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# Comments: Needlessly Fighting an Uphill Battle: Extensive Estate Planning Complications Faced by Gay and Lesbian Individuals, Including Drastic Resort to Adult Adoption of Same-Sex Partners, Necessitate Revision of Maryland's Intestacy Law to Provide Heir-at-Law Status for Domestic Partners

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NEEDLESSLY FIGHTING AN UPHILL BATTLE: EXTENSIVE  
ESTATE PLANNING COMPLICATIONS FACED BY GAY AND  
LESBIAN INDIVIDUALS, INCLUDING DRASTIC RESORT TO  
ADULT ADOPTION OF SAME-SEX PARTNERS,  
NECESSITATE REVISION OF MARYLAND'S INTESTACY  
LAW TO PROVIDE HEIR-AT-LAW STATUS FOR DOMESTIC  
PARTNERS

I. INTRODUCTION

Over half a million same-sex couples in the United States, a dramatically under-counted yet rapidly growing segment of the population,<sup>1</sup> needlessly face an uphill battle in estate planning. Because marriage and its resultant benefits are generally unavailable to same-sex couples, those individuals must rely on extensive and creative legal planning to reap inheritance and tax benefits that are automatically afforded to traditional married couples.<sup>2</sup>

Whether a gay or lesbian individual dies testate, with a valid will, or intestate, without a valid will, the root of the problem stems from outdated intestacy statutes, which fail to recognize the close family bond between same-sex partners.<sup>3</sup> To avoid the harsh consequences of intestacy law, an increasing number of same-sex couples are utilizing adult adoption of one's partner as a means to secure inheritance rights.<sup>4</sup> However, adult adoption is a risky solution to inheritance issues as it is fraught with many of its own problems.<sup>5</sup>

Several recent developments in Maryland set the stage to explore the issue of inheritance rights for same-sex couples. In 2007, the Court of Appeals of Maryland upheld the constitutionality of the legislative ban on gay marriage.<sup>6</sup> Just one year later, Maryland

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1. See Christopher Marquis, *Total of Unmarried Couples Surged in 2000 U.S. Census*, N.Y. TIMES, Mar. 13, 2003, at A22.
  2. See discussion *infra* Part II.
  3. See discussion *infra* Part III.A.1.
  4. See discussion *infra* Part IV.A.
  5. See discussion *infra* Part IV.B.
  6. *Conaway v. Deane*, 401 Md. 219, 932 A.2d 571 (2007) (upholding MD. CODE ANN., FAM. LAW § 2-201 (LEXIS through 2010 Reg. Sess.), which states “[o]nly a marriage between a man and a woman is valid in this State”). Though legislation to allow same-sex marriage was proposed in early 2011, the bill failed to pass in the Maryland House of Delegates. John Wagner, *Maryland House Kills Same-Sex Marriage Bill for*

enacted domestic-partner legislation to provide limited benefits regarding hospital visitation and medical care decisions to registered domestic partners.<sup>7</sup> Finally, in 2009, the legislature expanded domestic-partner legislation into the inheritance realm by allowing an inheritance tax exemption for jointly owned residences.<sup>8</sup> However, Maryland's current intestacy statutes neither recognize the surviving domestic partner as an heir nor provide any share of the decedent's estate to the surviving partner.<sup>9</sup> The complete omission of same-sex partners from intestacy law is the chief cause of the myriad estate planning complications that plague gay and lesbian individuals.<sup>10</sup>

The convergence of these developments raises the issue of inheritance rights for same-sex couples, which poses the question: Why should same-sex couples be forced to endure an uphill battle in estate planning that threatens to frustrate donative freedom or be forced to resort to drastic measures of adult adoption in an attempt to gain guaranteed inheritance rights when a simple revision to intestacy law could solve these overwhelming problems without disturbing the inheritance rights of others? This comment will show that the current solutions to estate-planning issues, which include adult adoption and contract-based instruments such as wills, are insufficient to insulate same-sex couples from estate planning risks and may actually create additional problems.<sup>11</sup> Finally, this comment will argue that these problems can be comprehensively solved by a revision of Maryland's archaic intestacy law to designate surviving domestic partners as heirs of the decedent.<sup>12</sup>

The objective of this comment is to present and analyze the various issues same-sex couples encounter in estate planning, focusing on the problems and ramifications of the increasing trend of using adult adoption of one's same-sex partner as a drastic means to secure inheritance rights.<sup>13</sup> Part II describes the reasons why same-sex

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*This Year*, WASHINGTON POST, MAR. 11, 2011, available at [http://voices.washingtonpost.com/annapolis/2011/03/maryland\\_house\\_killes\\_same-sex.html](http://voices.washingtonpost.com/annapolis/2011/03/maryland_house_killes_same-sex.html). Thus, same-sex marriage continues to be unavailable in Maryland. *See id.*

7. MD. CODE ANN., HEALTH-GEN. §§ 6-201, 6-202 (LEXIS through 2010 Reg. Sess.) (effective July 1, 2008).
8. MD. CODE ANN., TAX-GEN. § 7-203(l) (LEXIS through 2010 Reg. Sess.) (effective July 1, 2009).
9. *See* MD. CODE ANN., EST. & TRUSTS § 3-102 (LEXIS through 2010 Reg. Sess.) (providing heir status and an intestate share only for a surviving "spouse").
10. *See* discussion *infra* Part VI.B.
11. *See* discussion *infra* Parts III-IV.
12. *See* discussion *infra* Part IV.B.
13. *See* discussion *infra* Parts II-IV.

couples currently require more extensive and costly estate planning.<sup>14</sup> Part III discusses the shortcomings of contract-based estate planning mechanisms.<sup>15</sup> Part IV analyzes the advantages and substantial disadvantages of adult adoption within same-sex couples.<sup>16</sup>

This comment seeks to provide a workable solution to the myriad estate planning problems that same-sex couples face by proposing an amendment to archaic intestacy law that would create an heir-at-law status for a surviving domestic partner.<sup>17</sup> After examining the law in other jurisdictions in Part V,<sup>18</sup> this comment will discuss the merits of expanding existing domestic partnership legislation into the realm of intestate succession to promote testamentary freedom and best enforce testamentary intent in Part VI.<sup>19</sup>

## II. SAME-SEX COUPLES' HEIGHTENED NEED FOR ESTATE PLANNING

While estate planning is practical for nearly everyone, it is especially critical for gay or lesbian individuals who face very particular planning needs not only with regards to distribution of their property, but also as to recognition of their testamentary wishes.<sup>20</sup> Same-sex couples must engage in comparatively more extensive estate planning than heterosexual couples to achieve the family, inheritance, and tax benefits automatically bestowed by the marital relationship and to insulate their executed testamentary documents from challenges.<sup>21</sup>

The legal benefits of marriage include creating inheritance rights and tax benefits, creating heirship, and creating a legally recognized familial relationship.<sup>22</sup> Same-sex couples must use either adult adoption or an array of contract-based estate planning tools, such as wills, trusts, joint ownership, retirement accounts, or insurance

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14. See discussion *infra* Part II.A–D.

15. See discussion *infra* Part III.A–D.

16. See discussion *infra* Part IV.A–B.

17. See discussion *infra* Part VI.B–C.

18. See discussion *infra* Part V.A–B.

19. See discussion *infra* Part VI.B–C.

20. Aimee Bouchard & Kim Zadworny, *Growing Old Together: Estate Planning Concerns for the Aging Same-Sex Couple*, 30 W. NEW ENG. L. REV. 713, 713 (2008).

21. See Matthew R. Dubois, Note, *Legal Planning for Gay, Lesbian, and Non-Traditional Elders*, 63 ALB. L. REV. 263, 268–72 (1999).

22. Gwendolyn L. Snodgrass, Note, *Creating Family Without Marriage: The Advantages and Disadvantages of Adult Adoption Among Gay and Lesbian Partners*, 36 BRANDEIS J. FAM. L. 75, 75 (1997).

policies to attain some of these marital tax and inheritance benefits.<sup>23</sup> Moreover, while adult adoption is the only mechanism by which same-sex couples can create heir status as parent and child, there is currently no option for same-sex couples to create spousal heir status or its equivalent.<sup>24</sup>

#### A. Census Data Regarding Same-Sex Couple Households

Estate planning considerations for unmarried couples affect a rapidly increasing segment of the population.<sup>25</sup> The incidence of unmarried same-sex couples has increased dramatically over the past several decades.<sup>26</sup> The 2000 Census enumerated 5.5 million cohabitating unmarried-couple households, a 72% increase from the 3.2 million reported in 1990.<sup>27</sup>

The estate-planning problems same-sex couples face are collectively amplified by reference to the considerable number of same-sex couples nationwide.<sup>28</sup> In fact, the number of reported same-sex couples increased over 300% from the 1990 Census to the 2000 Census.<sup>29</sup> Currently, same-sex couple households account for almost 11% (594,000) of the 5.5 million unmarried couple households.<sup>30</sup> In Maryland, same-sex couples comprise 10% (11,243) of the 110,335 unmarried-couple households.<sup>31</sup> Moreover, evidence suggests that this population demographic is “dramatically

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23. *Id.* at 75–76. However, as will be discussed more fully in Parts III and IV, both contract-based tools and adult adoption suffer from various disadvantages. See discussion *infra* Parts III–IV. Contract-based techniques are subject to challenges by blood relatives that often prevail because of anti-gay biases. See Snodgrass, *supra* note 22, at 76. The disadvantages of adult adoption are fully explored in Part IV.B. See discussion *infra* Part IV.B.

24. See Snodgrass, *supra* note 22, at 76.

25. See TAVIA SIMMONS & MARTIN O’CONNELL, U.S. CENSUS BUREAU, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: CENSUS 2000 SPECIAL REPORTS 1 (2003), available at <http://www.census.gov/prod/2003pubs/censr-5.pdf>.

26. Bouchard & Zadworny, *supra* note 20, at 715.

27. Marquis, *supra* note 1. Changes in the number of same-sex couple households could not be accurately measured because of differences in collection methods between 1990 and 2000. *Id.*

28. See SIMMONS & O’CONNELL, *supra* note 25.

29. Bouchard & Zadworny, *supra* note 20, at 715.

30. SIMMONS & O’CONNELL, *supra* note 25. Unmarried same-sex couple households account for one percent of all coupled households, including both married and unmarried couples. *Id.*

31. *Id.* at 4. Same-sex couple households account for one percent of all coupled households in Maryland. *Id.* No census data was collected as to the number of households occupied by same-sex couples that do not live together. See *id.* at 1 (reporting same-sex data for coupled households only).

undercounted” due to differences in counting methods between 1990 and 2000 and the refusal of same-sex couples to identify themselves out of fear of prejudice or confusion over the wording of the unmarried partner classification.<sup>32</sup> Unfortunately, same-sex couples must confront and plan around particular estate-planning complications if they wish to leave their shared property to their committed partners upon death.<sup>33</sup>

### B. *Gay Marriage Is Prohibited in Maryland*

The need for estate planning is heightened in light of *Conaway v. Deane*, the recent Court of Appeals of Maryland case that upheld the State’s ban on gay marriage as constitutional.<sup>34</sup> The challenged statute at issue, section 2-201 of the Maryland Code Family Law article, which states that “[o]nly a marriage between a man and a woman is valid in this State,”<sup>35</sup> was analyzed under the deferential rational review standard and validated by the court.<sup>36</sup> Therefore, without the protections and benefits of marriage, same-sex couples must carefully construct an estate plan to avoid the harsh consequences of intestacy.<sup>37</sup>

However, even in states where gay marriage is legal, the need for specialized estate planning is not obviated because same-sex couples still face recognition issues if they relocate.<sup>38</sup> Although certain states

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32. Marquis, *supra* note 1.

33. See discussion *infra* Part II.B–C (describing heightened need for estate planning and the consequences of failure to plan).

34. 401 Md. 219, 238, 932 A.2d 571, 581 (2007).

35. MD. CODE ANN., FAM. LAW § 2-201 (LEXIS through 2010 Reg. Sess.).

36. *Conaway*, 401 Md. at 325, 932 A.2d at 635. The Court found that section 2-201 does not (1) abridge the fundamental right to marriage, *id.* at 294, 932 A.2d at 616 (“The Right to Same-Sex Marriage is Not so Deeply Rooted in the History and Tradition of this State or the Nation as a Whole Such That it Should be Deemed Fundamental.”), (2) impermissibly discriminate on the basis of sex, *id.* at 270, 932 A.2d at 602 (“Because there is no evidence . . . [of intent] to differentiate between men and women as classes on the basis of some misconception regarding gender roles in our society, we conclude that the ERA does not mandate that the State recognize same-sex marriage . . .”), or (3) implicate a suspect or quasi-suspect class, *id.* at 277, 932 A.2d at 606 (“We find that sexual orientation is neither a suspect nor quasi-suspect class.”). Therefore, section 2-201, the marriage statute, was subject to rational basis review. *Id.* at 277, 932 A.2d at 606.

37. See *infra* Part II.C for a discussion of the consequences of intestacy for same-sex couples.

38. See Frank S. Berall, *Estate Planning Considerations for Unmarried Same or Opposite Sex Cohabitants*, 23 QUINNIPIAC L. REV. 361, 362–63 (2004).

permit gay marriage under their respective state laws,<sup>39</sup> the federal Defense of Marriage Act (DOMA) presents uncertainty as to inter-jurisdictional recognition of same-sex marriage.<sup>40</sup> By restricting application of the Full Faith and Credit Clause, DOMA does not require states to respect a marital relationship between same-sex couples created under another state's laws.<sup>41</sup>

The significance of the fact that states need not recognize the validity of same-sex marriages performed in other states is underscored by estate law, which dictates that the applicable law governing a decedent's estate is that of the state in which the decedent was domiciled at death.<sup>42</sup> Generally, the disposition of personal property is governed by the laws of the domiciliary state, whereas the situs of real property determines the applicable law governing the disposition of real property.<sup>43</sup> Because the laws of the state in which the decedent is domiciled govern the disposition of property, even if a same-sex couple is legally married in another

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39. Same-sex marriage is legal in: Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, and Washington, D.C. Evan Glass, *Maryland Set to Expand Gay Rights, Same-Sex Marriage*, CNN (Jan. 12, 2011), [http://articles.cnn.com/2011-01-12/politics/maryland.same.sex.marriage\\_1\\_civil-unions-marriage-bill-gay-couples/2?\\_s=PM:POLITICS](http://articles.cnn.com/2011-01-12/politics/maryland.same.sex.marriage_1_civil-unions-marriage-bill-gay-couples/2?_s=PM:POLITICS).
40. Defense of Marriage Act, 28 U.S.C. § 1738C (2006) (“No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same-sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.”); see Berall, *supra* note 38, at 363. DOMA also federally defines marriage as between a man and woman only. 1 U.S.C. § 7 (2006) (“[T]he word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”).
41. Berall, *supra* note 38, at 363 (“Notwithstanding the United States Constitution’s Full Faith and Credit Clause, the DOMAs may permit states to refuse to grant full faith and credit to other states’ lawful same-sex marriages.”). Legal scholars have hotly debated the constitutionality of DOMA. See, e.g., Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307, 307–09 (1998) (arguing that DOMA is unconstitutional as it exceeds the scope of Congress’ power under the Full Faith and Credit Clause); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 391–92 (1998) (arguing that the passage of DOMA was properly within the scope of Congress’s power under the “Effects Clause” of the Full Faith and Credit Clause).
42. See Dawn Allison, Note, *The Importance of Estate Planning Within the Gay and Lesbian Community*, 23 T. MARSHALL L. REV. 445, 459 (1998); see also MD. CODE ANN., EST. & TRUSTS § 5-103(a)–(b) (LEXIS through 2010 Reg. Sess.) (describing venue rules for probating an estate).
43. Allison, *supra* note 42, at 459 (citing Jesse Dukeminier & Stanley Johanson, *Wills, Trust, and Estates* 68 (5th ed. 1995)); see also EST. & TRUSTS § 5-103(a)–(b).

state, if they relocate to a state like Maryland<sup>44</sup> where gay marriage is not recognized or even if they merely own real probate property in another jurisdiction, they may be denied the protections and inheritance benefits of marriage with respect to the transfer of that property upon death.<sup>45</sup> Thus, until gay marriage is legalized in all states, states are required to give effect to the validity of legal same-sex marriages in other jurisdictions, or states update their intestacy statutes to recognize committed same-sex partners as heirs, careful estate planning will continue to be a critical necessity for same-sex individuals. Moreover, because DOMA federally defines the term *spouse* to include only married heterosexual couples, same-sex couples will continue to face issues with federal law, including federal estate taxes, for the foreseeable future.<sup>46</sup>

### C. Harsh Consequences of Current Intestacy Statutes

The issue that most underscores the need for estate planning by same-sex individuals is the complete exclusion of same-sex partners from intestacy law.<sup>47</sup> The consequences of this omission are that same-sex committed partners are not considered heirs of their deceased partners and thus are not entitled to any share of the estate and are unable to prevent more collateral relatives from challenging the decedent's will.<sup>48</sup>

Intestacy statutes establish rules for the division of a decedent's probate property (property titled in one's sole name at death) not effectively disposed of by a valid will.<sup>49</sup> These statutes represent "the will which the law makes," which yields to and only takes effect in the event a decedent fails to properly execute a will.<sup>50</sup> Although the chief purpose of intestacy law is to best reflect the intent of the testator had he made a will, intestate succession operates based on

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44. *But see* Marriage – Whether Out-of-State Same-Sex Marriage That is Valid in the State of Celebration May Be Recognized in Md., 95 Op. Att'y Gen. 43–44 (2010) (opining that Maryland courts would respect a same-sex marriage validly performed in another state as it would not be contrary to Maryland's public policy). However, the opinion does not carry the force of law.

45. See 28 U.S.C. § 1738C; EST. & TRUSTS § 5-103(a)–(b).

46. See 1 U.S.C. § 7 (2006).

47. Dubois, *supra* note 21, at 315.

48. See discussion *infra* Part III.A.1.

49. See, e.g., EST. & TRUSTS § 3-101.

50. Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 *FORDHAM L. REV.* 1031, 1032–33 (2004).



relationship by consanguinity or marriage, not by affinity, to accommodate the competing principle of administrative feasibility.<sup>51</sup>

Maryland's intestacy statutes distribute probate property to a decedent's surviving marital spouse and blood relatives in a hierarchical fashion that closely adheres to the traditional nuclear-family model.<sup>52</sup> If the decedent leaves a surviving spouse, he or she is the most favored, inheriting from one-half to the entire probate estate depending upon whether the decedent left surviving issue or parents.<sup>53</sup> Next, if there are surviving issue of the decedent, they share either the remainder of the estate after subtracting the surviving spouse's share or the entire estate if there is no surviving spouse by representation.<sup>54</sup> In the event that the decedent leaves neither a surviving spouse nor any surviving issue, the property is distributed exclusively to the surviving parents or their surviving lineal descendants, the surviving grandparents or their surviving lineal descendants, or the surviving great-grandparents or their surviving lineal descendants, in that order.<sup>55</sup> Finally, in the event that a decedent is not survived by any of the aforementioned consanguineous relatives, the property will escheat to the state.<sup>56</sup>

Therefore, under Maryland's current intestacy scheme, the surviving partner in a same-sex relationship is completely barred from inheriting any probate assets via intestate succession from his or her partner regardless of the length, familial nature, or intimacy of the relationship between the couple.<sup>57</sup> Also, as is more fully discussed in Part III.A.1., the consequences of committed same-sex partners receiving no recognition as heirs is apparent even when the decedent makes a will because heir status is the basis for determining standing

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51. *Barron v. Janney*, 225 Md. 228, 234–35, 170 A.2d 176, 180 (1961); *see also* EST. & TRUSTS § 3-101 (property is distributed to “heirs” only).

52. *See* EST. & TRUSTS §§ 3-102 to -104.

53. *Id.* § 3-102.

54. *Id.* § 3-103.

55. *Id.* § 3-104. However, the parents, if surviving, are the only class of relatives that receive a share (after subtracting the surviving spouse's share) of the estate even if there is a surviving spouse. *Id.* § 3-102(d). None of the other ancestors or collateral relatives receive a share if there is a surviving spouse. *Id.* § 3-102(e). If there are surviving issue, none of the ancestors or collateral relatives, including the parents, receive a share. *Id.* §§ 3-103 to -104.

56. *Id.* § 3-105.

57. *See id.* §§ 3-101 to -105. Intestacy statutes are bright line rules that distribute property only to surviving blood relatives or surviving spouses. *See id.* Maryland's statutes are characteristic of the vast majority of jurisdictions, which leave property only to spouses and blood relatives. Dubois, *supra* note 21, at 315–16 (“Intestacy laws in varying jurisdictions provide that the estate of a person who dies without a will passes to biological relatives under the traditional family model.”).

to challenge a will; the lack of heirship of same-sex partners enables more collateral relatives to contest the will.<sup>58</sup> Meticulous estate planning remains a necessity to avoid the unforgiving application of intestacy laws and mitigate the risk that a surviving partner, despite the decedent's wishes to the contrary, will receive none of the property he or she shared with the decedent during their joint lives.

#### *D. Estate Planning Inhibitions*

The harsh consequences of intestacy law are magnified by reference to the number of people who die intestate: “[I]ntestacy remains a common phenomenon today.”<sup>59</sup> A recent survey of the general population revealed that a majority of people (55%) have not executed a will.<sup>60</sup> Even 30% of wealthy adults with “investable assets” over half a million dollars do not currently have wills.<sup>61</sup>

These startlingly high instances of intestacy are explained by basic psychological theories.<sup>62</sup> Various “psychological barriers,” as well as transaction costs, prevent the testamentary process and mandate application of intestacy statutes at death.<sup>63</sup> For example, “[c]lients often harbor . . . ‘the illusion of continued life.’”<sup>64</sup> The mind simply does not entertain the possibility of untimely death and thus believes that there is no pressing need to create a will.<sup>65</sup> Superstition also plays a role in inhibiting testation; many fear that if they execute their wills now, the document would “become relevant in short order.”<sup>66</sup> Finally, cognitive psychologists developed a “terror management” theory to explain the human instinct to avoid situations, such as will making, that directly confront mortality.<sup>67</sup>

Gay and lesbian individuals specifically face additional estate-planning hurdles including discomfort with disclosing their sexual orientation, legitimate fears of social and legal bias, and “the

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58. See discussion *infra* Part III.A.1.

59. Hirsch, *supra* note 50, at 1051.

60. Ashlea Ebeling, *Where There's No Will*, FORBES.COM (Nov. 12, 2007, 12:00 AM), [http://www.forbes.com/forbes/2007/1112/094\\_print.html](http://www.forbes.com/forbes/2007/1112/094_print.html).

61. *Id.*

62. Hirsch, *supra* note 50, at 1047 (“For propensities to testation do not depend merely on cold assessments of costs and benefits: Psychological factors are also implicated.”).

63. *Id.* at 1047-50 (noting that while cost does play a role in inhibiting testation, psychological factors such as the “illusion of continued life,” superstition, and “terror management” are the chief reasons that inhibit people from making wills).

64. *Id.* at 1047.

65. *Id.* at 1047-48.

66. *Id.* at 1048.

67. *Id.* at 1049.

daunting nature of the extensive legal planning required to effectuate their wishes.”<sup>68</sup> Moreover, because gay or lesbian testators have a unique need for specialized estate planning, the cost of such services rapidly increases.<sup>69</sup> However, many gay and lesbian clients who require costly legal planning are middle income or even poor.<sup>70</sup> Stereotypes of the relative affluence of lesbian and gay individuals have been disproven by a study which suggests that gay men and lesbian women suffer from an 11 to 30% earnings gap as compared to their heterosexual peers because of the unique type of discrimination that affects them in the workplace.<sup>71</sup> In sum, gay or lesbian testators face many more obstacles preventing testation, but unfortunately, they are precisely the group with the greatest need for testation.

### III. CONTRACT-BASED ESTATE PLANNING TECHNIQUES

Contract-based estate planning techniques are the most commonly used tools for distributing a decedent's property at death. In the context of same-sex couples, each of the following planning mechanisms provides certain advantages but is also accompanied by certain disadvantages or risks.<sup>72</sup> Perhaps the most significant disadvantage is that these contract-based estate-planning tools are subject to challenges by a testator's heirs who have nothing to gain and everything to lose.<sup>73</sup> Moreover, although a combination of contract-based planning techniques can create pseudo-marital benefits, they cannot create a recognized family relationship or convey guaranteed inheritance rights.<sup>74</sup>

#### A. Wills

A will is an instrument by which a person directs dispositions of property to take effect upon death.<sup>75</sup> As one of the most basic, fundamental estate-planning tools, a will is a mechanism to effectuate a testator's intent by distributing property according to the terms of the document.<sup>76</sup> It is a necessary component of a comprehensive estate plan for a gay or lesbian individual because it is the only

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68. Dubois, *supra* note 21, at 267.

69. *Id.* at 269–70.

70. *Id.* at 269.

71. *Id.* at n.25 (citing M.V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 INDUS. & LAB. REL. REV. 726, 737 (1995)).

72. See discussion *infra* Part III.A–D.

73. See discussion *infra* Part III.A.1.

74. Snodgrass, *supra* note 22, at 79.

75. BLACK'S LAW DICTIONARY 778 (3d Pocket ed. 2006).

76. See *id.*

document that allows a decedent's probate assets to pass testate to persons of his or her choosing as opposed to passing via the strict laws of intestacy, under which the surviving partner would receive nothing.<sup>77</sup> Therefore, even if an individual employs a probate avoidance strategy, such as an *intervivos* trust, to dispose of property, a will is still essential as a precautionary measure to demonstrate the intent to pass property outside of probate, to demonstrate the intent to dispose of personal effects, or "in the event of forgotten or unanticipated assets."<sup>78</sup> Unfortunately, while still a necessary document, a will alone does not always afford adequate protection of a testator's wishes.<sup>79</sup>

### 1. Standing to Challenge the Will

While wills can be challenged on various grounds, the challenger must first have standing to contest the will.<sup>80</sup> An interest in the testator's property is the foundation of the right to challenge a will.<sup>81</sup> Standing is not conferred if one's interest in the testator's property arises solely because of beneficiary status under the current will offered for probate because if the will was invalidated, the challenger would gain nothing and thus has no stake in the outcome.<sup>82</sup> Rather, as the Maryland Court of Appeals has explained, standing is limited to those who are heirs under intestacy statutes or beneficiaries under a previous will.<sup>83</sup> However, those challengers whose interests arise solely as a beneficiary under a will and not as an heir-at-law face an additional impediment to standing: the validity of the previous will must be established before the new will can be challenged, "for, otherwise the attack may be by one who would not benefit by its overthrow."<sup>84</sup>

Therefore, because a surviving same-sex partner is not considered an heir under intestacy laws,<sup>85</sup> the partner will be unable to challenge

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77. Dubois, *supra* note 21, at 319.

78. *Id.* at 320.

79. See discussion *infra* Part III.A.1-2 (discussing challenges to and invalidations of wills).

80. *Elliott v. Md. Nat'l Bank*, 291 Md. 69, 77, 432 A.2d 473, 478 (1981).

81. *Id.* at 77, 432 A.2d at 478.

82. *Id.* at 78, 432 A.2d at 478 (explaining that the reason for the rule is to prevent a challenger from being in the "inconsistent position of attacking the validity of [the very instrument that] provides the property interest" necessary to challenge).

83. *Yingling v. Smith*, 254 Md. 366, 368, 255 A.2d 64, 66 (1969)

84. *Ades v. Norins*, 204 Md. 267, 274, 103 A.2d 842, 845 (1954).

85. See MD. CODE ANN., EST. & TRUSTS §§ 3-101 to -105 (LEXIS through 2010 Reg. Sess.). As is more fully discussed in the following section, same-sex partners are not

the will unless he or she was a beneficiary under a previous will and can establish its validity as a prerequisite to the challenge of the current will.<sup>86</sup> However, the more potent effect is to make the will more apt to challenges by allowing heir status for more collateral relatives who have little to lose and much to gain.<sup>87</sup> For illustrative purposes, if the couple were a traditional married couple, the surviving spouse would be considered an heir and thus either the spouse alone (if no surviving issue or parents), the spouse and surviving issue, or the spouse and surviving parents (if no surviving issue) would be considered the only heir(s) of the testator.<sup>88</sup> In other words, the heir-at-law status conferred on the spouse precludes heir status from being granted to collateral relatives, such as siblings, cousins, aunts, uncles, nieces, and nephews, effectively reducing the potential for challenges against the will.<sup>89</sup> In light of these issues, a will leaving significant property to the testator's same-sex partner may be insufficient to ensure the assets reach the intended beneficiaries.

## 2. Grounds for Challenges and Its Effect on Testamentary Disposition

Wills can be challenged or contested on various grounds, including noncompliance with execution formalities, lack of testamentary capacity, undue influence, duress, or fraud.<sup>90</sup> Undue influence, a specific ground for challenging testamentary intent, is a troublesome challenge to a will leaving property to a same-sex partner.<sup>91</sup> In such a claim, the challenger asserts that the last will and testament does not reflect the "true intent" of the testator but rather reflects the successful effort of the surviving partner to substitute his or her own wishes for those of the testator.<sup>92</sup> Undue influence is generally

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considered heirs at law unless they undergo the drastic measure of adult adoption, where one partner adopts the other partner as his or her child. *See* discussion *infra* Part IV.A.

86. *See supra* note 84 and accompanying text.

87. *See* EST. & TRUSTS §§ 3-101 to -105.

88. *See id.* § 3-102(a)-(e).

89. *See id.*

90. Bouchard & Zadworny, *supra* note 20, at 726 (suggesting various precautions to prevent challenges to wills).

91. Dubois, *supra* note 21, at 314; *see also* JOEL C. DOBRIS, STEWART E. STERK & MELANIE B. LESLIE, ESTATES AND TRUSTS 424 (3d ed. 2007).

92. DOBRIS, STERK & LESLIE, *supra* note 91, at 424; *see also* Moore v. Smith, 321 Md. 347, 353, 582 A.2d 1237, 1239 (1995) ("Generally, undue influence amounts to physical or moral coercion that forces a testator to follow another's judgment instead of his own.").

proven by the presence of a confidential relationship, one based on trust and reliance, which is generally present in a committed same-sex partnership, and various “suspicious circumstances.”<sup>93</sup> Characteristic elements of suspicious circumstances include (1) the will substantially benefits the influencer, (2) the influencer assisted in or caused the execution of the will, (3) there was an opportunity to exert influence over the testator, (4) the will contains an “unnatural disposition,” (5) the terms of the new will constitute a change from a former will, and (6) the testator was susceptible to undue influence.<sup>94</sup> Because same-sex couples are not a legally recognized family unit, a will provision that leaves property to the surviving same-sex partner is technically an “unnatural” disposition, increasing the likelihood of a successful undue influence challenge, albeit marginally.<sup>95</sup>

The probability of successfully challenging a will is increased for gay or lesbian testators, as evidence suggests “anti-gay biases are often quite evident in jury verdicts.”<sup>96</sup> Gay and lesbian testators who execute wills transferring property to their same-sex partners are more likely than heterosexual testators to have their donative intent undermined by a successful challenge to their wills made by the testator’s survivors testators, despite the fact that the gay or lesbian testator has a much greater need for the will to operate to effectuate his intent.<sup>97</sup>

Moreover, even long-standing will construction principles seemingly work against the testamentary wishes of same-sex couples.<sup>98</sup> For instance, if testamentary intent is ambiguous, the will

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93. *Moore*, 321 Md. at 353, 582 A.2d at 1239.

94. *Id.* at 353, 582 A.2d at 1239.

95. *See* *Stockslager v. Hartle*, 200 Md. 544, 552, 92 A.2d 363, 366 (1952) (explaining that while a disposition to a non-family member is considered unnatural, it is not alone sufficient to warrant a per se conclusion of undue influence).

96. Terry L. Turnipseed, *Scalia’s Ship of Revulsion Has Sailed: Will Lawrence Protect Adults Who Adopt Lovers to Help Ensure Their Inheritance from Incest Prosecution?*, 32 *HAMLIN L. REV.* 95, 102 (2009).

97. E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 *ARIZ. L. REV.* 1063, 1075 (1999) (suggesting two possible reasons for this bias: first, that the trier of fact is simply unfamiliar with and does not value or understand the nature of same-sex relationships and thus searches for explanations other than donative intent, such as lack of testamentary capacity of undue influence, or secondly and more insidiously, that the trier of fact, offended by such a lifestyle uses doctrines of undue influence and lack of capacity to invalidate the will); Snodgrass, *supra* note 22, at 79.

98. *See* 22 *MD. L. ENCYCLOPEDIA WILLS* § 97 (2000) (describing “[c]onstruction in favor of heirs or distributees”); *id.* § 98 (describing “[c]onstruction in favor of just, natural, or reasonable disposition”).

is construed to dispose of property in a “just, natural, or reasonable manner” with the presumption that the testator did not intend to disinherit his heirs at law.<sup>99</sup> These construction principles evidence the belief that testators prefer to benefit the natural objects of their bounty over non-family members.<sup>100</sup> Because same-sex partners are not legally recognized as being part of a family unit and are not heirs of their partners, will construction principles, which only operate when the will contains ambiguity, weigh heavily against leaving property to the surviving partner.<sup>101</sup> Therefore, same-sex couples must go to greater lengths to ensure that their will provisions clearly and patently express their wishes.<sup>102</sup>

Finally, in the event of a successful challenge to a will, the will, or challenged portion thereof, is deemed invalid and the testator’s property is distributed according to the default laws of intestacy, which favor blood relatives and wholly exclude the surviving partner, frustrating the testator’s intent.<sup>103</sup> The prevalence of bias in successful undue influence cases illustrates the uphill battle same-sex couples face, even if they engage in estate planning.<sup>104</sup>

### *B. Trusts*

Trusts are an appealing option for certain gay or lesbian individuals who value distributive flexibility, privacy, and avoidance of probate.<sup>105</sup> Revocable trusts, which are created by the grantor during life, vest the grantor with the ability to alter, amend, or revoke the trust during his or her lifetime but do not create any tax advantages.<sup>106</sup> Irrevocable trusts, on the other hand, do not allow the creator to

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99. *Id.*

100. *See id.*

101. *See id.*

102. If the will is unambiguous and clearly manifests the desire to leave property to the surviving partner, the court may not use construction principles to thwart donative intent. *See Green v. Michael*, 183 Md. 76, 86, 36 A.2d 923, 927 (1944) (“If a man disposes of his estate in the free exercise of his own free will and judgment, the court is not authorized to nullify his gift because of the judicial belief that he . . . disregarded consideration of kinship which should justly have been recognized.”).

103. *See MD. CODE ANN., EST. & TRUSTS* § 3-101 (LEXIS through 2010 Reg. Sess.) (“Any part of the net estate of a decedent *not effectively disposed of by his will* shall be distributed by the personal representative to the heirs of the decedent in the order prescribed in this subtitle.” (emphasis added)); Spitko, *supra* note 97, at 1075.

104. DOBRIS, STERK & LESLIE, *supra* note 91, at 483.

105. *See Dubois*, *supra* note 21, at 321–24 (discussing the advantages of trusts).

106. *Id.* at 321–22.

change or revoke the trust once created but do provide gift- and estate-tax benefits.<sup>107</sup>

However, the major disadvantage of trusts lies in their funding.<sup>108</sup> The trust terms can only operate to dictate distribution of assets that are titled in the trust's name, and therefore, the grantor will have to retitle any assets to be controlled by the trust.<sup>109</sup> Any assets that are not titled in the trust's name will remain in the probate estate, subject to disposition either by will or intestacy.<sup>110</sup>

Additionally, trustee commissions are an additional cost of maintaining a trust.<sup>111</sup> Therefore, the expenses, including time and money to retitle assets and commission fees to trustees, may outweigh the benefits of creating a trust.<sup>112</sup> Unfortunately, the expense to create and manage trusts makes this mechanism unavailable for those with lower incomes and insubstantial assets, creating a substantial risk that the partner may be left with nothing.<sup>113</sup>

Finally, because trusts avoid the probate process, they concurrently sacrifice the protections that the probate process supplies. For instance, probate shortens the statute of limitations for claims against the estate to six months from date of death; however, for trusts that operate outside of probate, the normal three-year statute of limitations applies for such claims.<sup>114</sup>

In sum, for those individuals with more substantial assets, trusts are an attractive option to control the disposition of certain assets and maintain privacy. However, because of the reality that one's assets can change during life and the need to retitle assets into the trust, wills are still necessary to direct unanticipated, insignificant, or forgotten assets to the chosen beneficiaries and avoid operation of the intestacy statutes.

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107. *Id.* at 323–24.

108. *Id.* at 323.

109. *Id.*

110. *Id.*

111. DOBRIS, STERK & LESLIE, *supra* note 91, at 554–55. Trustees who manage trust funds are entitled to commissions during the settlor's lifetime and after the settlor's death for as long as the trust remains. *Id.*

112. *Id.* at 556.

113. *See id.*

114. Compare MD. CODE ANN., EST. & TRUSTS § 8-103 (LEXIS through 2010 Reg. Sess.), with MD. CODE ANN., CTS. & JUD. PROC. § 5-101 (LEXIS through 2010 Reg. Sess.).



### C. Joint Ownership of Property

Ownership of certain property as joint tenants with the right of survivorship is an attractive estate-planning option for same-sex couples because the interest in the property passes automatically and immediately to the surviving joint tenant upon the decedent's death, bypassing the probate process.<sup>115</sup> Additionally, joint-ownership arrangements are less prone to challenges by heirs at law.<sup>116</sup> Besides the practical advantage of ensuring that the survivor can continue to have uninterrupted enjoyment of the home that they have shared throughout their joint lives, same-sex couples also use joint ownership of property as a symbolic expression of their commitment.<sup>117</sup>

However, this form of ownership does suffer from several disadvantages that may leave the surviving partner without adequate protection.<sup>118</sup> First, it limits distributive flexibility because the property must pass entirely and exclusively to the surviving joint tenant(s): it cannot be converted to cash and distributed to various beneficiaries of the decedent's choosing.<sup>119</sup> A joint tenancy is also unilaterally severable by a tenant by conveying his interest or even secretly deeding it to himself without consent or notice to the other tenant(s), which destroys the right of survivorship.<sup>120</sup> Joint tenancy also complicates estate-tax issues by inflating the estate value of the first partner to die.<sup>121</sup> Section 2040 of the Internal Revenue Code provides that the entire value of jointly owned property is included in the estate of the first partner to die unless the survivor can prove contribution to rebut such a presumption.<sup>122</sup> Finally, if one partner

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115. See *Cooper v. Bikle*, 334 Md. 608, 621, 640 A.2d 1120, 1126 (1994).

116. Patricia A. Cain, *A Review Essay: Tax and Financial Planning for Same-Sex Couples: Recommended Reading*, 8 L. & SEXUALITY 613, 640 (1998) ("While no transfer is completely free from attack for undue influence or fraud, joint tenancy has the advantage of being viewed as a lifetime transfer in which the donee partner has a vested interest at the time of creation. That makes the transfer more difficult to attack once sufficient time has passed.").

117. See *id.*

118. See discussion *infra* notes 119–23 and accompanying text.

119. See *Cooper*, 334 Md. at 621, 640 A.2d at 1126 ("[T]he last surviving joint tenant [becomes] the sole owner of the entire estate.") (quoting ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 5.3, at 202 (1984)).

120. *Johnson v. MacIntyre*, 356 Md. 471, 489–90, 740 A.2d 599, 609 (1999) (holding that a joint tenant's conveyance of a portion of the property to herself and a third party without consent of the other joint tenant effectively severed the joint tenancy and the right of survivorship); Berall, *supra* note 38, at 381–82.

121. See I.R.C. § 2040(a) (2006); Cain, *supra* note 116, at 642.

122. I.R.C. § 2040(a); Berall, *supra* note 38, at 382.

transfers his or her property from sole ownership to a joint-ownership arrangement, the creation of such joint tenancy results in the gift of a one-half interest in the property and thus may incur gift taxes.<sup>123</sup>

#### *D. Other Estate Planning Tools*

Gay and lesbian individuals may also choose to supplement their estate plans with various other tools, such as life insurance, payable on death accounts (POD accounts), and Totten trusts. Each of these mechanisms avoids the lengthy probate process and provides immediate liquidity to the surviving partner. Moreover, each is fully revocable and amendable during the individual's lifetime as he or she is free to change the designated beneficiary, change the amount of the policy or the amount held in the account, or cancel the policy or close the account.<sup>124</sup> Totten trusts and POD accounts, which pass bank-account funds to a designated beneficiary upon the depositor's death, provide the additional advantage of being revocable while the depositor still retains full use and control of the account during his or her lifetime.<sup>125</sup>

However, the scope of these tools is limited only to those assets held as bank funds and the policy amount of the life insurance.<sup>126</sup> None are able to control the disposition of probate assets that the decedent has acquired throughout his or her life.<sup>127</sup> In sum, these devices are merely supplemental estate-planning mechanisms, but alone are not sufficient to meet the comprehensive estate planning needs of gay or lesbian individuals.

#### IV. ADULT ADOPTION OF ONE'S SAME-SEX PARTNER: AN EXTREME 'SOLUTION'

While each of the contract-based estate-planning tools discussed above supplies benefits that parallel marital benefits, none create heir status between the same-sex couples and none create inalienable or guaranteed inheritance rights.<sup>128</sup> Adult adoption, however, does allow same-sex couples to create heir status by establishing a legally recognized family relationship as "parent" and "child."<sup>129</sup> For these

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123. Cain, *supra* note 116, at 641; Dubois, *supra* note 21, at 329.

124. See Allison, *supra* note 42, at 475-76.

125. *Id.* at 475.

126. See *id.* at 475-76.

127. *Id.* (explaining that these devices pass property outside of probate).

128. See Snodgrass, *supra* note 22, at 79.

129. *Id.*

inheritance based reasons, same-sex couples are turning to the drastic measure of adult adoption with increasing frequency.<sup>130</sup>

### A. *Advantages of Adult Adoption*

By creating a parent-child relationship between the partners adult adoption creates three significant and otherwise unattainable benefits: formalizing the family unit, conferring heir-at-law status, and preventing will contests.<sup>131</sup>

#### 1. Legally Recognized Family

In light of the fact that same-sex marriage is prohibited in most states, adult adoption is the only mechanism that creates a “bona fide” and legally recognized family relationship.<sup>132</sup> Creating this family relationship is a strong motivator for adult adoption because it allows the couples to formally, legally, and symbolically express their commitment to each other.<sup>133</sup>

#### 2. Heir-at-law Status

The primary effect of the parent-child relationship created by adult adoption is to bestow heir-at-law status upon the same-sex partners, mitigating the harsh consequences of intestacy law.<sup>134</sup> Adult adoption ensures that the surviving partner will inherit from the decedent.<sup>135</sup> Therefore, even if the deceased partner neglected to execute a will or the will was successfully challenged, the surviving adopted partner would nonetheless inherit as a child of the decedent.<sup>136</sup> This favorable result occurs automatically by virtue of the familial relationship created by adoption.<sup>137</sup>

However, unlike a married couple, where the heir status is reciprocal or equivalent as “spouses,” the relative inheritance rights of a parent and child are skewed in favor of the child.<sup>138</sup> Therefore, the percentage of the estate that the survivor inherits from the partner may depend on whether the “parent” partner or the “child” partner

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130. Turnipseed, *supra* note 96, at 95–96.

131. Snodgrass, *supra* note 22, at 80–82.

132. *Id.* at 75.

133. *Id.* at 80–81.

134. *See id.* at 81.

135. DOBRIS, STERK & LESLIE, *supra* note 91, at 484.

136. MD. CODE ANN., EST. & TRUSTS § 3-103 (LEXIS through 2010 Reg. Sess.). The child would inherit the entire estate, assuming that the decedent did not leave a surviving spouse. *Id.*

137. Snodgrass, *supra* note 22, at 81.

138. *See* EST. & TRUSTS §§ 3-103, 3-104(b).

dies first.<sup>139</sup> Nonetheless, same-sex couples still turn to adult adoption because it is the only mechanism that includes the surviving partner in the intestate succession distribution scheme.<sup>140</sup>

### 3. Preventing Will Contests

The most valuable consequence of adult adoption, however, is that it nullifies the heir status of a testator's collateral blood relatives so that they no longer possess standing to challenge the will or other testamentary instrument as heirs.<sup>141</sup> Because the child of an unmarried decedent will take to the exclusion of all other blood relatives and the parent of an unmarried decedent with no surviving issue will take to the exclusion of all others,<sup>142</sup> the exclusive heir status of the child or parent eradicates the heir status of any other blood relative.<sup>143</sup> Without heirship, such relatives may only challenge the will if they were the beneficiaries under a previous will and can establish the validity of that prior will.<sup>144</sup> Therefore, even if the couple has already executed wills, adult adoption is a safety mechanism to protect against will challenges by collateral relatives and to ensure that the partners' testamentary wishes are properly fulfilled.<sup>145</sup>

### 4. Other Advantages

In addition to the three chief advantages discussed above, adult adoption confers several other benefits on same-sex couples, including various employment-related benefits, such as access to health insurance, Social Security payments, recovery in certain tort actions, and visitation privileges.<sup>146</sup> Adult adoption also creates certain tax benefits.<sup>147</sup> For example, the creation of a parent-child status completely eliminates the state inheritance tax usually assessed

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139. Assuming there is no surviving spouse, the surviving child inherits the entire estate from the deceased parent. *Id.* § 3-103. If the parent-partner had children from a previous relationship, those children and the child-partner would share the entire estate equally. *Id.* By contrast, if the child-partner were to die first, the parent would only inherit if the child-partner left no surviving lineal descendants. *Id.* § 3-104(b) (explaining that parents only inherit when there are no surviving issue).

140. See Snodgrass, *supra* note 22, at 81.

141. *Id.* at 81–82.

142. See EST. & TRUSTS §§ 3-103, 3-104(b).

143. DOBRIS, STERK & LESLIE, *supra* note 91, at 484.

144. *Id.*; see also *Ades v. Norins*, 204 Md. 267, 274, 103 A.2d 842, 845 (1954).

145. Snodgrass, *supra* note 22, at 81–82.

146. Turnipseed, *supra* note 96, at 105–06.

147. *Id.* at 105

on property transfers from the decedent partner to the surviving partner.<sup>148</sup>

Maryland imposes a 10% inheritance tax on the value of property that passes from a decedent to non-exempted beneficiaries via will, intestate succession, trust, joint ownership, or otherwise.<sup>149</sup> Therefore, beneficiaries who receive property from a decedent are subject to the inheritance tax unless specifically exempted by statute.<sup>150</sup> The “family allowance” provision exempts those beneficiaries with marital or certain blood relationships to the decedent, including the decedent’s spouse, lineal descendants and their respective spouses, parents, grandparents, and siblings.<sup>151</sup> However, same-sex couples are not included in the family-allowance exemption irrespective of the closeness and longevity of their relationship.<sup>152</sup>

### *B. Disadvantages and Consequences of Adult Adoption*

#### 1. Irrevocability

While adult adoption secures inheritance rights for the adoptee, it is fraught with many adverse consequences. Perhaps the most negative consequence is its irrevocability.<sup>153</sup> Adult adoption, unlike marriage, is irreversible, notwithstanding the demise of the underlying romantic relationship.<sup>154</sup> Generally, unless a third party later adopts the partner,<sup>155</sup> or unless fraud or undue influence induced the adoption, it cannot be annulled, and the adoption is permanent.<sup>156</sup>

Another difference between adult adoption, which is often used to obtain the benefits of marriage, and marriage is that upon a decree of absolute divorce, all provisions favoring the former spouse in a will are automatically revoked. This implicitly recognizes the preference that once a couple ends the relationship, they no longer desire to

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148. See MD. CODE ANN., TAX-GEN. § 7-203(b)(2) (LEXIS through 2010 Reg. Sess.).

149. *Id.* §§ 7-202, -204.

150. *Id.* §§ 7-202 to -203.

151. *Id.* § 7-203(b)(2).

152. See *id.*

153. Snodgrass, *supra* note 22, at 83–84.

154. *Id.* at 83.

155. See MD. CODE ANN., EST. & TRUSTS § 1-207(b) (LEXIS through 2010 Reg. Sess.) (“A child who has been adopted more than once shall be considered to be a child of the parent or parents who have adopted him most recently and shall cease to be considered a child of his previous parents.”).

156. Snodgrass, *supra* note 22, at 83.

leave property to the former spouse or partner.<sup>157</sup> Therefore, if a divorced testator dies without updating his will, the former spouse will receive nothing.<sup>158</sup> Unfortunately, in the case of adult adoption, the former partner will receive a share unless the other partner validly executes a will disinheriting them.<sup>159</sup> Therefore, the separated adoptive partner would have to proactively craft an estate plan in order to disinherit the adopted partner because while the loving relationship has ended, the legally binding parent-child relationship remains intact.<sup>160</sup> Moreover, even if the partner employs a testamentary device, such as a will, to disinherit the former partner, the former partner will still have standing to contest the will as an heir of the testator.<sup>161</sup>

The final disadvantage with respect to irrevocability is that a couple who utilizes adult adoption as a means to secure inheritance rights will be prevented from later marrying if the option becomes available.<sup>162</sup> Because the parent-child relationship created by the adoption is irrevocable, the couple would be barred from marrying under Maryland Family Law section 2-202, which prohibits marriages within three degrees of direct lineal relation.<sup>163</sup>

## 2. Termination of Inheritance Rights from Natural Family

The adoptee's right to inherit as an heir-at-law from the natural parents is terminated upon adoption since the adoptee is removed from his or her natural family and transplanted into the adoptive family tree.<sup>164</sup> Because the adoptee is no longer a legal heir of the natural parents, he or she may only receive property from them upon

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157. See EST. & TRUSTS § 4-105(4) (stating that all provisions in a will relating to the spouse are automatically revoked upon absolute divorce or annulment).

158. See *id.*

159. See Snodgrass, *supra* note 22, at 83.

160. See *id.*

161. *Id.* at 83–84; see also *supra* note 84 and accompanying text.

162. See MD. CODE ANN., FAM. LAW § 2-202(b) (LEXIS through 2010 Reg. Sess.).

163. *Id.*

164. MD. CODE ANN., EST. & TRUSTS § 1-207(a) (LEXIS through 2010 Reg. Sess.) (“An adopted child shall be treated as a natural child of his adopting parent or parents. On adoption, a child no longer shall be considered a child of either natural parent . . . .”); *Hall v. Vallandingham*, 75 Md. App. 187, 193, 540 A.2d 1162, 1164 (1988) (expressly disallowing dual inheritance rights by adopted persons from both the natural and adoptive lines of family and holding that “the adopted child shall lose all rights of inheritance from its parents and from their natural collateral or lineal relatives”).

their death through devise, not through intestacy.<sup>165</sup> Adult adoption does not affect the right of the adoptee to inherit from his or her natural parents by will.<sup>166</sup> Thus, while the adoptee gains the right to inherit from her adoptive partner, he or she must simultaneously sacrifice the right to inherit as an heir-at-law from his or her natural family.<sup>167</sup> Furthermore, because adult adoption is irrevocable, if the couple later separates and the adoptee is disinherited by the former partner, the adoptee cannot restore his or her ability to inherit from the natural parents.<sup>168</sup>

This consideration is often the controlling factor in deciding which partner will be the adoptee and which will be the adoptor.<sup>169</sup> Fortunately, because Maryland places no express age limitations with respect to the parent and child, same-sex couples can structure the adoption so as to mitigate this consequence.<sup>170</sup> For example, if one partner's parents have already passed away, this consequence is of little relevance and that partner would naturally become the adoptee.<sup>171</sup>

### 3. Perverse Social Relationship

Establishing a parent-child relationship among a romantically involved couple obviously creates an "awkward legal status" and perverse social implications that many find undesirable.<sup>172</sup> It is clear that same-sex partners view their relationship as spousal rather than parental in nature; therefore, using adult adoption to secure inheritance rights requires a cynical view of the legal system to achieve an outcome that does not reflect the true nature of the relationship.<sup>173</sup> Adult adoption among same-sex couples "simply does not fit with society's expectations of a true parent-child relationship."<sup>174</sup>

Moreover, many couples are unprepared for the "psychological impact of the adoption on the dynamics of [an adult emotional and

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165. Snodgrass, *supra* note 22, at 84.

166. FAM. LAW § 5-341(a) (stating that adoption statutes do "not limit the right of an individual to provide for distribution of property by will").

167. *See id.* § 5-341(a)(2)(i)-(ii); EST. & TRUSTS § 1-207(a).

168. Snodgrass, *supra* note 22, at 84.

169. *Id.*

170. FAM. LAW § 5-341(c).

171. Snodgrass, *supra* note 22, at 84.

172. Dubois, *supra* note 21, at 317.

173. DOBRIS, STERK & LESLIE, *supra* note 91, at 484.

174. *Id.* (quoting Ralph C. Brasheir, *Children and Inheritance in the Non-Traditional Family*, 1996 UTAH L. REV. 93, 171-72 (1996)).

sexual] relationship.”<sup>175</sup> Additionally, outsiders to the relationship, such as friends, relatives, or co-workers “may be unable to tolerate the perversion of social roles that results when life partners become parent and child, creating further psychological stress for the couple.”<sup>176</sup>

In conclusion, while adult adoption does provide significant benefits, those benefits come at a high cost; hence, adult adoption has been dubbed the “high stakes means to inheritance.”<sup>177</sup> However, because it is currently the only mechanism that guarantees inheritance rights for a surviving partner, same-sex couples will continue to resort to adult adoption. As discussed below, an updated intestacy statute that bestows heir-at-law status and thus guarantees inheritance rights for same-sex committed partners would confer all the benefits of adult adoption with virtually none of the cost.<sup>178</sup>

#### V. RECIPROCAL BENEFICIARY AND DOMESTIC PARTNER LEGISLATION IN OTHER JURISDICTIONS

Affording equal intestacy rights to same-sex couples, without extending complete marital benefits, has been accomplished by other jurisdictions through reciprocal-beneficiary legislation or domestic partnerships.<sup>179</sup>

##### A. *Reciprocal Beneficiaries: Hawaii*

In 1997, Hawaii created a “reciprocal beneficiary relationship” designation to “extend certain rights and benefits [sic] which are presently available only to married couples [sic] to couples composed of two individuals who are legally prohibited from marrying under state law.”<sup>180</sup> The legislature declined to extend marriage to same-sex couples but acknowledged that such couples have “significant personal, emotional, and economic relationships” and thus certain marital rights and benefits should also be extended to these individuals.<sup>181</sup> This act is significant because it was the first in the nation to implicitly recognize the familial nature of committed same-

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175. Snodgrass, *supra* note 22, at 84.

176. *Id.*

177. Deborah L. Jacobs, *Adult Adoption a High-Stakes Means to an Inheritance*, N.Y. TIMES (May 21, 2009), <http://www.nytimes.com/2009/05/21/your-money/estate-planning/21ADOPT.html>.

178. See discussion *infra* Part VI.D.

179. See Bouchard & Zadworny, *supra* note 20, at 716–20.

180. HAW. REV. STAT. § 572C-1 (West, Westlaw through 2010 Reg. Sess.).

181. *Id.* § 572C-2.



sex relationships and thus set a model example for other states to follow.<sup>182</sup>

In order to become eligible for the host of benefits conferred by the reciprocal beneficiary relationship, the couple must first register as such.<sup>183</sup> The requirements for registration are relatively simple.<sup>184</sup> Additionally, unlike adult adoption, the relationship is easily terminable by filing a signed declaration with the director of health, and furthermore, couples are not prohibited from later marrying if it becomes an option.<sup>185</sup>

The Reciprocal Beneficiaries Act grants many property and inheritance rights that would otherwise be unavailable to same-sex couples including the ability to hold property as tenants by the entirety,<sup>186</sup> the right to an elective share of the partner's estate (equivalent to that of a spouse),<sup>187</sup> and an automatic revocation of any will provisions favoring a reciprocal beneficiary upon termination of the relationship.<sup>188</sup> Additionally, and most importantly, reciprocal beneficiaries are granted an heir-at-law status equivalent to that of a surviving spouse under intestacy law.<sup>189</sup> Therefore, as an heir, the reciprocal beneficiary would inherit even if the partner failed to make a will and in the event the partner executed a will, collateral relatives would be without standing to challenge it.<sup>190</sup>

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182. *See id.* (implicitly acknowledging the familial nature of unmarried couple relationships, including same-sex couples, by taking legislative notice of their "significant personal, emotional, and economic relationships" that couples who are prohibited from marrying often share). *See generally* W. Brian Burnette, *Hawaii's Reciprocal Beneficiaries Act: An Effective Step in Resolving the Controversy Surrounding Same-Sex Marriage*, 37 BRANDEIS L.J. 81, 81 (1998) ("This Act, the most comprehensive of its kind in the nation, endows non-married couples, who register as 'reciprocal beneficiaries,' with many of the same rights and benefits married couples receive under Hawaii law.").

183. *See* HAW. REV. STAT. § 572C-4.

184. Parties who are at least eighteen years of age, not currently married or in another reciprocal beneficiary relationship, and who are legally prohibited from marrying need only sign a declaration of reciprocal beneficiary relationship indicating that the consent of both parties is not obtained by fraud or duress and file the form with the director of health. *Id.* §§ 572C-4 to C-5.

185. *Id.* § 572C-7.

186. *Id.* § 509-2(a).

187. *Id.* § 560:2-202.

188. *Id.* § 560:2-804.

189. *Id.* § 560:2-102 (stating that the intestate share of the reciprocal beneficiary is equivalent to the surviving spouse).

190. *See supra* notes 85-87 and accompanying text.

*B. Domestic Partnership: California, New Jersey, Washington, Wisconsin, and Maine*

Several jurisdictions have expanded their domestic partner statutes beyond employment and health related benefits into intestacy law to provide heir-at-law status and an intestate share to surviving domestic partners.<sup>191</sup> These benefits are of paramount importance to provide protection for the surviving domestic partner, whether or not an individual executes a will.<sup>192</sup>

In these jurisdictions, the legally recognized domestic-partner relationship confers inheritance benefits closely akin to those that spouses receive, greatly easing the need for complex estate planning.<sup>193</sup> Moreover, the requirements for entering into a domestic-partner relationship are relatively simple,<sup>194</sup> and unlike adult adoption, the relationship is terminable by either partner.<sup>195</sup>

1. California

California was one of the first states to expand its intestacy statute beyond the marital relationship to allow a surviving domestic partner to inherit the deceased partner's separate property in the same manner as a surviving spouse.<sup>196</sup> More recently, several states have followed California's lead.

2. New Jersey

In 2006, New Jersey amended its intestacy statutes to grant domestic partners the same inheritance rights, including elective share rights, as spouses.<sup>197</sup> Following its enactment, the Supreme Court of New Jersey implicitly affirmed its validity by holding that

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191. *See, e.g.*, N.J. STAT. ANN. § 3B:5-3 (West, Westlaw through 2010 legislation).

192. *See supra* notes 85–87 and accompanying text (explaining the dual benefits conferred by heir-at-law status: an intestate share in the event the individual does not execute a valid will and the prevention of other relatives from challenging the will in the event the individual does execute a will).

193. *See, e.g., supra* notes 85–89 and accompanying text.

194. *See, e.g.*, N.J. STAT. ANN. § 26:8A-4 (requiring partners to file an “Affidavit of Domestic Partnership” and furnish proof that they share a common residence and are “otherwise jointly responsible for each other’s common welfare”).

195. *Id.* § 26:8A-10 (providing the grounds for termination of a domestic partnership).

196. Act of July 1, 2003, ch. 447, § 1, 2002 Cal. Stat. 2517, 2517 (codified at CAL. PROB. CODE § 6401(c) (Deering, LEXIS through 2010 Legislation)).

197. Act effective Jan. 12, 2006, ch. 331, § 2, 2005 N.J. Laws 2187, 2189-90 (codified at N.J. STAT. ANN. § 3B:5-3) (intestate share); Act effective Jan. 12, 2006, ch. 331, § 7, 2005 N.J. Laws 2187, 2192 (codified at N.J. STAT. ANN. § 3B:8-1) (elective share).

denying to committed same-sex couples the rights that are bestowed to heterosexual married couples violates the state's equal protection guarantee.<sup>198</sup> The court noted that in order to eradicate discrimination on the basis of sexual orientation, the "unequal dispensation of rights and benefits to committed same-sex partners" could no longer be tolerated.<sup>199</sup> Moreover, to cure the remaining violations, the court required the legislature to either "amend the marriage statutes to include same-sex couples or create a parallel statutory structure" that would provide rights, benefits, obligations, and burdens equal to those of marriage.<sup>200</sup>

The legislative intent supporting the creation of New Jersey's domestic-partner statute and its expansion into the inheritance realm is consistent with the court-mandated policy of eradicating sexual-orientation discrimination. Upon enacting the Domestic Partnership Act, the legislature declared that there are a substantial number of individuals who live together in "important personal, emotional and economic committed relationships" with another same-sex individual and recognized that those "mutually supportive" relationships should formally be given credence.<sup>201</sup> In light of the familial nature of these relationships, the Domestic Partner Act extends various benefits and rights to committed same-sex couples that were previously only accorded to married couples.<sup>202</sup> The legislature expressed its recognition of the human-rights dimension, which propelled the decision to extend benefits to same-sex couples, by stating that

[t]he need for all persons who are in domestic partnerships, regardless of their sex, to have access to these rights and benefits is paramount in view of their essential relationship to any reasonable conception of basic human dignity and autonomy, and the extent to which they will play an integral role in enabling these persons to enjoy their familial relationships as domestic partners.<sup>203</sup>

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198. *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006). The court, however, did hold that there was no fundamental right to same-sex marriage and found the violation to be solely one of the equal protection guarantee. *Id.*

199. *Id.*

200. *Id.*

201. N.J. STAT. ANN. § 26:8A-2(a), (c) (West, Westlaw through 2010 legislation).

202. *Id.* § 26:8A-2(d).

203. *Id.*

### 3. Washington

Washington, in 2007, enacted similar legislation bestowing equal inheritance rights upon “state registered domestic partner[s].”<sup>204</sup> Under the statute, the surviving domestic partner is accorded the same primary heir-at-law status as that of a surviving spouse.<sup>205</sup>

Notably, the Washington legislature chose to extend these fundamental inheritance rights to state-registered domestic partners despite recent case law upholding the state’s Defense of Marriage Act, which prohibits same-sex marriage.<sup>206</sup> However, the court’s opinion was fraught with instances that implied that the justices’ personal views conflicted with the constitutional decision.<sup>207</sup>

The legislative findings, which prompted Washington’s enactment of a state-registered domestic-partner system and its expansion into the realm of intestacy law, are similar to those of other states that have implemented such laws.<sup>208</sup> The statutes were enacted to further the state’s interest in “promoting family relationships and protecting

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204. Act effective July 22, 2007, ch. 156, § 27, 2007 Wash. Sess. Laws 616, 634 (codified at WASH. REV. CODE ANN. § 11.04.015 (West, Westlaw through 2011 chapter 2)).

205. WASH. REV. CODE ANN. § 11.04.015 (West, Westlaw through 2011 chapter 2) (providing a guaranteed minimum share of one-half of the decedent’s estate).

206. *See Andersen v. King Cnty.*, 138 P.3d 963, 968 (Wash. 2006) (“[T]he solid body of constitutional law disfavors the conclusion that there is a right to marry a person of the same sex.”). The court held that the state’s Defense of Marriage Act, prohibiting same-sex marriages, did not violate the equal protection clause or the due process clause because gay and lesbian individuals are not a suspect class, nor is there a fundamental right to marry a person of the same sex. *Id.* at 969. Therefore, under the deferential rational review standard, the DOMA, limiting marriage to heterosexual couples, was reasonably related to the legitimate state interest in furthering procreation and furthering the well-being of children. *Id.*

207. *See, e.g., id.* at 968 (“In reaching this conclusion, we have engaged in an exhaustive constitutional inquiry and have deferred to the legislative branch as required . . . . We see no reason, however, why the legislature or the people acting through the initiative process would be foreclosed from extending the right to marry to gay and lesbian couples . . . .”); *id.* (“[T]he court’s role is limited to determining the constitutionality of DOMA . . . our decision is not based on an independent determination of what we believe the law should be.”); *id.* (“[A] judge’s understanding of the law is a separate and distinct matter from his or her personal views about sound policy.”); *id.* at 968–69 (“Perhaps because of the nature of the issue in this case and the strong feelings it brings to the front, some [dissenting justices] have uncharacteristically been led to depart significantly from the court’s limited role . . . .”).

208. *See supra* notes 192–94 and accompanying text (discussing the legislative history of New Jersey’s domestic partner statutes).

family members during life crises.”<sup>209</sup> The findings were summarized as follows:

Many Washingtonians are in intimate, committed, and exclusive relationships with another person to whom they are not legally married. These relationships are important to the individuals involved and their families; they also benefit the public by providing a private source of mutual support for the financial, physical, and emotional health of those individuals and their families. The public has an interest in providing a legal framework for such mutually supportive relationships, whether the partners are of the same or different sexes, and irrespective of their sexual orientation.<sup>210</sup>

Remarkably, the legislature implicitly recognized the uphill battle that same-sex couples must encounter with respect to estate-planning issues. The legislature first explained that because same-sex couples cannot marry, they do not have automatic access to certain rights and benefits, such as death benefits, which arise from the traditional marital relationship.<sup>211</sup> The legislature then noted that “[a]lthough many of these rights and benefits may be secured by private agreement, doing so is often costly and complex,”<sup>212</sup> implicitly acknowledging that although same-sex couples can create inheritance rights through contract-based agreements such as wills, trusts, and joint-ownership arrangements, doing so is costly, burdensome, and does not guarantee such rights.

#### 4. Other: Wisconsin and Maine

In 2009, Wisconsin also enacted similar legislation giving registered domestic partners an heir-at-law designation and the same intestate inheritance rights as spouses.<sup>213</sup> Additionally, Maine is yet

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209. WASH. REV. CODE ANN. § 26.60.010 (West, Westlaw through 2011 Laws chapters 1 & 2).

210. *Id.*

211. *Id.*

212. *Id.*

213. Act of June 29, 2009, ch. 770, § 3247, 2009 Wis. Sess. Laws 604, 608 (codified at WIS. STAT. § 852.01 (West, Westlaw through 2009 Act 406)) (treating surviving domestic partners and spouses alike with respect to the intestate share). The policy supporting the domestic partnership statutes is to establish the legal parameters of a domestic partner relationship for the “interests of the citizens.” *Id.* at 604.

another jurisdiction that provides intestate inheritance rights to registered domestic partners equal to those of spouses.<sup>214</sup>

Each of the above mentioned jurisdictions compassionately recognizes the personal, emotional, and economic relationships between committed same-sex partners.<sup>215</sup> With respect to estate planning, legally formalizing the cherished family bond between same-sex couples by granting basic rights, such as inheritance benefits and heir-at-law status, virtually eliminates the costly burden and daunting nature of the complex estate-planning needs that they previously faced without those rights.

## VI. SOLUTION FOR MARYLAND: EXPAND EXISTING DOMESTIC-PARTNER LEGISLATION TO AMEND OUTDATED INTESTACY LAWS

### A. Existing Domestic Partner Statutes

In 2008, following in the wake of the *Conaway v. Deane* decision, which upheld Maryland's ban on same-sex marriage,<sup>216</sup> the legislature created a domestic-partner designation and enacted laws to provide certain limited benefits to this registered class of constituents.<sup>217</sup> Under the current law, in order to register as domestic partners, the couple must sign and file an affidavit stating that they have established a domestic partnership, and they must also furnish proof of their committed and mutually interdependent relationship.<sup>218</sup> Benefits include hospital visitation rights and various

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214. ME. REV. STAT. ANN. tit. 18-A, § 2-102 (West, Westlaw through 2009 Second Reg. Sess. of 124th Leg.).

215. See, e.g., N.J. STAT. ANN. § 26:8A-2(a)–(b) (West, Westlaw through 2010 legislation).

216. 401 Md. 219, 237–38, 932 A.2d 571, 581 (2007).

217. Act effective July 1, 2008, ch. 590, § 6-101, 2008 Md. Laws 4597, 4604 (codified at MD. CODE ANN., HEALTH-GEN. § 6-101 (LEXIS through 2010 Reg. Sess.)). In order to be eligible to enter into a domestic partnership, the individuals must be (1) 18 or older; (2) unrelated by blood or marriage; (3) not currently married, in a civil union, or in a domestic partnership with another individual; and (4) in agreement “to be in a relationship of mutual interdependence in which each individual contributes to the maintenance and support of the other individual and the relationship, even if both individuals are not required to contribute equally to the relationship.” *Id.*

218. MD. CODE ANN., HEALTH-GEN. § 6-101(b) (LEXIS through 2010 Reg. Sess.). Proof of the relationship may be established by furnishing any two of the following: (1) joint liability of the individuals for a mortgage, lease, or loan; (2) designation of one of the individuals as the primary beneficiary under the other's life insurance policy or under the other's retirement plan; (3) designation of one of the individuals as the primary beneficiary of the other's will; (4) durable power of attorney granted by one of the

rights during medical emergencies, such as permission to accompany the injured domestic partner in the ambulance.<sup>219</sup>

However, legislative history explaining the enactment of the domestic partnership statutes suggests a narrow scope, primarily for the purpose of facilitating “Health Care Facility Visitation and Medical Decisions.”<sup>220</sup> Further bolstering this conclusion is the fact that the domestic-partner statute was codified in the Maryland Health-General Article under the “Health Care Facility Visitation and Medical Emergencies” title.<sup>221</sup> Both the method of codification and the legislative history signal that the intent was not to create a comprehensive parallel structure of equality for same-sex couples but rather to provide limited benefits in the health care realm.<sup>222</sup>

In 2009, the legislature expanded domestic-partnership benefits to include a limited inheritance-tax exemption for the interest that passes from the decedent to the surviving partner in their primary residence if held by the registered partners in joint tenancy.<sup>223</sup> However, domestic partners still remain ineligible for the “[f]amily allowance,” which wholly exempts marital and certain blood relatives from all inheritance taxes simply by virtue of their familial relation to the decedent.<sup>224</sup> Moreover, the narrow scope of the current domestic-partner statutes does not confer any inheritance rights on registered domestic partners.<sup>225</sup> Therefore, despite the existence of domestic partnership, same-sex couples in Maryland still needlessly face complex estate-planning complications because they remain completely excluded from intestacy statutes.

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individuals to the other individual; (5) joint ownership or lease of a motor vehicle; (6) a joint checking account, joint investments, or a joint credit account; (7) a joint renter's or homeowner's insurance policy; (8) coverage on a health insurance policy; (9) joint responsibility for child care; or (10) a relationship or cohabitation contract.  
*Id.*

219. *Id.* §§ 6-201 to -202.

220. S.B. 566, 2008 Leg., 425th Sess., 2008 Md. Laws 4597.

221. HEALTH-GEN. § 6-101.

222. *See id.*; S.B. 566, 2008 Leg., 425th Sess., 2008 Md. Laws 4597.

223. Act effective July 1, 2009, ch. 602, § 7-203, 2008 Md. Laws 3405, 3406 (codified at MD. CODE ANN., TAX-GEN. § 7-203(1)(2) (LEXIS through 2010 Reg. Sess.)) (“[T]he inheritance tax does not apply to the receipt of an interest in a joint primary residence that: (i) . . . was held in joint tenancy by the decedent and the domestic partner; and (ii) passes from the decedent to or for the use of the domestic partner.”).

224. MD. CODE ANN., TAX-GEN. § 7-203(b) (LEXIS through 2010 Reg. Sess.).

225. *See* MD. CODE ANN., EST. & TRUSTS § 3-102 (LEXIS through 2010 Reg. Sess.) (surviving “spouse” does not include domestic partners).

*B. Maryland Should Expand Domestic Partner Legislation to Intestacy Statutes*

Presently, the complete omission of same-sex partners from intestacy law precludes them having any guaranteed rights to inherit from their respective partner and consequently facilitates challenges to wills by family members who disapprove of the testator's sexual orientation and lifestyle choice.<sup>226</sup> Extending inheritance rights to surviving domestic partners by designating them as primary heirs of the deceased partner would serve the dual function of mitigating the harsh consequences of intestate succession and reducing the likelihood of will contests.<sup>227</sup> In the case of intestacy, inclusion of the domestic partner as the primary heir would best mirror what the decedent would have intended had he or she executed a valid will.<sup>228</sup> In the case of testate succession, the heir status of the domestic partner reduces the potential for challenges and, most importantly, ensures that testamentary intent is satisfied.<sup>229</sup>

A revised intestacy statute that provides inheritance rights to a surviving same-sex partner would promote the donative freedom not only of gay and lesbian individuals in same-sex domestic partner relationships who die intestate but also of those who die fully testate.<sup>230</sup> Furthermore, the inclusion of same-sex couples in intestacy law reflects the personal, economic, and familial bond between committed same-sex partners and diminishes the discriminatory nature of current intestate statutes.

1. Current Intestacy Law Discriminates Against Same-Sex Couples

Maryland's intestacy law completely excludes nonmarital committed partners from consideration as heirs of the decedent.<sup>231</sup> In essence, current intestacy statutes ignore the same-sex family relationship and consequently ignore the different romantic and affectional preferences that these individuals possess.<sup>232</sup> Ignorance of these romantic and affectional preferences necessarily translates into ignorance of these individuals' donative preferences, because

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226. See Turnipseed, *supra* note 96, at 97.

227. See Spitko, *supra* note 97, at 1075.

228. See discussion *infra* Part VI.B.2.

229. See discussion *infra* Part VI.B.3.

230. Spitko, *supra* note 97, at 1075.

231. See MD. CODE ANN., EST. & TRUSTS § 3-102 (LEXIS through 2010 Reg. Sess.) ("spouse" does not include non-marital partners).

232. See Spitko, *supra* note 97, at 1064.



decedents generally choose to leave their estates to their loved ones.<sup>233</sup>

The exclusion of the same-sex relationship and its resultant preferences from intestacy statutes discriminates against gay and lesbian individuals in two principal ways.<sup>234</sup> First, it denies gay and lesbian individuals equal donative freedom.<sup>235</sup> Currently, by favoring the surviving spouse, intestacy statutes divide property according to the affectional preferences of the traditional nuclear family.<sup>236</sup> In contrast, by failing to provide intestate inheritance rights for a surviving nonmarital partner, intestacy statutes disregard the donative preferences of gay and lesbian individuals.<sup>237</sup> Therefore, gay and lesbian individuals cannot rely on intestacy statutes to carry out their donative intent and must affirmatively craft an estate plan to avoid its application.

Second, current intestacy statutes discriminate against gay and lesbian individuals by devaluing same-sex relationships through refusal to formally recognize such relationships.<sup>238</sup> After all, “to be gay and on the “outside” is less to be denied protections and freedom than it is to simply to not count.”<sup>239</sup> Updating intestacy statutes would thereby reduce discrimination, further the fundamental goal of donative freedom, and provide recognition of a bona fide family relationship for same-sex couples.

## 2. Intestate Succession: Providing Heir-at-Law Status

Whether a decedent dies wholly intestate, fails to dispose of all property via will or other instrument, or executes an invalid will, the default laws of intestacy will govern.<sup>240</sup> The purpose of intestacy statutes, which rests on the supposed desire of a decedent, “is to make such a will for an intestate as he would have been most likely to make for himself.”<sup>241</sup> In other words, intestacy law seeks to promote the donative freedom of those who, for whatever reason, pass away

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233. *Id.*

234. *Id.*

235. *Id.*

236. *See* EST. & TRUSTS § 3-101 (giving primary heir status to the surviving spouse); Spitko, *supra* note 97, at 1064–65.

237. Spitko, *supra* note 97, at 1066.

238. *Id.* at 1065.

239. *Id.* at 1063 (quoting Sarah Pettit, *Justify Our Love*, in *OUTSIDE THE LAW: NARRATIVES ON JUSTICE IN AMERICA* 130, 133 (Susan Richards Shreve & Porter Shreve eds., 1997)).

240. *See* EST. & TRUSTS § 3-101.

241. *Barron v. Janney*, 225 Md. 228, 234-35, 170 A.2d 176, 180 (1961).

without employing their right to expressly provide for the disposition of their estate upon death.<sup>242</sup> This goal is accomplished by providing heir-at-law status to those family members that approximate the distributive plan that the intestate decedent would have been most likely to create had he or she executed a will.<sup>243</sup> Underlying policy supporting intestacy law rests on the maxim that donative freedom should contain the right not to be forced to execute a will to pass property to one's family members.<sup>244</sup> Denial of such a fundamental "right would 'create[] a trap for the ignorant or misinformed,'" who are either unaware of the benefits of executing a will or are unable to afford the legal services required to execute a valid will.<sup>245</sup>

Current intestacy law, which completely omits a surviving domestic partner, does mirror the imputed donative intent of the traditional nuclear family.<sup>246</sup> Drafters of these statutes justify designating the surviving spouse as the primary heir by reference to the decedent's presumed testamentary intent based on the underlying assumption that the decedent would have favored the spouse had he or she created a valid estate plan.<sup>247</sup> However, empirical data confirms that gay and lesbian individuals similarly prefer to leave their property to their committed same-sex partner upon death.<sup>248</sup> Therefore, the complete exclusion of registered domestic partners as heirs proves that current intestacy statutes are glaringly inadequate to approximate a gay or lesbian decedent's donative intent.

A study, which surveyed three unmarried groups from the general public—committed opposite-sex couples, committed female same-sex couples, and committed male same-sex couples—was conducted to obtain data illuminating the donative preferences of these couples.<sup>249</sup> The data revealed that individuals with same-sex partners

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242. Spitko, *supra* note 97, at 1070.

243. *Id.*

244. Hirsch, *supra* note 50, at 1034.

245. *Id.* (quoting 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, 323–24 (1978)).

246. See Spitko, *supra* note 97, at 1064–65 (explaining that typical intestacy statutes favor non-gay individuals over gay and lesbian individuals by making the spouse the primary heir over other possible inheritors).

247. *Id.* at 1065.

248. Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 89 (1998) ("Respondents with same-sex partners, however, were consistently more generous to partners than were . . . respondents with opposite-sex partners.").

249. *Id.* at 31.

were “consistently more generous” to their partners than the married and unmarried heterosexual couples.<sup>250</sup>

Respondents were asked to state their distributive preferences in a variety of scenarios.<sup>251</sup> For example, when the decedent is survived only by the partner and parents, current law would provide nothing to the partner, but every single respondent with a same-sex partner would give the surviving partner some share.<sup>252</sup> In fact, a large majority (64.7%) would give the partner the entire estate.<sup>253</sup> In the situation where the decedent is survived only by the partner and siblings, current law would again yield nothing for the surviving partner, but all respondents with a same-sex partner would prefer the partner to receive a share of the estate.<sup>254</sup> Moreover, nearly all of those participants would give the surviving partner at least one-half.<sup>255</sup> Finally, in the situation where the decedent is survived by the partner and children, current law, which provides nothing to the partner, again delivers a result in stark contrast to the true wishes of the decedent with a surviving same-sex partner.<sup>256</sup> Nearly all (93.9%) of the participants with same-sex partners would give the partner a share of the intestate estate, with the majority dividing the estate equally between the surviving partner and the decedent’s child.<sup>257</sup>

Moreover, the study assessed the attitudes of all participants with regard to inclusion of committed, nonmarital partners in intestacy law; all groups consistently voiced the preference that both same-sex and opposite-sex committed couples be treated alike.<sup>258</sup> In sum, this survey suggests that intestacy statutes would better reflect donative intent if modified to provide a primary intestate share of the decedent’s estate to the surviving same-sex domestic partner.<sup>259</sup> The sharp contrast between the distributive outcome under the current intestacy scheme, where the partner receives nothing,<sup>260</sup> and the actual distributive preferences of gay and lesbian individuals, where

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250. *Id.* at 89.

251. *Id.* at 34.

252. *Id.* at 38.

253. *Id.*

254. *Id.* at 41–42.

255. *Id.* at 42.

256. *Id.* at 47 (explaining that same-sex couples would prefer that the partner received some share of the estate).

257. *Id.*

258. *Id.* at 89.

259. *See id.*; Spitko, *supra* note 97, at 1074.

260. MD. CODE ANN., EST. & TRUSTS § 3-102 (LEXIS through 2010 Reg. Sess.) (leaving property only to the spouse, not to the domestic partner).

the partner receives a substantial share,<sup>261</sup> necessitates a revision in archaic intestacy law that has failed to adapt to changing family structure.

In order to implement the goal of donative freedom, intestacy provisions should be updated to reflect the realities of modern families and the wishes of decedents who live in such families.<sup>262</sup> Gay and lesbian individuals undoubtedly consider their committed partner as family, and the partner undoubtedly fulfills a role most parallel to a spouse in the traditional-couple context. Revising the intestacy statute to provide a share, equivalent to that of a spouse, for surviving domestic partners would closely approximate the true intent of gay and lesbian individuals who die without executing a valid will and therefore further the primary goal of donative freedom.<sup>263</sup> Consistent with its underlying purpose, Maryland's intestacy statute should be updated to reflect the intent of same-sex couples to leave property to their committed partners.

### 3. Testate Succession: Limiting Will Challenges

In addition to mitigating the severe consequences of intestate succession, according heir-at-law status to domestic partners would also prove beneficial to testate succession law that operates when the decedent executes a will.<sup>264</sup> In fact, the updated intestacy statute would serve as a mechanism for ensuring testamentary freedom and effectuating a testator's intent.<sup>265</sup>

Testamentary freedom, simply put, is the long-standing notion that an individual should be free to dispose of his or her accumulated property upon death to whomever he or she chooses.<sup>266</sup> This freedom rests on principles of natural law.<sup>267</sup> Having created their own wealth during life with the fruits of their labor, individuals possess a natural right to dispose of that wealth freely upon death as a logical extension

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261. Fellows et al., *supra* note 248, at 89.

262. See Spitko, *supra* note 97, at 1070.

263. See Fellows et al., *supra* note 248, at 89 (explaining that individuals in a committed same-sex relationship prefer to leave property to their partners).

264. See Spitko, *supra* note 97, at 1075 (explaining that according intestate inheritance rights to same-sex partners would promote the donative freedom of both gay and lesbian individuals who die intestate and those who die testate).

265. *Id.* (“[A] provision of intestate inheritance rights for a committed same-sex surviving partner would further [the] primary value of promoting donative freedom.”).

266. Terry L. Turnipseed, *Why Shouldn't I Be Allowed To Leave My Property to Whomever I Choose at My Death?*, 44 BRANDEIS L.J. 737, 751 (2006).

267. *Id.* at 756.

of property ownership.<sup>268</sup> Moreover, as a “hallmark of the common law,” freedom of testation has been promulgated as “one of the most fundamental rights guaranteed by U.S. law.”<sup>269</sup>

Maryland courts are also in accord; they seek to promote testamentary freedom by assigning great weight to the intent of the testator in will-construction cases.<sup>270</sup> Indeed, the Court of Appeals of Maryland recently stated that the paramount concern of the courts in such cases “is to ascertain and effectuate the testator’s expressed intent.”<sup>271</sup> Though recently restated, this principle dates back to medieval times.<sup>272</sup> A chancellor from the 17<sup>th</sup> century coined the phrase: “the intent of the testator is ‘the pole-star by which the courts must steer.’”<sup>273</sup> Providing an intestate inheritance share to same-sex domestic partners operates to respect the “intent of the testator” by preempting will challenges and furthering the paramount value of promoting testamentary freedom.<sup>274</sup>

Because testamentary freedom is such a fundamental right, when that right is exercised, it should be respected to the utmost degree.<sup>275</sup> Updating the intestacy statute to provide a primary heir-at-law status for a surviving domestic partner heightens respect for a testator’s expressed wishes in two ways. First, inclusion of domestic partners within intestacy law would limit will challenge suits instigated by disgruntled family members who may object to the decedent’s sexual orientation.<sup>276</sup> Under current law, more loosely related individuals such as cousins, nieces, or grandnephews may instigate a challenge because standing rules permit anyone who would inherit from the decedent under the laws of intestacy to contest the will.<sup>277</sup> However, if modified to include domestic partners as heirs (with status equivalent to that of a spouse), only surviving direct lineal

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268. *Id.* at 756, 760.

269. *Id.* at 751.

270. *See Pfeufer v. Cyphers*, 397 Md. 643, 919 A.2d 641 (2007).

271. *Id.* at 649, 919 A.2d at 645.

272. Hirsch, *supra* note 50, at 1042 n.40.

273. *Id.* at 1042 (quoting 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 537 (O. W. Holmes, Jr. ed., 1873)).

274. *See Spitko*, *supra* note 97, at 1076.

275. *See Pfeufer*, 397 Md. at 649, 919 A.2d at 645 (stating the general principle that the intent of the testator is the chief consideration).

276. Allison, *supra* note 42, at 446.

277. *See supra* notes 80–87 and accompanying text (discussing standing rules).

descendants, or if none, surviving parents, would have heir status and thus standing to contest the will.<sup>278</sup>

Moreover, the revised intestacy statute comparatively lessens the descendants' or parents' share of the estate because the surviving partner would now receive at least one-half of the estate as opposed to nothing under current law.<sup>279</sup> Consequently, it reduces the incentive of these blood relatives to challenge the estate plan, because they would have little or nothing to gain by attaining a declaration that the individual died intestate.<sup>280</sup> Therefore, the risk of challenges is significantly lessened under the revised intestacy law as fewer relatives have standing to contest the will, and those who have standing have a reduced incentive to challenge.<sup>281</sup> By better insulating wills from spiteful challenges and needlessly protracted litigation, the amended intestacy statute would serve as a mechanism for effectuating a testator's intent and promoting testamentary freedom.<sup>282</sup>

Second, inclusion of domestic partners as heirs under intestacy law makes will challenges less likely to succeed. In challenge suits, courts employ construction principles to clarify donative intent, which presume that a rational testator would prefer family members (i.e., heirs-at-law) over nonfamily members in the distribution of his or her estate.<sup>283</sup> Currently, the familial nature of same-sex relationships lacks objective support in the law.<sup>284</sup> Including same-sex partners in intestacy law would render legislative support that the domestic partner relationship is a bona fide family relationship,

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278. MD. CODE ANN., EST. & TRUSTS §§ 3-102, 3-104 (LEXIS through 2010 Reg. Sess.). This is precisely because the heir status of the partner would preempt more distant relatives from inheriting and thus having standing. *See id.* § 3-104.

279. *Id.* § 3-102.

280. Spitko, *supra* note 97, at 1075. If the relatives did obtain a declaration that the decedent died intestate, the surviving domestic partner would receive at least one-half of the estate. EST. & TRUSTS § 3-102.

281. *See* Spitko, *supra* note 97, at 1075.

282. *See id.*

283. *See* 22 MD. L. ENCYCLOPEDIA *Wills* § 97 (2000) (describing “[c]onstruction in favor of heirs or distributees”); *id.* § 98 (describing “[c]onstruction in favor of just, natural, or reasonable disposition”).

284. Intestacy laws define family as those related by blood or marriage. Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 5 (2000) (“[I]ntestacy laws define family as persons related by blood, marriage or adoption.”). Same-sex couples, without the ability to marry, are therefore excluded from the definition of family under current law. EST. & TRUSTS § 3-102 (providing no heir status for a domestic partner).

deserving of recognition as such.<sup>285</sup> Committed same-sex partners would finally be outwardly recognized as family members.<sup>286</sup> Therefore, a will leaving substantial property to a committed same-sex partner could consistently be reconciled with the presumption that testators prefer family members.<sup>287</sup> This consistency would lead to a lesser likelihood that wills will be invalidated upon challenge.<sup>288</sup>

Finally, in harmony with the theme that testamentary freedom is paramount, default intestacy statutes should only govern where the decedent has not properly expressed his or her testamentary intent via a will or other instrument.<sup>289</sup> Because an individual's wishes should reign supreme, intestacy statutes should be used as gap-filler laws only when the decedent has not otherwise directed disposition.<sup>290</sup> However, under current law, intestacy statutes are instead being manipulated, in some instances, by estranged or collateral blood relatives as a tool to garner standing to contest a will out of spite or prejudice and undermine the donative intent of the testator.<sup>291</sup> Even if these challengers ultimately lose and the will is upheld, the mere instigation of the lawsuit itself is the harbinger of stress, heartache, and costly legal expense.

An updated intestacy law that designates the surviving same-sex partner as the primary heir of the decedent will relegate intestacy statutes to their intended purpose—gap-filler rules that take effect only in the absence of a valid will<sup>292</sup>—and remove the potential for abuse by disgruntled relatives by eliminating their heir status and thus their ability to contest the will.<sup>293</sup> With a lessened potential for will challenges, gay and lesbian individuals can feel more secure that their wishes will be respected upon death and their donative intent will not

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285. See Fellows et al., *supra* note 248, at 9.

286. *Id.* (stating that inclusion in intestacy law would validate the relationship).

287. See 22 MD. L. ENCYCLOPEDIA *Wills* § 97 (2000).

288. Because same-sex domestic partners would be considered family, will construction principles would now favor instead of oppose bequests to same-sex partners. See *id.*

289. See EST. & TRUSTS § 3-101 (“Any part of the net estate of a decedent *not effectively disposed of by his will* shall be distributed by the personal representative to the heirs of the decedent in the order prescribed in this subtitle.” (emphasis added)).

290. *Id.*; Hirsch, *supra* note 50, at 1032–33 (“[T]he intestacy statute, set[s] out rules for the division of decedents’ estates that take effect in the absence of, and yield to, an executed writing. The intestacy scheme represents ‘the will which the law makes,’ if and only if the decedent fails to make her own.”).

291. Spitko, *supra* note 97, at 1075.

292. Hirsch, *supra* note 50, at 1032–33.

293. Spitko, *supra* note 97, at 1075.

be undermined by spiteful relatives over disapproval of the decedent's lifestyle choice.<sup>294</sup>

#### 4. Principle of Donative Freedom Dictates Heir-at-Law Status for Domestic Partners

Donative freedom is at the apex of the values of succession law.<sup>295</sup> Therefore, it follows that succession law should mirror the wishes of a decedent, both with regard to protecting and respecting testamentary expressions of desire, such as wills, and in the case of intestacy, by anticipating situations where those expressions have not adequately been presented.<sup>296</sup> Simply updating intestacy law to provide an heir-at-law status for registered domestic partners, equivalent to that of a spouse, furthers the fundamental ideal of donative freedom both in the testamentary context, by eliminating heir status for collateral relatives, limiting will challenges, and causing greater respect for testamentary instruments, and in the intestate realm, by providing the surviving domestic partner with a share of the estate in accordance with the decedent's true wishes.<sup>297</sup>

Moreover, this change can be affected without disturbing the donative wishes of the traditional nuclear family because the domestic partner status and spousal status are mutually exclusive.<sup>298</sup> Simply put, the heir-at-law status for domestic partners would only take effect in the situation where the decedent actually dies leaving a surviving registered domestic partner, and thus will have no effect in the situations where the decedent dies with a surviving spouse or where the decedent dies unmarried and not in a domestic partner relationship.<sup>299</sup> Therefore, the donative freedom of traditional families is still preserved while providing much needed equality for committed same-sex couples.

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294. *See id.*

295. *Id.* at 1068.

296. *Id.*

297. *See* discussion *supra* Part VI.B.2–3; *see also supra* notes 249–59 and accompanying text (discussing empirical data regarding gay and lesbian individuals' donative wishes).

298. MD. CODE ANN., HEALTH-GEN. § 6-101(a)(3) (LEXIS through 2010 Reg. Sess.) (explaining that registered domestic partners cannot also simultaneously be in a marital relationship).

299. *See, e.g.,* MD. CODE ANN., EST. & TRUSTS §§ 3-103, 3-104 (LEXIS through 2010 Reg. Sess.) (explaining the distributive scheme when the decedent leaves no surviving spouse and signaling that the spousal provision is only applicable in the event the decedent leaves a spouse).



C. *Maryland Should Expand Domestic-Partner Legislation to Amend Inheritance Tax Statutes*

In recognition of the close familial bond between same-sex domestic partners, and in order to fully provide for fundamental fairness in estate law, Maryland's inheritance tax statutes should also be amended to incorporate surviving domestic partners into the family-exemption provision.<sup>300</sup>

1. Function and Purpose of the Inheritance Tax

The Maryland Tax General Article imposes a 10% inheritance tax on the "privilege of receiving property that passes from a decedent" to his or her beneficiaries for the purpose of raising revenue for the state.<sup>301</sup> Therefore, those who receive property from a decedent via will, intestate succession, trust, joint ownership, or otherwise are subject to the inheritance tax unless specifically exempted.<sup>302</sup> The Court of Appeals of Maryland has continually explained that the inheritance tax, as distinguished from an estate tax, is not a tax upon the property but rather a succession tax exacted by the state against the legatee or heir for the "privilege" of succeeding to an inheritance.<sup>303</sup>

2. The Family Exemption

The Maryland legislature has accorded preferential treatment to certain classes of beneficiaries by exempting them from the inheritance tax.<sup>304</sup> The family allowance statute distinguishes and

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300. Maryland should follow New Jersey's lead. New Jersey, which utilizes domestic partner status to create rights and benefits that directly parallel marital benefits, accordingly excludes spouses and domestic partners from the inheritance tax. N.J. STAT. ANN. § 54:34-2(a) (West, Westlaw through 2010 Legislation) (exempting spouses and domestic partners from inheritance taxes for all transfers made after January 1, 1985). New Jersey, like Maryland, exempts closely related family members, such as spouses, parents, grandparents, and lineal descendants, from the inheritance tax. *Id.* § 54:34-2(a)(1)-(2). However, New Jersey also includes domestic partners in the list of family members who are exempt from inheritance taxation. *Id.* § 54:34-2(a).

301. MD. CODE ANN., TAX-GEN. § 7-202 ("Imposition of Tax") (LEXIS through 2010 Reg. Sess.); *id.* § 7-204 ("Tax Rate"); *Clarke v. Union Trust Co. of D.C.*, 192 Md. 127, 138, 63 A.2d 635, 640 (1949) (explaining that the purpose of collateral inheritance tax is to raise revenue for the State of Maryland).

302. § 7-202 (declaring that all property received from a decedent is taxable unless exempted); *id.* § 7-203 (listing exemptions).

303. *See Pohlhaus v. Register of Wills*, 248 Md. 625, 238 A.2d 91 (1968); *Bouse v. Hutzler*, 180 Md. 682, 684-85, 26 A.2d 767, 768 (1942).

304. *See* TAX-GEN. § 7-203.

favors closely related family members from all other beneficiaries.<sup>305</sup> Hence, the courts have dubbed this tax the “Collateral Inheritance Tax” because the tax only applies to loosely or non-related individuals who receive property from the decedent.<sup>306</sup>

The “family allowance” provision provides for complete exclusion of beneficiaries with marital or certain blood relationships to the decedent from the inheritance tax, including spouses, lineal descendants and their respective spouses, parents, grandparents, and siblings.<sup>307</sup> While the legislature failed to explicitly state its policy reasons,<sup>308</sup> creating an exemption to benefit close family members implicitly recognizes the public policy of protecting the family; the innate tendency to leave one’s accumulated property for the use and benefit of close loved ones should be respected as a natural right as opposed to a taxable “privilege.”<sup>309</sup> Moreover, considering this exemption to a statute (with a primary purpose to raise revenue<sup>310</sup>) was expected to generate approximately \$25 million in losses per year,<sup>311</sup> it is clear that the legislature found such policy to be of overriding importance.

### 3. Inclusion of Domestic Partners in the Family Exemption: A Changing Definition of Family

Notwithstanding the fact that certain relatives, including spouses, stepparents, and stepchildren, are exempt from a 10% inheritance tax merely by virtue of their familial relationship to the decedent, committed same-sex domestic partners are not included in the family-allowance exemption irrespective of the closeness and longevity of their relationship.<sup>312</sup> The justification for the Maryland inheritance tax is an imposition on the “privilege of becoming a beneficiary

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305. *Id.* § 7-203(b)(2).

306. *See, e.g., Clarke*, 192 Md. at 130, 63 A.2d at 636.

307. TAX-GEN. § 7-203(b)(2).

308. *See* MD. GEN. ASSEMB., DEP’T OF LEGIS. SERVS., FISCAL NOTE OF INHERITANCE TAX – EXEMPTION FOR LINEAL BENEFICIARIES AND SIBLINGS, S.B. 1, Reg. Sess., at 1 (Md. 2000), available at [http://mlis.state.md.us/PDF-documents/2000rs/fnotes/bil\\_0001/sb0001.pdf](http://mlis.state.md.us/PDF-documents/2000rs/fnotes/bil_0001/sb0001.pdf). Rather, the legislature noted the trend in other jurisdictions to either repeal the inheritance tax or exempt close relatives from the tax. *Id.* at 2–3.

309. *See Wilson v. Lewis*, 311 Md. 547, 554, 536 A.2d 658, 662 (1988) (“The purport of the statute is that collateral kindred should pay a certain premium for the privilege of acquiring a decedent’s property which is subject to the laws of Maryland.”).

310. *Id.* (citing *Clarke*, 192 Md. at 138, 63 A.2d at 635)

311. FISCAL NOTE OF INHERITANCE TAX – EXEMPTION FOR LINEAL BENEFICIARIES AND SIBLINGS, *supra* note 308, at 1.

312. TAX-GEN. § 7-203(b).

under a will or of succeeding to an inheritance.”<sup>313</sup> The exclusion of committed same-sex partners, who cannot legally marry, from family exemption, manifests the view that their relationship is more akin to mere “strangers” rather than closely familial, and thus, the surviving partner should incur a premium for the “privilege,” as opposed to the natural right, of succeeding to his or her partner’s property.<sup>314</sup> However, this relational view of committed same-sex partners is plainly out of touch with reality.<sup>315</sup>

Committed same-sex couples undoubtedly consider each other “family” in the truest sense of the word.<sup>316</sup> Beyond the mechanical definition of family as simply the presence of a marital or blood relation, family has been described by courts as “a continuing relationship of love and care, and an assumption of responsibility for some other person.”<sup>317</sup> In this sense, the significant personal and emotional connections that these couples have forged and their shared economic obligations unquestionably establish a “family” relationship between domestic partners. In fact, a familial relationship is a prerequisite to a valid domestic-partner relationship: in order to become registered domestic partners, the partners must “be in a relationship of mutual interdependence in which each individual contributes to the maintenance and support of the other individual.”<sup>318</sup> Therefore, based on the plain language of the “family allowance” exemption,<sup>319</sup> registered domestic partners, as mutually interdependent family members,<sup>320</sup> should absolutely be exempt from inheritance taxes under this provision.

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313. *Bouse v. Hutzler*, 180 Md. 682, 685, 26 A.2d 767, 768 (1942).

314. *See State v. Dalrymple*, 70 Md. 294, 301–02, 17 A. 82, 83 (1889) (stating the general principle that inheritance by strangers and collateral relatives is a “privilege,” the enjoyment of which should be taxed, but not discussing the merits of the inheritance tax within a committed same-sex relationship).

315. *See Gary*, *supra* note 284, at 33.

316. For example, from an intestacy perspective, common sense dictates that individuals prefer to leave property to their family (hence, the reasoning behind intestacy statutes, which presume that a decedent’s intent was to leave property to family members, and will construction principles, which presume that a rational testator would prefer his or her family members over others). *See supra* notes 241, 243 and accompanying text. Empirical data proves that gay and lesbian individuals overwhelmingly prefer to leave property to their partners. *Fellows et al.*, *supra* note 248, at 89. Therefore, it both logically and instinctively follows that gay and lesbian individuals must consider their committed partners ‘family.’

317. *Gary*, *supra* note 284, at 33 (quoting *In re Adult Anonymous II*, 452 N.Y.S.2d 198, 201 (1982)).

318. MD. CODE ANN., HEALTH-GEN. § 6-101(a)(4) (LEXIS through 2010 Reg. Sess.).

319. MD. CODE ANN., TAX-GEN. § 7-203(b)(2) (LEXIS through 2010 Reg. Sess.).

320. HEALTH-GEN. § 6-101(a)(4).

Support for the claim that registered domestic partners should be considered family under the inheritance tax exemption is bolstered by reference to the changed family structure. The family structure in the United States has transformed dramatically from the traditional nuclear family norm.<sup>321</sup> Committed same-sex couples are now “unmistakable parts of the American family scene.”<sup>322</sup> In light of this transformation, laws in many jurisdictions, including Maryland, are beginning to formally acknowledge this nontraditional family structure.<sup>323</sup>

For example, by creating the domestic-partner status, Maryland has implicitly embraced the changing definition of family to include committed same-sex couples.<sup>324</sup> The domestic-partner statute recognizes that same-sex couples, who are unable to marry but nonetheless share a mutually interdependent relationship, should be entitled to certain rights and benefits.<sup>325</sup>

#### 4. A Step in the Right Direction

In July 2009, the legislature took a step in the right direction towards providing equal treatment for domestic partners in estate law by creating an exemption from inheritance taxes for domestic partners in limited circumstances.<sup>326</sup> In the situation where a joint primary residence (1) was held in joint tenancy by the decedent and the domestic partner at the time of death and (2) passes from the decedent to or for the use of the surviving domestic partner, then the value of such property is exempt from inheritance taxes.<sup>327</sup>

The legislative analysis supporting the bill first laid out the progression of the previous amendments to the inheritance tax statutes, including the exemption of direct family members under the family allowance in 2000 and the exemption of stepchildren and

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321. Gary, *supra* note 284, at 4.

322. Spitko, *supra* note 97, at 1095 (quoting Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 224 (1991)).

323. See HEALTH-GEN. §§ 6-101 to -102 (establishing and providing benefits for domestic partners); Gary, *supra* note 284, at 4.

324. See HEALTH-GEN. § 6-101.

325. See *id.*

326. See Act effective July 1, 2009, ch. 602, § 7-203, 2008 Md. Laws 3405, 3406 (codified at MD. CODE ANN., TAX-GEN. § 7-203(1) (LEXIS through 2010 Reg. Sess.)).

327. MD. CODE ANN., TAX-GEN. § 7-203(1)(2) (LEXIS through 2010 Reg. Sess.).

stepparents in 2004.<sup>328</sup> Then, after considering the potential number of same-sex domestic partners (16,213 cohabitating same-sex couples in 2007), the legislature adopted the proposal to create an exemption from inheritance taxes for joint-tenancy residences passing to the decedent's domestic partner.<sup>329</sup>

While certainly a positive step, the legislation falls short of formally recognizing domestic partners as family under the inheritance tax statute.<sup>330</sup> Considering the reality of these relationships and the fact that the domestic-partner statute requires a relationship of "mutual interdependence,"<sup>331</sup> akin to a family relationship, the legislature should proceed to formally recognize the relationship and completely exempt property passing between domestic partners from inheritance taxes by adding domestic partners to the family allowance provision. Beginning with the exclusion of close family members (including spouses),<sup>332</sup> then progressing to the exclusion of stepparents and stepchildren,<sup>333</sup> the exclusion of property transfers between domestic partners from inheritance taxes is the next logical step in this sequence of legislation.

##### 5. Reference to Other Jurisdictions

In making its initial determination to create the family-allowance exemption, the Maryland legislature explicitly relied on trends in other jurisdictions to render support for its decision, specifically noting that New Jersey completely exempted spouses and lineal descendants from the inheritance tax.<sup>334</sup> Recently, New Jersey (one of the few remaining states that collects inheritance taxes) has expanded its family exemption to now include domestic partners, along with spouses and lineal descendants.<sup>335</sup> Furthermore, as an overall trend, states across the nation are finally recognizing caring, personal relationships of same-sex couples and utilizing domestic-partner status to create benefits for these committed couples akin to

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328. MD. GEN. ASSEMB., DEP'T OF LEGIS. SERVS., FISCAL AND POLICY NOTE OF INHERITANCE TAX – EXEMPTION – DOMESTIC PARTNERS, S.B. 785, Reg. Sess., at 2 (Md. 2009), available at [http://mlis.state.md.us/2009rs/fnotes/bil\\_0005/sb0785.pdf](http://mlis.state.md.us/2009rs/fnotes/bil_0005/sb0785.pdf).

329. *Id.* at 4; TAX-GEN. § 7-203(2).

330. TAX-GEN. § 7-203(1) (stating that domestic partners are only exempted in limited circumstances).

331. MD. CODE ANN., HEALTH-GEN. § 6-101(a)(4) (LEXIS through 2010 Reg. Sess.).

332. TAX-GEN. § 7-203(b).

333. *Id.*

334. FISCAL NOTE OF INHERITANCE TAX – EXEMPTION FOR LINEAL BENEFICIARIES AND SIBLINGS, *supra* note 308, at 3.

335. N.J. STAT. ANN. § 54:34-2(a) (West, Westlaw through 2010 legislation) (effective July 10, 2004).

certain spousal benefits.<sup>336</sup> Considering the sound policy that supports this type of legislation, Maryland should follow suit and provide domestic partners with an exemption from inheritance taxes under the family allowance provision.

In conclusion, same-sex domestic partners share significant personal, economic, and emotional connections, closely akin to the family bond shared by traditional families.<sup>337</sup> In light of the undeniably familial and interdependent nature of relationships between domestic partners and after considering trends in neighboring jurisdictions, Maryland should take the next logical step and include domestic partners in the family allowance provision, thereby exempting them from inheritance taxes. This exemption would remove the final obstacle that same-sex couples face in their needlessly uphill estate-planning battle, providing much needed equality to gay and lesbian individuals in this area of law.

*D. Revised Intestacy Statutes Provide Significant Advantages Over Adult Adoption*

Under current law, same-sex couples are forced to choose either to endure the significant risk that their testamentary desires upon death will not be honored and their life-long partner will be left with nothing,<sup>338</sup> or to somewhat guarantee inheritance rights by creating an awkward, perverse, and irreversible parent-child relationship through adult adoption of the partner.<sup>339</sup> However, simple revisions to intestacy statutes and inheritance tax exemptions to include domestic partners would provide guaranteed inheritance rights and supply critical protections to ensure that testamentary desires are respected.<sup>340</sup> In essence, such revisions would provide all of the benefits and none of the costs of adult adoption.

Same-sex couples now turn to adult adoption and a parent-child relationship designation in order to reap inheritance benefits such as

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336. See discussion *supra* Part V.B (discussing the trends in other jurisdictions that have enacted domestic partner statutes).

337. See discussion *supra* Part VI.C.3 (discussing the changing structure of the family).

338. See Dubois, *supra* note 21, at 268 (noting that gay and lesbian individuals must rely on extensive legal planning to guarantee the “family structure, benefits, obligations, and reliance” that traditional heterosexual couples take for granted).

339. Snodgrass, *supra* note 22, at 79 (stating that adult adoption is the only available solution which creates inalienable estate and inheritance rights).

340. Spitko, *supra* note 97, at 1075 (explaining that providing heir status to same-sex partners would promote the “donative freedom” of such individuals whether they die intestate or testate).

receiving an intestate share, limiting will challenges, receiving an exclusion from inheritance taxes, and creating a bona fide family relationship.<sup>341</sup> However, these benefits come only at a high cost: the parent-child relationship is irreversible, the adoptee's right to inherit from his or her natural family is terminated, and it creates a perverse social status because a romantic partner is simultaneously the child.<sup>342</sup>

On the other hand, bestowing heir status on surviving domestic partners suffers from none of the drawbacks of adult adoption. First, the domestic-partner relationship is terminable, and therefore does not affect the couples' right to marry later, if that becomes an option in the future.<sup>343</sup> Second, the domestic partner's inheritance rights from his or her natural family are not terminated because sacrifice of inheritance rights from one's natural family is solely a function of adoption.<sup>344</sup> Third, providing benefits to domestic partners generates formal recognition of a bona fide family relationship.<sup>345</sup> Finally, the domestic partner designation more closely approximates the true nature of the underlying relationship of the same-sex couple by creating a legal relationship akin to spouses, not a perverse parent-child relationship.<sup>346</sup>

Updating the intestacy statute and inheritance tax exemption statute to include domestic partners would entirely remove the complex estate-planning risks that compel certain same-sex couples to resort to the problem-fraught "solution" of adult adoption.<sup>347</sup> By granting heir-at-law status to domestic partners, the revised statutes would create a win-win situation, providing all of the benefits of adult adoption (such as guaranteed inheritance rights), with none of the accompanying sacrifices and without disturbing the rights of traditional heterosexual couples and their families.

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341. Snodgrass, *supra* note 22, at 80–83.

342. *Id.* at 83–84 (explaining the disadvantages of adult adoption).

343. Because adult adoption creates an irreversible parent-child relationship, the couple would be prohibited from later marrying, even if same-sex marriage was permitted, because of the incest prohibition against the marriage of a parent and child. See MD. CODE ANN., FAM. LAW § 2-202 (LEXIS through 2010 Reg. Sess.).

344. MD. CODE ANN., EST. & TRUSTS § 1-207(a) (LEXIS through 2010 Reg. Sess.); Snodgrass, *supra* note 22, at 84 (“[T]he legal relationship with the adoptee’s natural parents terminates upon adoption.”).

345. See *supra* note 132 and accompanying text.

346. See Snodgrass, *supra* note 22, at 84 (discussing the “perversion of social roles” that results from adult adoption).

347. See Spitko, *supra* note 97, at 1075.

## VII. CONCLUSION

Same-sex couples needlessly face a daunting uphill battle in planning for the distribution of their property to their loved ones upon death solely because of the complete omission of surviving same-sex partners from intestacy law.<sup>348</sup> Present intestacy laws deliver a result in stark contrast to a gay or lesbian decedent's true wishes: the surviving same-sex partner is prohibited from inheriting anything from the deceased partner, notwithstanding the length, intimacy, or devotion of the relationship.<sup>349</sup> Moreover, the far-reaching effects of exclusion from intestacy law may even prevent a gay or lesbian testator's carefully crafted estate plan from being implemented because disgruntled relatives can contest and defeat the estate plan, again leaving the committed partner with nothing.<sup>350</sup>

Clearly, current intestacy law is glaringly ineffective to protect the donative intent of gay and lesbian individuals.<sup>351</sup> The harsh results generated by an inheritance system that completely ignores the existence of same-sex couples necessitate the expansion of domestic-partner status into the realm of intestacy law. A revised intestacy statute that grants inheritance rights to a surviving same-sex domestic partner would promote the donative freedom not only of gay and lesbian individuals in same-sex partnerships who die intestate, but also of those who die fully testate.<sup>352</sup>

In sum, this comment urges the Maryland legislature to revise archaic intestacy law by providing heir-at-law status to domestic partners to reflect and accommodate the divergent modern family structures and to formally recognize the bona fide family relationship that committed same-sex couples share.<sup>353</sup> Such a revision virtually eliminates the complex, overwhelming estate-planning obstacles that presently inhibit a gay or lesbian decedent's fundamental right to donative freedom. Furthermore, revisions to include domestic partners as family within intestacy law are in accordance with "Maryland's developing public policy concerning intimate same-sex relationships" shifting away from condemnation and towards "recognition and . . . support" of such unions.<sup>354</sup> Finally, extending

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348. See *supra* Part VI.B.2.

349. See *supra* Part VI.B.2.

350. See *supra* Part VI.B.3.

351. See *supra* Part VI.B.2.

352. Spitko, *supra* note 97, at 1075.

353. *Supra* Part VI.B.

354. Marriage – Whether Out-of-State Same-Sex Marriage That is Valid in the State of Celebration May Be Recognized in Maryland, *supra* note 44, at 43–44.



intestacy rights to same-sex domestic partners allows for equality and fairness in this currently oppressive area of the law without infringing upon the state's current constitutional prohibition against same-sex marriage and without affecting the rights of traditional married couples.<sup>355</sup>

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355. See *supra* note 297 and accompanying text.

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