

ADULT ADOPTION: INTESTATE SUCCESSION AND CLASS GIFTS UNDER THE UNIFORM PROBATE CODE

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INTRODUCTION

Since the nineteenth century, adoption has been used in the United States to create legally recognized parent–child relationships between consenting adults.¹ While adult adoption has grown in prevalence in the United States,² some Americans are either unaware of its availability or

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¹ See, e.g., *In re Wright's Estate*, 155 Pa. 64, 65 (1893) (referencing a provision of the Act of May 9, 1889, which “authorized the adoption of adults, as children and heirs, with the consent and approval of the persons so adopted and of the proper court”).

² See 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, 95 (2009) (recognizing the “growing trend” of adult adoption in the United States).

underestimate its use in our legal system. In reality, there are several reasons why an adult would choose to adopt another adult, and the practice is not at all uncommon.³

This Comment explores adult adoption and the corresponding rights afforded to adult adoptees under the intestate succession and class gift provisions of the Uniform Probate Code (“UPC”).⁴ The Comment assesses the advantages and disadvantages of adopting the UPC’s suggested provisions and proposes a modification to the UPC that treats adult adoptees consistently in both the class gift and intestacy contexts: as natural children for transfers directly from adoptive parents but not for transfers from third parties. As discussed below, such a statutory framework is both consistent with the principles of estate law and is sound public policy.

The motivations behind an adult adoption are often numerous and include the recognition of familial ties, enjoyment of employment benefits, and establishment of inheritance rights.⁵ For these reasons, adult adoption has been used by same-sex couples to obtain some of the rights denied to them by the unavailability of marriage.⁶ This Comment seeks a happy medium that ensures the protection of the important benefits that lie outside of the inheritance realm, while avoiding the potential manipulation of estate law. It concludes that adult adoption petitions should be broadly granted, with legislatures resolving intestacy and class gift issues through clear and comprehensive inheritance statutes.

Part II of this Comment explores the history and rationale behind adult adoption and assesses its statutory availability across states. Part III explains the treatment of adult adoptees under UPC sections 2-155 and 2-705 and determines that while the UPC provision on class gifts is consistent with decedent intent and social policy, the intestacy provision falls short.

Part IV proposes a statutory scheme that adopts the UPC class gift provision, but modifies the UPC intestacy section to limit inheritance by an adult adoptee through an adoptive parent to those situations where a parent-child relationship exists. Part IV also suggests a reciprocal beneficiary program as a way for states to allow parties to preserve inheritance rights without resorting to adult adoption.

³ Unfortunately no data are available regarding the number of adult adoption petitions in each state. However, adult adoption has been acknowledged as enjoying “widespread recognition within our legal system,” and “not an uncommon occurrence.” Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*, 37 VAND. L. REV. 711, 749 (1984). One now-dated estimate by “knowledgeable practitioners” put the number of successful adult adoption petitions in California at around two to three hundred per year. See Peter N. Fowler, Comment, *Adult Adoption: A “New” Legal Tool for Lesbians and Gay Men*, 14 GOLDEN GATE U. L. REV. 667, 702 (1984).

⁴ UNIF. PROBATE CODE §§ 2-115, 2-705 (amended 2008), 8 U.L.A. 50-51, 141-42 (Supp. 2011).

⁵ See, e.g., Fowler, *supra* note 3, at 679-88.

⁶ See, e.g., *id.*

I. BACKGROUND

A. *History of Adoption*

Historically, adoption's primary uses were to perpetuate familial lineage and designate heirs to fulfill religious obligations.⁷ The intended beneficiary of the adoption was the adopter rather than the adoptee.⁸ When adoption first emerged in the United States, it was an informal process used to relieve the government of a ward and provide an economic benefit to the adoptive parents.⁹ The state of the adoptive home was not a consideration, and the children were often used as cheap labor.¹⁰ It was not until the nineteenth century that the primary concern in minor adoptions shifted from the adopter's potential benefits to the best interests of the child.¹¹

Adoption did not exist under English common law and its formal acceptance and regulation in the United States has been exclusively by statute.¹² In the mid-nineteenth century, general adoption legislation was introduced as part of the growing call for social welfare reform.¹³ While some of the enacted statutes provided for the adoption of "children,"¹⁴ several state legislatures also enacted separate provisions for the adoption of adults.¹⁵ At the same time, the broad and ambiguous language of the general adoption provisions in other states was interpreted to extend to adoptees of any age.¹⁶

⁷ Rein, *supra* note 3, at 714.

⁸ See Walter Wadlington, *Adoption of Adults: A Family Law Anomaly*, 54 CORNELL L. REV. 566, 567 (1969).

⁹ See Rein, *supra* note 3, at 714–15.

¹⁰ See Ruth-Arlene W. Howe, *Adoption Practice, Issues, and Laws 1958–1983*, 17 FAM. L.Q. 173, 176 (1983).

¹¹ See Rein, *supra* note 3, at 716–17.

¹² Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 747 (1956); Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 443 (1971).

¹³ Rein, *supra* note 3, at 716–17. The increase in immigration and rise in poverty associated with the industrial revolution caused a corresponding rise in the number of destitute children, which highlighted the inadequacies of the limited and informal adoption process in existence. Housing the children that were displaced became a focus of Christian philanthropy and led to our current adoption system. *Id.*

¹⁴ Wadlington, *supra* note 8, at 569. Massachusetts is believed to be the first state to ratify an adoption statute, in 1851. *Id.* The Act provided for the adoption of "children," which was interpreted to limit its application to minors only. *Id.*

¹⁵ *Id.* Within twenty years of enacting its general adoption provision, Massachusetts enacted a specific provision for adult adoption that stated: "A person of adult age may be adopted in like manner upon his own consent, without other consent or notice." 1871 Mass. Acts 654. Vermont also endorsed adult adoption as early as 1853. See 1853 Vt. Acts & Resolves 42–43.

¹⁶ See Note, *Adult Adoption*, 1972 WASH. U. L.Q. 253, 255 (1972).

B. Why Adopt an Adult?

While adult adoption gained recognition at around the same time as minor adoption, the rationales for its use were (and remain) largely different. Similar to minor adoption, adult adoption is implemented to formalize a family unit.¹⁷ This is often the motivation behind the adoption of foster and stepchildren who were raised by the adoptive parent and developed a parent-child bond but had not yet legally solidified that relationship.¹⁸ The parties may fail to undertake an adoption when the adoptee is a minor because of legal obstacles,¹⁹ or an earlier adoption may be invalidated because of a procedural defect.²⁰ After reaching adulthood, the child may also want to carry on the family name or give recognition to her de facto parent.²¹

Additionally, adult adoption is sometimes used in an attempt to circumvent various laws and regulations or to ensure the extension of benefits to the adoptee.²² One illustrative example is *Coker v. Celebrezze*, in which a grandparent adopted his twenty-three-year-old disabled grandchild in order to secure insurance and disability benefits under the Social Security Act.²³ Similarly, in *333 E. 53rd Street Associates v. Mann*, two elderly roommates used adult adoption to circumvent state eviction laws.²⁴

¹⁷ See, e.g., Fowler, *supra* note 3, at 686–88.

¹⁸ See, e.g., *St. Louis Union Trust Co. v. Hill*, 76 S.W.2d 685, 686, 689 (Mo. 1934) (upholding the adoption of Hill's two stepchildren, ages twenty-two and twenty-eight).

¹⁹ This issue often arises when the biological parent refuses to consent to the adoption. See, e.g., *In re Estate of Joseph*, 949 P.2d 472, 480–81 (Cal. 1998) (explaining that the natural parents' refusal to consent was a legal barrier to adoption by the foster parent while the child was a minor, but the impediment was lifted when the child reached the age of maturity).

²⁰ Several states have annulment statutes that provides for the revocation of a final adoption decree within a specified time period if the decree is procedurally defective. See, e.g., ARIZ. REV. STAT. ANN. § 8-123 (2011) (allowing one year for procedural attacks on adoption decrees); COLO. REV. STAT. § 19-5-214 (2010) (allowing ninety days for procedural attacks on final decrees, extended to one year for stepparent adoptions); D.C. CODE § 16-310 (2011) (allowing one year for procedural attacks on adoption decrees); see also Note, *When Love Is Not Enough: Toward a Unified Wrongful Adoption Tort*, 105 HARV. L. REV. 1761, 1766–67 (1992).

²¹ See *In re Adoption of Miller*, 227 So. 2d 73, 74 (Fla. Dist. Ct. App. 1969) (stating that the adoptee wanted to be legally recognized as the adopters' son because he felt the adopters were his only real family, he had used their surname since high school, and they felt a mutual affection as members of a family unit).

²² See, e.g., Wadlington, *supra* note 8, at 577.

²³ 241 F. Supp. 783, 783–85 (E.D. Tenn. 1965). The Social Security Act required that the beneficiary be the wage earner's child, adopted child, or stepchild. *Id.* at 784. Though the adoption itself was approved, the claim for benefits was denied by the government on the ground that Tennessee law did not allow for the adoption of an individual over the age of twenty-one. *Id.* The District Court, however, disagreed with the government and reinstated the benefits on the grounds of legislative intent. *Id.* at 786–87.

²⁴ 503 N.Y.S.2d 752, 753 (N.Y. App. Div. 1986). Jerri Blanchard, the adopter, was a rent-controlled tenant in an apartment building that was subsequently converted to cooperative ownership.

Increasingly, however, adult adoption is prompted by inheritance objectives.²⁵ On questions of inheritance, the law generally treats adopted children in the same manner as natural children.²⁶ A growing number of people take advantage of this principle of estate law through adult adoption, which brings the adoptee into the purview of intestate succession and may even qualify him as a class gift beneficiary.²⁷

In all fifty states, if an individual dies intestate (i.e., without a legal will) and is survived only by an adopted child, the adopted child becomes the sole inheritor of the individual's estate.²⁸ This severs the inheritance rights of all other biological relatives, such as the decedent's siblings and parents.²⁹ Additionally, by becoming the adoptive parent's heir, the adoptee may be entitled to inherit through the adopter via intestate succession.³⁰ For example, if the adopter dies before a relative from whom he would inherit, and the relative then dies intestate, the adoptee could inherit his adoptive parent's share by representation.

This issue was addressed in *Harper v. Martin*.³¹ In *Harper*, a terminally ill petitioner adopted a forty-seven-year-old male for the sole purpose of qualifying him as an heir to her incompetent relative who lacked a will.³² The trial court held that the adoptee did not constitute an heir on the ground that the relative was too incompetent to make a will and therefore did not have the opportunity to disinherit him.³³ The appellate court reversed, however, finding that the relative did not have any plan for

Id. Helen Mann, the adoptee, was Blanchard's roommate who lived with Blanchard since before the conversion. *Id.* In order to secure Mann's tenancy after Blanchard died, Blanchard legally adopted Mann so that she fell within the New York City Rent and Eviction Regulations. *Id.* at 753–54 (“No occupant of housing accommodations shall be evicted under this section where the occupant is either the surviving spouse of the deceased tenant or some other member of the deceased tenant's family who has been living with the tenant.” (quoting N.Y. COMP. CODES R. & REGS. tit. 9, § 2104.6(d))).

²⁵ See, e.g., *In re Adoption of Swanson*, 623 A.2d 1095, 1098 (Del. 1993) (“Cases upholding adoptions for the purpose of improving the adoptee's inheritance rights continue to grow.”).

²⁶ See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5 cmt. d (1999); 2 AM. JUR. 2D *Adoption* § 175 (2011); Brynne E. McCabe, Note, *Adult Adoption: The Varying Motives, Potential Consequences, and Ethical Considerations*, 22 QUINNIPIAC PROB. L.J. 300, 301 (2009).

²⁷ See Rein, *supra* note 3, 749–51.

²⁸ See generally Turnipseed, *supra* note 2, at 99–106 (providing background information on intestate succession in the United States).

²⁹ See Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 253 (1981).

³⁰ See, e.g., JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 101 (8th ed. 2009). To inherit “through” someone means to acquire the right to inherit that the person would have had if he were living or able to inherit. This is different than inheriting “from” someone, which entitles an individual to a portion of the person's estate, but does not allow the individual to continue to inherit from other estates on that person's behalf.

³¹ 552 S.W.2d 690 (Ky. Ct. App. 1977).

³² *Id.* at 692.

³³ *Id.*

disposition that would be “thwarted” by recognizing the adoptee’s inheritance rights.³⁴

In cases where an adoptive parent dies with a will, the recognition of the adoptee as the adoptive parent’s descendant ensures that natural parents and collateral relatives³⁵ are barred from challenging the will’s legality.³⁶ The only individuals with standing to contest a will are those who stand to inherit if the will is invalidated.³⁷ By removing their ability to take by intestacy, the adoption revokes the standing of other relatives to challenge the will’s validity.³⁸ A notorious example is *Greene v. Fitzpatrick*, in which a wealthy, unmarried attorney adopted his married mistress in order to secure her inheritance rights and prevent any challenge by his biological relatives.³⁹ Justice Holmes acknowledged this effect of adoption, noting that adoption for the purpose of “tak[ing] away any inducement that some of those who otherwise would have been his heirs might have to oppose his will” was “perfectly proper.”⁴⁰

More controversial than intestate succession is the use of adult adoption to include the adoptee within class gifts in will and trust dispositions.⁴¹ In designating beneficiaries, a testator or settlor of a trust may provide for distribution to such classes as “children,” “issue,” or “descendants.”⁴² Generally, the language used in defining the class⁴³ and

³⁴ *Id.*

³⁵ In the context of estate law, collaterals are relatives outside of the direct line of ascent or descent. Collaterals include such relatives as siblings, cousins, aunts, and uncles. *See, e.g.,* ROGER W. ANDERSEN & IRA MARK BLOOM, *FUNDAMENTALS OF TRUSTS AND ESTATES* 43 (3d ed. 2007).

³⁶ *See* DUKEMINIER ET AL., *supra* note 30, at 102–03.

³⁷ *See, e.g., id.*

³⁸ *See id.* This is not to say that blood relatives are denied all methods of attack. They may still be able to challenge the actual adoption decree on grounds of mental incapacity or undue influence. *See, e.g.,* *Wilson v. Caulfield*, 67 S.W.2d 761, 764 (Mo. Ct. App. 1934) (allowing a challenge to adoption on fraud and undue influence grounds). If the adoption is set aside, the relatives regain standing to challenge the will because their intestacy rights are reinstated. *See, e.g.,* DUKEMINIER ET AL., *supra* note 30, at 102–03. However, the adoption still offers an additional line of defense against the invalidation of the will and provides a strong indication of testamentary intent. *See id.* at 103.

³⁹ 295 S.W. 896, 897 (Ky. 1927). It is important to note, however, that the court did allow the relatives to challenge the actual adoption, as opposed to the will, on fraud and undue influence grounds. *See id.* at 899; *see also* *Wilson*, 67 S.W.2d at 764 (providing an example of an adoption being challenged on fraud and undue influence grounds).

⁴⁰ *Collamore v. Learned*, 50 N.E. 518, 519 (Mass. 1898).

⁴¹ *See* Rein, *supra* note 3, at 755 (raising the argument that in class gift situations, as opposed to intestate succession, it is more likely that the adoption will have occurred long after the donor’s death, making manipulation more plausible).

⁴² *See, e.g.,* DUKEMINIER ET AL., *supra* note 30, at 103.

⁴³ *See* Note, *supra* note 16, at 265–66 (noting that some courts have held such designations as “issue” and “heirs of the body” to require blood relationships and “children” to exclude adults, but have interpreted “heirs” more broadly).

the statutes in effect at the time of execution⁴⁴ are considered as factors when determining whether the adult adoptee falls within the beneficiary class.⁴⁵ Several courts have interpreted adult adoptees to fall within these classes in the same manner as minor adoptees.⁴⁶ The designations of “heirs” and “heirs at law” in particular have been subject to a technical interpretation that does away with the requirement of a blood relationship and includes both minor and adult adoptees.⁴⁷

In *In re Estate of Fortney*,⁴⁸ the court took such a broad approach in interpreting a class gift. John Fortney’s parents, the testators, formulated their will so that all of their property would go to John and his sister, and then to their children.⁴⁹ If John and his sister died without heirs, the remainder would go to the testators’ siblings’ children.⁵⁰ After John’s sister passed away without any children, John, who was ninety years old and childless, adopted his wife’s sixty-five-year-old nephew.⁵¹ Over the objection of John’s cousins, the court held that the property transferred to the adult adoptee at John’s death.⁵² Looking to the Kentucky probate code, the court held that “an adopted adult falls within the definition of ‘child’ as contemplated by that statute.”⁵³ Though the original will was executed sixteen years before adult adoption even became legal in Kansas, the court reasoned that the testator must be presumed “to know the legislature might change *both* the age of majority and the limitation that only minors could be adopted.”⁵⁴

If an adult adoptee qualifies for inclusion in such a class, the associated rights go beyond even those inheritance rights provided by marriage.⁵⁵ Such a result has not gone unnoticed by savvy estate planners. In *Bedinger v. Graybill’s Executor & Trustee*, the Kentucky Court of Appeals (then the

⁴⁴ See *Abramovic v. Brunken*, 94 Cal. Rptr. 303, 305 (Cal. Ct. App. 1971) (denying inclusion of adult adoptee as “issue” on grounds that at the time of execution, issue was defined as a blood relation and adult adoption had not been legalized); *First Nat’l Bank of Kan. City v. Sullivan*, 394 S.W.2d 273, 281 (Mo. 1965) (“[The court’s interpretation] is in accordance with the general rule that whether an adopted child is embraced within the meaning of a described class of beneficiaries in a will is governed by the law in force at the time the will or other instrument was executed.”).

⁴⁵ Note, *supra* note 16, at 264.

⁴⁶ See *id.* at 264–65.

⁴⁷ See *id.* at 263–65; see also *Brock v. Dorman*, 98 S.W.2d 672, 675 (Mo. 1936) (allowing inclusion of adult adoptee in a class gift to “heirs,” and noting that the term “heir” is “broader and more inclusive” than “children” or “heirs of the body”).

⁴⁸ 611 P.2d 599 (Kan. Ct. App. 1980).

⁴⁹ *Id.* at 601.

⁵⁰ *Id.*

⁵¹ *Id.* at 600–01.

⁵² *Id.* at 605.

⁵³ *Id.* at 604.

⁵⁴ *Id.* at 603.

⁵⁵ See *McCabe*, *supra* note 26, at 301.

state's highest court) upheld the adoption of a forty-five-year-old wife by her fifty-eight-year-old husband.⁵⁶ The primary purpose of the adoption was to secure the wife's entitlement to a trust established by her mother-in-law, which went to the husband during his life with the remainder to his heirs at law.⁵⁷ If the husband died without any heirs, the trust would be divided between two charities.⁵⁸ The adoption made his wife his heir at law and thus the beneficiary of the trust upon his death.⁵⁹ The court upheld the adoption and thus the inheritance since adult adoption was clearly lawful and adopted children were included within the designation of an heir under Kentucky law.⁶⁰

Finally, another, though admittedly weaker, financial reason for adult adoption is the potential for reduced inheritance taxes. In some states, inheritance tax rates are lower for property transfers that flow to a lineal heir as opposed to someone unrelated or less directly related to the decedent in the disposition of an estate.⁶¹ In *In re Adoption of Swanson*, the Supreme Court of Delaware acknowledged this benefit, stating that one reason for the adult adoption at issue was to "obtain the reduced inheritance tax rate which natural and adopted children enjoy under Delaware law."⁶²

C. Adult Adoption by Same-Sex Couples

Because of the numerous advantages of adult adoption, it is used by same-sex couples seeking benefits denied to them because they are unable to legally marry. Adult adoption by same-sex couples may be implemented for a combination of reasons, such as recognizing family units, establishing intestate succession, or ensuring the extension of benefits.⁶³ While this seems like a tempting tool for same-sex couples and may in fact be the best available option for an individual couple, it also carries several disadvantages.

1. *The benefits of marriage: A comparison to adult adoption.*—Marriage includes a multitude of benefits that are not

⁵⁶ 302 S.W.2d 594, 596, 600 (Ky. Ct. App. 1957).

⁵⁷ *Id.* at 596.

⁵⁸ *Id.*

⁵⁹ *Id.* at 600.

⁶⁰ *Id.* at 598–99.

⁶¹ See Turnipseed, *supra* note 2, at 105.

⁶² *In re Adoption of Swanson*, 623 A.2d 1095, 1096 (Del. 1993) (involving the adoption of a fifty-one-year-old man by his sixty-six-year-old companion). This benefit is no longer as significant a motivation for adult adoption, however, since the large majority of states have done away with their inheritance tax. See Turnipseed, *supra* note 2, at 105 n.59 (citing *Taxes by State*, RETIREMENT LIVING INFO. CENTER (Jan. 2011), <http://www.retirementliving.com/RLtaxes.html>). Even Delaware, noted above, has since replaced its inheritance tax with an estate tax that does not examine the relationship to the receiving parties of the property. See *id.* (citing 71 Del. Laws 902 (1999)).

⁶³ See, e.g., Fowler, *supra* note 3, at 679–88.

otherwise available to unmarried couples.⁶⁴ By denying gay and lesbian couples the right to marry, federal and state legislatures block the primary route to the couples' recognition of those benefits.⁶⁵ Though the definition of family has broadened and become more flexible in today's society, courts, legislatures, and government decisionmakers have continued to show reluctance toward recognizing same-sex marriage.⁶⁶ In light of this hesitation, adult adoption has become an imperfect alternative for many same-sex couples.

Possibly the most significant benefit that marriage provides is the legal and formal recognition of a family unit. As an expression of commitment, marriage is said to promote the societal goal of family stability.⁶⁷ In this respect, adult adoption does a fair job of simulating the marital relationship by formally and publically acknowledging a direct family tie between adopter and adoptee.

Additionally, many beneficiary privileges are established within the framework of familial status based on marriage or biological ties. Access to insurance policies, employee benefits, and retirement funds may be equally important to the same-sex couples that wish to marry as it is to the married couples to whom the benefits apply.⁶⁸ Worker's compensation schemes often function the same way, with benefits only provided to qualified "dependents" of the employee.⁶⁹ In this context, adult adoption creates the family relationship that is generally needed to become a beneficiary, thus conferring the same rights as would a marriage.⁷⁰

Finally, same-sex couples use adult adoption largely to secure the intestate succession created by marriage.⁷¹ Under intestacy laws, the estate of a decedent, or at least a portion of that estate, first passes to the surviving

⁶⁴ See Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 359, 359 (1995) (referencing the "panoply of entitlements and privileges that come as part of the institution of marriage").

⁶⁵ It is true that all unmarried couples are denied the benefits of the institution of marriage, but the impact on same-sex couples is particularly severe because they are not afforded the option to enter into a marital relationship. See *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1604 (1989) [hereinafter *Sexual Orientation and the Law*].

⁶⁶ See *Moore v. City of E. Cleveland*, 431 U.S. 494, 504–06 (1977) (broadening the legal definition of family beyond the nuclear family to include one's extended family); see also *Sexual Orientation and the Law*, *supra* note 65, at 1604 (noting the changing modern family, often headed by a single parent or by two working parents).

⁶⁷ See *Sexual Orientation and the Law*, *supra* note 65, at 1607.

⁶⁸ See Turnipseed, *supra* note 2, at 105–06.

⁶⁹ See *Sexual Orientation and the Law*, *supra* note 65, at 1618–19.

⁷⁰ Although in the insurance context a policyholder may designate whomever he wishes as a beneficiary, the insurance company may require factual evidence of a close relationship between the insured and the proposed beneficiary. See Fowler, *supra* note 3, at 682–83. Through adult adoption, the couple can avoid or minimize the ability of other potential heirs to attack the designation of a beneficiary on undue influence grounds. See *id.*

⁷¹ See *id.* at 679–80.

spouse.⁷² For example, under UPC section 2-102, the entire intestate estate passes to the surviving spouse if there is no surviving parent or descendant, or if any descendants are also descendants of the surviving spouse.⁷³ In any other context, a minimum of \$150,000 still transfers first to the surviving spouse.⁷⁴ By creating a legal relationship through adult adoption, same-sex couples may be able to ensure similar intestacy rights.⁷⁵

2. *The disadvantages of adult adoption for same-sex couples.*—Despite the benefits of adult adoption, same-sex couples have been wary of using it as a legal tool.⁷⁶ While it confers rights similar to those that marriage creates, it also entails many disadvantages that do not arise in the marital context. Probably the most widespread criticism of adult adoption for same-sex couples is its irrevocability.⁷⁷ If the intimate relationship between the couple ends, there is no mechanism comparable to divorce to sever the legal bond.⁷⁸ Because the legal relationship remains, even an attempt to disinherit the adoptee may prove futile since the adoptee will have standing to contest the will.⁷⁹ Additionally, the adoptee may continue to qualify as a class member in gifts by third parties to the heirs of the adoptive parent.⁸⁰

The strong push to create a permanent family unit through adoption also has the added repercussion of affecting the partners' inheritance rights beyond their immediate relationship. In most states, the adoptee loses his right to inherit from his biological parents when the new parent-child relationship is created via adoption.⁸¹ If the intimate relationship ends, the adoptee cannot restore his right to inherit from his natural parents.⁸²

⁷² See DUKEMINIER ET AL., *supra* note 30, at 75–76.

⁷³ UNIF. PROBATE CODE § 2-102 (amended 2008), 8 U.L.A. 36–37 (Supp. 2011).

⁷⁴ *Id.*

⁷⁵ As the main thrust of this Comment, the intestacy succession laws surrounding adult adoption and its implications for same-sex couples in particular will be discussed in more detail *infra* Part III.

⁷⁶ See 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).

⁷⁷ See *id.* at 83 (identifying its irrevocability as adult adoption's "most negative characteristic").

⁷⁸ See, e.g., DUKEMINIER ET AL., *supra* note 30, at 107.

⁷⁹ See, e.g., Snodgrass, *supra* note 76, at 83–84; see also *supra* notes 35–40 and accompanying text (discussing the effect of adult adoption on standing to contest a will).

⁸⁰ This issue was highlighted by the famous case of billionaire tobacco heiress Doris Duke, who adopted thirty-five-year-old Chandi Heffner. See DUKEMINIER ET AL., *supra* note 30, at 107–08. Doris and Chandi later had a falling out, and Doris wished to exclude Chandi from taking as her heir. *Id.* at 107. Specifically, Doris's father had established two trusts that named Doris's children as remainders. *Id.* Though Doris was explicit in her will that she did not intend for Chandi to be treated as her child, Chandi sued and received a \$60 million settlement from the trusts and \$5 million from Doris's estate. *Id.* at 107–08.

⁸¹ See Fowler, *supra* note 3, at 681. In response to this, same-sex couples should consider which partner stands to inherit the most and which partner is likely to outlive the other. Chase, *supra* note 64, at 387–88. Additionally, couples should consider the fact that an adoptee can still inherit from his

Socially, adult adoption may subject the parties to the scorn of friends and family. Unlike marriage, outsiders may view the adoptive relationship as undermining social roles and perverting the parent–child relationship.⁸³ This can take a psychological toll on the partners both individually and as a couple.⁸⁴ Additionally, the imposition of a parent–child relationship may have a psychological impact on the parties by destabilizing the idea that the relationship is one based on equality, since it formally changes the positions of the parties in relation to each other.⁸⁵

Finally, sexually intimate partners who establish a parent–child relationship through adult adoption run the risk of being prosecuted for incest. Though it is uncertain how often this happens in practice, the incest statutes of many states are broad enough to include sexual relations between a parent and an adult adopted child.⁸⁶ While incest statutes are narrowly construed such that they will not act as a legal bar to the actual adoption of one’s lover, the subsequent relationship that is established may open up the couple to criminal prosecution.⁸⁷ Such criminalization has been criticized on constitutional grounds post-*Lawrence v. Texas*,⁸⁸ but for now, the risk remains a consideration of same-sex couples looking to legally recognize their relationship.

Because of these drawbacks, couples have been cautious in their use of adult adoption as a stand-in for marriage.⁸⁹ However, with the unavailability of same-sex marriage in almost all jurisdictions,⁹⁰ adult adoption is still a valid option to secure certain benefits that are otherwise inaccessible. Given its continued use, it is helpful to next examine the law surrounding the availability of adult adoption.

biological parents by will. Snodgrass, *supra* note 76, at 84. If one partner’s relatives are more supportive of the relationship, it may be beneficial for that partner to sever the legally recognized familial ties and instead establish his inheritance rights by will.

⁸² Snodgrass, *supra* note 76, at 84.

⁸³ *See id.*

⁸⁴ *See id.*

⁸⁵ *See* Fowler, *supra* note 3, at 707.

⁸⁶ Turnipseed, *supra* note 2, at 98. Currently, states are split as to whether the adoption of a lover falls within the reach of incest statutes. *See id.* at 121–23 (noting that at least twenty-five states have laws, either statutory or common law, that place the adoptive relationship between an adopted parent and adult child within the reach of incest).

⁸⁷ Snodgrass, *supra* note 76, at 85.

⁸⁸ 539 U.S. 558 (2003); *see* Turnipseed, *supra* note 2, at 132 (concluding that *Lawrence*’s protection of personal sexual privacy should be extended to protect against criminalization of same-sex couples who choose to adopt).

⁸⁹ *See* Snodgrass, *supra* note 76, at 75.

⁹⁰ *See Same-Sex Marriage, Civil Unions and Domestic Partnerships*, NAT’L CONF. ST. LEGISLATURES (July 14, 2011), <http://www.ncsl.org/default.aspx?tabid=16430> (citing only seven states and the District of Columbia as issuing marriage licenses to same-sex couples).

D. The Law Surrounding Adult Adoption

As noted previously, adoption in the United States exists purely as a creature of statute.⁹¹ Most states allow one adult to adopt another, subject to certain statutory requirements and limitations.⁹² In courts that grant adult adoptions, most take the position that a court has a duty to recognize adult adoptions if the statute allows it. Other courts, however, inject their own interpretations into the statutes, reading in requirements and limitations that they argue are necessary to remain consistent with public policy.⁹³ This section provides an overview of the relevant state statutory requirements. It also addresses the actual adoption process and how adult adoption may differ from minor adoption.

1. Statutory Restrictions.—Currently, several states have statutorily defined restrictions or prohibitions on the adoption of adults.⁹⁴ In many, the restriction is an age requirement.⁹⁵ In New Jersey, for example, adult adoption is allowed with a minimum ten-year age gap,⁹⁶ and in Massachusetts, Nevada, and Connecticut, state statutes allow for adult adoption as long as the adopted adult is younger than the adopter.⁹⁷

In addition, several statutes make some form of qualification based on the existing relationship between the parties, most commonly prohibiting adult adoption between spouses or siblings.⁹⁸ The Uniform Adoption Act (UAA) states that “[a]n adult may adopt another adult . . . but an adult may not adopt his or her spouse.”⁹⁹ Other states require the existence of a certain type of relationship before the parties can enter into an adult adoption.¹⁰⁰ In Arizona, an adult adoptee must be a “stepchild, niece, nephew, cousin or

⁹¹ See *supra* Part I.A.

⁹² See Turnipseed, *supra* note 2, at 107–08.

⁹³ See McCabe, *supra* note 26, at 305–06.

⁹⁴ See, e.g., K. M. Potraker, Annotation, *Adoption of Adult*, 21 A.L.R. 3d 1012 (1968).

⁹⁵ See, e.g., *id.*

⁹⁶ N.J. STAT. ANN. § 2A:22-2 (West 2011). This requirement may be waived, however, if the court determines that the adoption would be in the best interests of the adoptee. *Id.* Similarly, Puerto Rico allows for the adoption of an adult as long as the adoptee is fourteen years younger than the adopter. P.R. LAWS ANN. tit. 31, § 531(4) (2009).

⁹⁷ CONN. GEN. STAT. § 45a-734 (2011); MASS. ANN. LAWS ch. 210, § 1 (LexisNexis 2011); NEV. REV. STAT. § 127.190 (2007).

⁹⁸ See MASS. ANN. LAWS ch. 210, § 1 (allowing the adoption of a younger adult “unless such other person is his or her wife or husband, or brother, sister, uncle or aunt, of the whole or half blood”); CONN. GEN. STAT. § 45a-734 (using similar language to the Massachusetts statute).

⁹⁹ UNIF. ADOPTION ACT § 5-101, 9 U.L.A. 113 (1994). While the UAA has only been adopted in its entirety in Vermont, other states have adopted portions of the Act to supplement their existing adoption statutes. See Carrie L. Wambaugh, Comment, *Biology Is Important, but Does Not Necessarily Always Constitute a “Family”*: A Brief Survey of the Uniform Adoption Act, 32 AKRON L. REV. 791, 792 & n.8 (1999).

¹⁰⁰ See ARIZ. REV. STAT. ANN. § 14-8101 (2010); OHIO REV. CODE ANN. § 3107.02(B)(3) (West 2011).

grandchild of the adopting person.”¹⁰¹ Similarly, Ohio allows for the adoption of an adult primarily if the adoptee is disabled or mentally retarded, or the adopter acted as stepparent or foster-caregiver to the adoptee while she was a minor.¹⁰²

2. *Judicial Considerations and the Process of Adopting an Adult.*—Once the parties have ensured compliance with any relevant statutory requirements, the process of adopting an adult is usually relatively simple. In fact, adopting an adult is often easier than adopting a minor, since many of the concerns in a minor adoption are no longer relevant.¹⁰³ Some courts treat adult adoption as similar to a contractual agreement and routinely grant petitions presented by two competent adults.¹⁰⁴ This is reflected in the UAA, which requires only the consent of the adoptee and adoptive parent for an adult adoption.¹⁰⁵ Generally, giving notice to the biological parents and other blood relatives is not even required.¹⁰⁶ This is one notable way in which the adult adoption process is more streamlined than that of minor adoption, which generally requires some form of consent by the biological parents.¹⁰⁷

Additionally, in minor adoptions the court traditionally looks to the best interests of the adoptee.¹⁰⁸ When the proposed adoption is between two consenting adults, however, some courts refuse to substitute their own judgment of the parties’ “best interests” for that of the consenting adults.¹⁰⁹

Other courts choose to go beyond the plain language of the statute. Some consider the underlying motivation of the parties, looking to whether the purpose of the adoption is insincere, criminal, or fraudulent.¹¹⁰ Courts often recognize that an adult adoption for inheritance purposes is not itself fraudulent.¹¹¹ Other courts look to the public policy implications of granting

¹⁰¹ ARIZ. REV. STAT. ANN. § 14-8101. The provision also allows for adoption by a foster parent as long as the adoptee was placed in the adopter’s custody as a juvenile and the parties have maintained a familial relationship for at least five years. *Id.*

¹⁰² OHIO REV. CODE ANN. § 3107.02(B).

¹⁰³ See McCabe, *supra* note 26, at 304.

¹⁰⁴ See Fowler, *supra* note 3, at 692. In such cases, the only finding by the court is whether there is voluntary and mutual consent. *See id.*

¹⁰⁵ UNIF. ADOPTION ACT § 5-103, 9 U.L.A. 114 (1994). The provision requires the parties’ consent to be in writing, and it must acknowledge their understanding of the consequences of the adoption, specifically as it relates to “inheritance, property, or support.” *Id.*

¹⁰⁶ See Turnipseed, *supra* note 2, at 111.

¹⁰⁷ See McCabe, *supra* note 26, at 304; *see also* § 2-401, 9 U.L.A. 49–50 (requiring the consent of the child’s biological mother and the presumed father, or the minor’s guardian or current adoptive parent).

¹⁰⁸ McCabe, *supra* note 26, at 304.

¹⁰⁹ Fowler, *supra* note 3, at 694.

¹¹⁰ See McCabe, *supra* note 26, at 305.

¹¹¹ See Potraker, *supra* note 94, § 8.

adult adoptions.¹¹² Notably, New York courts have relied on public policy grounds to deny adult adoptions to homosexual couples.¹¹³ According to the state's highest court, allowing the adoption of one's lover would be "wholly inconsistent with the underlying public policy of providing a parent-child relationship,"¹¹⁴ and "the Legislature could not have intended that the statute be employed 'to arrive at an unreasonable or absurd result.'"¹¹⁵

Overall, the process of adopting an adult and the limitations imposed by the legislature and judiciary vary widely from state to state.¹¹⁶ The majority of states do, however, allow some form of adult adoption,¹¹⁷ which raises the issue of how such relationships should be treated in those states. The next section addresses the treatment of adult adoptees under the UPC provisions on intestate succession and class gifts and assesses the positive and negative attributes of the Code's approach.

II. ADULT ADOPTION, INTESTATE SUCCESSION, AND CLASS GIFTS

As noted previously, adult adoption is often undertaken to secure the adoptee's inheritance rights.¹¹⁸ This arises in the context of intestate succession, where the adoptee may stand to inherit from or through the adoptive parent under the intestacy laws adopted by the state. Additionally, inheritance issues arise in relation to trust cases and class gifts, where the established legal relationship may result in the inclusion of the adoptee in such class designations as "heirs" and "descendants."¹¹⁹ The UPC, which seeks to establish a model for the states, has weighed in on the treatment of adult adoptees in both contexts. This section examines the relevant UPC provisions, compares them with current state statutes, and assesses whether they properly promote the principles of estate law and are consistent with sound public policy for the states.

A. *The Uniform Probate Code*

1. *UPC Section 2-115.*—In general, the UPC treats adopted children as natural children for intestacy purposes. This is explained in Article II of the UPC, which includes the Code's detailed provisions regarding intestacy,

¹¹² See McCabe, *supra* note 26, at 305–06.

¹¹³ See *In re Adoption of Robert Paul P.*, 471 N.E.2d 424, 425–27 (N.Y. 1984).

¹¹⁴ *Id.* at 425.

¹¹⁵ *Id.* at 427 (quoting *Williams v. Williams*, 246 N.E.2d 333, 337 (N.Y. 1969)).

¹¹⁶ See *supra* notes 94–115 and accompanying text (discussing the various statutory restrictions and judicial interpretations across the states).

¹¹⁷ See Turnipseed, *supra* note 2, at 107–08; see also *Adult Adoption Laws*, ADOPTING.ORG, <http://www.adopting.org/adoptions/adopting-an-adult-state-laws.html> (last visited Oct. 21, 2011) (providing state-by-state summaries of adult adoption statutes).

¹¹⁸ See *supra* Part I.B.

¹¹⁹ See, e.g., *DUKEMINIER ET AL.*, *supra* note 30, at 106.

wills, and donative transfers.¹²⁰ Part 1 of Article II establishes the basic pattern of intestate succession to be applied in cases where there is no individualized estate plan.¹²¹ In section 2-118, the Code provides that a “parent-child relationship exists between an adoptee and the adoptee’s adoptive parent or parents.”¹²² The Code proceeds to define “adoptee” in section 2-115 as meaning “an individual who is adopted.”¹²³

The drafters explain in the comments to section 2-115 that “‘adoptee’ is not limited to an individual who is adopted as a minor *but includes an individual who is adopted as an adult.*”¹²⁴ This statement explicitly resolves the issue posed by adult adoptees, clarifying that they are to be treated in the same vein as natural children for purposes of intestacy. As section 2-116 states, if a parent-child relationship exists, “the parent is a parent of the child and the child is a child of the parent for the purpose of intestate succession.”¹²⁵ This means that, under the UPC, an adult adoptee may inherit directly as the heir of the adoptive parent and may also inherit through the adoptive parent as a descendant by representation.

2. *UPC Section 2-705.*—The UPC’s general policy that adopted children are to be treated as the natural children of the adoptive parent is reflected in its treatment of class gifts. In setting out the rules of construction to be applied to class gifts in wills and other governing instruments, section 2-705 specifically states that “[a]doptee” has the meaning set forth in Section 2-115.¹²⁶ As discussed above, section 2-115 defines adoptee as “an individual who is adopted.”¹²⁷ Section 2-705 goes on to explain that “[a] class gift that uses a term of relationship to identify the class members includes . . . an adoptee . . . in accordance with the rules for intestate succession regarding parent-child relationships.”¹²⁸ Thus, “except as otherwise provided in subsections (e) and (f),” an adoptee is to be included in any class that is founded on a parent-child relationship with the adoptive parent.¹²⁹

¹²⁰ UNIF. PROBATE CODE §§ 2-102 to -122 (amended 2008), 8 U.L.A. 36–66 (Supp. 2011).

¹²¹ *Id.* at Art. II, pt. 1, general cmt., 8 U.L.A. 34–35 (stating that the intestate succession established under Part 1 “was designed to provide suitable rules for the person of modest means who relies on the estate plan provided by law”).

¹²² *Id.* § 2-118(a), 8 U.L.A. 53.

¹²³ *Id.* § 2-115(1), 8 U.L.A. 50.

¹²⁴ *Id.* § 2-115 cmt., 8 U.L.A. 51–52 (emphasis added).

¹²⁵ *Id.* § 2-116, 8 U.L.A. 52.

¹²⁶ *Id.* § 2-705(a)(1), 8 U.L.A. 141.

¹²⁷ *Id.* § 2-115(1), 8 U.L.A. 50.

¹²⁸ *Id.* § 2-705(b), 8 U.L.A. 141.

¹²⁹ *Id.* Subsection (e), which is outside the scope of this Comment, addresses inheritance as a child of a genetic parent when the genetic parent or his relatives did not function as a parent. *Id.* § 2-705(e), 8 U.L.A. 141.

However, the UPC takes a distinctly different approach to its treatment of *adult* adoptees in its class gift provisions than it does in the intestacy context. As provided under subsection (f) under the heading “Transferor Not Adoptive Parent”:

In construing a dispositive provision of a transferor who is not the adoptive parent, an adoptee is not considered the child of the adoptive parent unless:

- (1) the adoption took place before the adoptee reached [eighteen] years of age;
- (2) the adoptive parent was the adoptee’s stepparent or foster parent; or
- (3) the adoptive parent functioned as a parent of the adoptee before the adoptee reached [eighteen] years of age.¹³⁰

This means that, while an adult adoptee is freely included in a class gift from her adoptive parent, she is not included in the same class for purposes of transfers from persons other than the adoptive parent unless a bona fide parent-child relationship exists.

To illustrate, suppose that *A* adopts *X* as an adult, and *A* is not *X*’s stepparent or foster parent and did not function as *X*’s parent while *X* was a minor. If *A* dies testate, leaving his estate “to my children,” *X* takes a share in the estate since the transferor is the adoptive parent. However, if a third party, such as *A*’s parent, dies and leaves his estate “to *A*’s children,” *X* is not entitled to share in the estate as part of that class. Thus, an adult adoptee is included in class gifts when transferred from the adopting parent but not from a third party.

B. State Statutes

Some state legislation addresses intestacy and class gift issues within state adoption laws, specifically prohibiting adult adoptions motivated by inheritance objectives.¹³¹ Other states distinguish between adult and minor adoptees under state intestacy and class gift laws, as does the UPC.¹³² However, a majority of states leave these questions open to the courts’ interpretation by not differentiating between adult and minor adoptees¹³³ and providing no guidance on the interpretation of class gift language.

In situations where the statute fails to distinguish between adult and minor adoptees, courts generally presume that adult adoptees are intended to be treated in the same respect as minor adoptees. Such an interpretation

¹³⁰ *Id.* § 2-705(f), 8 U.L.A. 141–42.

¹³¹ *See* ALA. CODE § 26-10A-6 cmt. (2011) (“Adult adoptions for inheritance purposes provided for in . . . the Alabama Code [were] repealed.”). The merits of such an approach are assessed in more detail *infra* Part III.B.

¹³² *See* IND. CODE § 29-1-6-1(d) (2011).

¹³³ *See* DEL. CODE ANN. tit. 12, § 101(1) (2011) (defining “[c]hild” as “any individual entitled to take as a child under this title by intestate succession from the parent”).

was adopted by the Delaware Supreme Court in *Chichester v. Wilmington Trust Co.*, where the court addressed whether two adult adoptees could inherit through their adoptive parent by right of representation.¹³⁴ The majority referenced the portion of the adoption statute relating specifically to adult adoption, which stated that “all the duties, rights, privileges and obligations recognized by law between parent and child shall exist between the petitioner . . . and the person . . . adopted, as fully and to all intents and purposes as if such person . . . were the lawful and natural offspring or issue of the petitioner.”¹³⁵ The court then applied this provision to the broad language in the probate code and held that the adult adoptees were included as beneficiaries of a trust as “issue” of their adoptive parent’s mother.¹³⁶

With regard to class gifts, some states have provisions similar to those of the UPC.¹³⁷ In Indiana, for example, the court distinguishes between minor and adult adoptees, treating a minor adoptee as the natural child of the adoptive parent for all intents and purposes related to class gifts.¹³⁸ With regard to adult adoptees, however, the statute states: “Any person adopted after the person’s twenty-first birthday by the testator shall be considered the child of the testator, but no other person shall be entitled to establish relationship to the testator through such child.”¹³⁹

C. Decedent’s Intent and Other Policy Considerations

When analyzing the merits of these statutes it is important to focus on both the interests of the property owner and the interests of society as a whole.¹⁴⁰ While it is true that, in practice, intestacy laws and rules of construction will not work equally well for each decedent, it should be the legislature’s objective to adopt a framework that is as consistent as possible with both the decedent’s intent and the relevant public policy objectives.¹⁴¹

1. Interests of the Property Owner.—When someone dies without a will, one of the fundamental objectives is to dispose of the estate in the manner most likely to reflect the decedent’s wishes.¹⁴² This is done by estimating what the average decedent in the situation would have

¹³⁴ 377 A.2d 11, 12 (Del. 1977).

¹³⁵ *Id.* at 13 n.1 (quoting DEL. CODE ANN. tit. 13, § 954).

¹³⁶ *Id.* at 14.

¹³⁷ See IND. CODE § 29-1-6-1(d).

¹³⁸ *Id.* (“In construing a will making a devise to a person or persons described by relationship to the testator or to another, any person adopted prior to the person’s twenty-first birthday before the death of the testator shall be considered the child of the adopting parent . . .”).

¹³⁹ *Id.*

¹⁴⁰ See Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 7 (2000).

¹⁴¹ See *id.* at 1–2.

¹⁴² See Mark Glover, *Formal Execution and Informal Revocation: Manifestations of Probate’s Family Protection Policy*, 34 OKLA. CITY U. L. REV. 411, 419 (2009).

intended.¹⁴³ In every state, the law assumes that the decedent's probable intent was to transfer property to the most proximate members of her family.¹⁴⁴

The preferential treatment of relatives in intestacy statutes stems in part from the strong tendency of testators to leave their estates to spouses and lineal descendants, providing evidence of the average decedent's intent.¹⁴⁵ Additionally, there is a commonly held expectation that if one dies intestate, his property transfers to his next of kin.¹⁴⁶ Roughly half the population dies without a will,¹⁴⁷ which may be due at least in part to the assumption that their estate will transfer to proximate family members without the need for costly legal action.¹⁴⁸ The goal of intestacy law is to meet this expectation.¹⁴⁹

When someone dies with a will, the goal remains the same: to give effect to the decedent's intent.¹⁵⁰ But unlike in intestacy situations, there is actual written evidence of the testator's wishes. This implicates the fundamental estate law principle of testamentary freedom, which is the belief that the testator has the right to dispose of her property as she wishes.¹⁵¹ The task then becomes one of construction: to interpret the instrument in the manner that most effectively protects this liberty and provides the intended interpretation of the language used. This issue arises with class gifts, where the testator often uses such terms as "children," "issue," or "heirs." In these cases, the court is presented with the task of determining whether the testator intended to include the relevant individual in that gift.

2. *Interests of Society.*—At the same time, it is important to look at the policy considerations implicated by adult adoptions, which can sometimes lie in tension with the likely intent of the donor.¹⁵² Though the

¹⁴³ Rein, *supra* note 3, at 732.

¹⁴⁴ See Glover, *supra* note 142, at 419.

¹⁴⁵ See *id.* (noting that scholarly surveys of probate records confirm that the "vast majority of testators distribute their estates within the family").

¹⁴⁶ See *id.* at 420–21.

¹⁴⁷ DUKEMINIER ET AL., *supra* note 30, at 71.

¹⁴⁸ Cf. Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 323–24 (arguing in support of the right not to execute a will so that one's estate passes to his family in accordance with decedent intent).

¹⁴⁹ See Glover, *supra* note 142, at 419 ("The primary goal of intestacy is to distribute the estate in accordance with the decedent's probable wishes; an intent the law assumes is to direct assets to surviving family members.").

¹⁵⁰ See Rein, *supra* note 3, at 731–32.

¹⁵¹ See Glover, *supra* note 142, at 422.

¹⁵² See Rein, *supra* note 3, at 732–33.

power of testation does have legal limitations,¹⁵³ the principle of testamentary freedom suggests that a clear indication of decedent intent generally supersedes any concern over reflecting community attitudes and meeting public expectations.¹⁵⁴ However, in cases of intestacy, where there is no written will indicating the decedent's wishes, and class gifts, where intent is often ambiguous, these concerns should play a larger role.

One of the primary societal goals of estate law is to support and encourage healthy family units.¹⁵⁵ Beyond just promoting succession within the family, estate law seeks to strengthen bonds and limit familial disputes.¹⁵⁶ By favoring succession within the family, it ensures that the decedent's dependents are provided for and gives incentive to care for and maintain relationships with adult family members.¹⁵⁷

Succession laws also have the ability to provide for the well-being of society as a whole. The broader social considerations for legislatures to keep in mind include promoting social and legal stability, encouraging ease of administration, maintaining respect for the system, and preventing waste.¹⁵⁸ Presumably, providing constancy within the law secures public expectations and encourages trust in the system.

This is not to say that the law should not be responsive to changes in society, but rather that it should have clear parameters and be consistently applied. For this reason, there is a societal interest in preventing the use of legal strategy to avoid and manipulate the rationales behind our laws. Not only does such manipulation cut against the interests that the legislature is trying to promote, but it may serve to undermine the credibility of the system as a whole. For example, parties using adult adoption solely for inheritance purposes are sometimes acting specifically to circumvent the decedent's intent. Yet, respecting the decedent's intent is a fundamental tenet of estate law.¹⁵⁹ Allowing inheritance in these cases disappoints public expectations and leads to inconsistency within the system.¹⁶⁰

¹⁵³ John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 n.8 (1975) (noting such limitations as taxation, forced share or other family protection legislation, and the rule against perpetuities).

¹⁵⁴ *See id.* at 491; *see also* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 & cmts. a–c (2003) (“The donor’s intention is given effect to the maximum extent allowed by law American law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor’s decisions about how to allocate his or her property.”).

¹⁵⁵ *See Gary, supra* note 140, at 10.

¹⁵⁶ *See id.*

¹⁵⁷ *See id.* at 11–12.

¹⁵⁸ *See* John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 513–16 (1977).

¹⁵⁹ *See Gary, supra* note 140, at 7–8.

¹⁶⁰ The court in *Cross v. Cross* endorsed this view, stating that to allow “[t]he adoption of an adult solely for the purpose of making him an heir of an ancestor under the terms of a testamentary instrument

D. Application: Intestate Succession and Class Gifts

Applying these considerations to the adoption context, it is now generally accepted that adoptive children should be treated as natural children for purposes of intestate succession and class gifts.¹⁶¹ The requirement of a blood connection, historically a prerequisite for a parent-child relationship in the intestacy and testacy context, has been largely disavowed as an outdated and underinclusive principle of estate law.¹⁶² This promotes the public policies in favor of adoption, which legally recognizes existing family bonds and promotes permanency within family units.

For inheritance purposes, the most common practice is to fully incorporate the child into the adopting family.¹⁶³ Not all states recognize the ability of an adopted child to inherit through the adoptive parent, though it has been argued that this is inconsistent with the societal policy of promoting the best interests of the adoptee by fully recognizing him as a family member.¹⁶⁴ This policy, that an adopted child should be recognized as a full member of the adoptive family, supports the inclusion of all adoptees in intestacy statutes. It is from this starting point that this Comment next considers decedent intent and societal interests in the treatment of adult adoptees under these provisions.

1. Intestate Succession.—State laws customarily allow an adult adoptee to inherit directly from an adoptive parent if that parent dies intestate.¹⁶⁵ This practice is also permissible under UPC section 2-116, given the definition of adoptee as including an adult adoptee under section

known and in existence at the time of the adoption is an act of subterfuge.” 532 N.E.2d 486, 488–89 (Ill. App. Ct. 1988).

¹⁶¹ Most jurisdictions recognize full inheritance rights between the adoptee and the adoptive family. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5(2) & cmt. d (1999) (“Most intestacy statutes, including the Original and Revised UPC, treat an adopted child as a full member of the child’s adoptive family.”). In terms of class gifts, adoptees are generally included in classes for gifts coming directly from the adoptive parent. Rein, *supra* note 3, at 733. A few courts have departed from this, but only in the context of avoiding dual inheritance. *Id.* When the donative instrument is executed by a third party (not the adoptee or adoptive parent), the courts previously applied the “stranger-to-the-adoption” rule, which served as a presumptive bar from including adopted children. *Id.* Today, however, courts have replaced this rule with a presumption that adoption includes the adoptee in the class unless the donor expressly excludes him. *Id.* at 735.

¹⁶² See Lee-ford Triitt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. REV. 367, 368–69 (2009).

¹⁶³ See Gary, *supra* note 140, at 28.

¹⁶⁴ See Rein, *supra* note 3, at 720–22. In South Dakota, for example, the state statute provides: “After adoption the [child and person adopting] shall sustain towards each other the legal relation of parent and child and have all the rights and be subject to all the duties of that relation.” S.D. CODIFIED LAWS § 25-6-16 (2011). State courts have interpreted this language to mean that “[t]he contractual nature of adoption does not extend beyond the adoptive parents and the child.” *In re Estate of Edwards*, 273 N.W.2d 118, 120 (S.D. 1978).

¹⁶⁵ See Rein, *supra* note 3, at 755.

2-115.¹⁶⁶ Historically, creating one's own heir through adoption has almost always been accepted and the result is considered very clearly within the contemplation of the decedent.¹⁶⁷ Though it has been argued that there is a tension between allowing this sort of designative freedom and promoting the societal interest in familial succession,¹⁶⁸ the strong policies in favor of property rights and testamentary freedom overwhelmingly suggest that the decedent's intent should be respected in this context.

As discussed *supra* Part II.A.1, UPC sections 2-115 and 2-116 also place no limitations on an adult adoptee's right to inherit through his adoptive parent.¹⁶⁹ Whether this ability to inherit as a descendant by representation is consistent with the decedent's intent is not nearly as clear as it is for transfers from the adoptive parent. Unlike minor adoptions, the theoretical full integration of the adoptee into the adopting family is less likely to reflect reality, especially in cases where the relationship is not truly one of parent to child.

There is a stronger probability in adult adoptions, as compared to minor adoptions, that relatives will not even be aware of the legal relationship, and, even if they are, they will presumably be less likely to consider the adoptee to be their grandson or niece or great-granddaughter. This is due in large part to the parties and motivations involved in adult adoptions, and the relative ease with which adult adoptions are obtained.¹⁷⁰ For example, with a homosexual couple, it is doubtful that the adopting partner's parents would consider their child's same-sex partner as their grandson. This would be inconsistent with general conceptions of familial roles, diminishing the likelihood that there would be the expectation that their estate would transfer to him in his capacity as a grandchild.

From an efficiency and policy perspective, disallowing the inheritance by adult adoptees through their adoptive parents would provide a bright-line rule that is simple to administer and likely to reflect the decedent's intent. Some argue that in intestacy cases the adoption is likely to occur during the decedent's lifetime, providing him with the opportunity to draft a will excluding the adoptee if he so desires.¹⁷¹ However if there is no requirement that the relatives be notified, a deceased relative of the adopter

¹⁶⁶ See UNIF. PROBATE CODE §§ 2-115 to -116 (amended 2008), 8 U.L.A. 50-52 (Supp. 2011).

¹⁶⁷ See Rein, *supra* note 3, at 755.

¹⁶⁸ See Gary, *supra* note 140, at 10. This tension exists in the adult adoptee context under the assumption that the adoption recognized a relationship that was not actually one of parent-child. By allowing the adult adoptee to inherit, this principle blocks the transfer to the true relatives of the decedent. See, e.g., Rein, *supra* note 3, at 755.

¹⁶⁹ See §§ 2-115 to -116, 8 U.L.A. 50-52.

¹⁷⁰ See *supra* Part I.B (discussing the reasons one would adopt an adult); *supra* Part I.D.2 (noting that adult adoptees are not required to give notice to their relatives that might be affected).

¹⁷¹ See Edward C. Halbach, Jr., *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971, 988 (1965).

may not even be aware of the adoption.¹⁷² Setting a default rule prohibiting such inheritance will provide the relatives that *do* know about the adoption the opportunity to change their wills to include the adoptee if they so desire.

It is true, however, that some adult adoptions are undertaken to recognize a parent–child relationship that has existed since the adoptee was a minor.¹⁷³ In these cases, the policies that underlie the treatment of minor adoptees as natural children are also present. Because of this, the legislature should provide an exception for such adult adoptees, allowing their inheritance as full-fledged members of the family.¹⁷⁴

The above analysis of public policy and decedent intent suggests that change is necessary both in section 2-115 of the UPC, which treats adopted children as natural children for intestacy purposes, and in those state statutes that are left open to interpretation regarding adult adoptees specifically. As stated previously, many state courts that are given such discretion presume that the legislature’s intention was to treat minor and adult adoptees in the same manner.¹⁷⁵ Since there are strong policy reasons for allowing minor adoptees to inherit through their adoptive parents that do not exist for all adult adoptees, the legislature should be clear about distinguishing between minors and adults.

2. *Class Gifts.*—While section 2-115 may lead to unfavorable results, the UPC more effectively addresses the specific concerns that arise with adult adoptions in its class gift provision, section 2-705.¹⁷⁶ In analyzing the decedent’s intent, the same issues surface as in the intestacy context. The only difference is that the donor has provided a written instrument that might give some indication of her intention. When the donor’s intent is clear, it should be fully respected.¹⁷⁷ However, such circumstances are rare.¹⁷⁸

When the gift is directly from the adoptive parent, it is evident that the donor intended to include the adult adoptee in the class.¹⁷⁹ However, when the decedent is a third party, it is likely that the decedent was not even aware of the adoption. This is true both because of the lack of notice-requirements and because many of these cases arise with respect to bequests

¹⁷² Rein, *supra* note 3, at 756.

¹⁷³ See *supra* notes 17–21 and accompanying text.

¹⁷⁴ The potential difficulties raised by leaving this determination to the judiciary are discussed *infra* Part III.A.

¹⁷⁵ See *supra* Part II.B.

¹⁷⁶ See UNIF. PROBATE CODE § 2-705 (amended 2008), 8 U.L.A. 141–42 (Supp. 2011).

¹⁷⁷ Rein, *supra* note 3, at 732 (“When the transferor’s intent is clear from the instrument, or clearly shown by surrounding circumstances or other admissible extrinsic evidence, that intent should be honored.” (footnote omitted)).

¹⁷⁸ See *id.* (describing most instruments making a class gift as “totally unenlightening” with respect to the donor’s intent regarding adoptees).

¹⁷⁹ See Halbach, *supra* note 171, at 976.

distributed long after the donor has died.¹⁸⁰ In fact, adult adoption may not have been legalized at the time the instrument was executed.¹⁸¹ Because many adult adoptions are used to solidify relationships other than ones that are parent–child in nature, it is probable that the testator did not anticipate such a relation to be included as a child or an heir when he executed the instrument.

The UPC properly addresses these issues by refusing to consider the adult adoptee as a child of the adoptive parent in interpreting class gifts from parties other than the adoptive parent.¹⁸² In addition to adequately deducing the decedent’s intent, section 2-705 promotes the societal interest in maintaining legal and social stability and in protecting the credibility of the statutory scheme. It also prevents any attempts to evade testamentary freedom, which is a fundamental tenet of estate law.

Additionally, parties may use adoption to gain benefits beyond those intended for their substantive relationship, such as when a husband adopts his wife.¹⁸³ State legislatures make a deliberate decision to confer certain benefits on specific types of relationships after considering the decedent’s probable intent and the policy considerations discussed above.¹⁸⁴ A legislature’s statutory scheme with respect to these relationships should not be undermined by the use of adoption in a way that frustrates that plan. This issue may also arise in the same-sex-couple context, with the growing (albeit slowly) availability of same-sex marriage.¹⁸⁵ Legislatures should avoid providing an incentive for couples to choose adoption over marriage by legalizing same-sex marriage and refusing to recognize benefits of an adult adoption that exceed those provided by marriage in cases where marriage more accurately embodies the relationship. By prohibiting inclusion in class gifts, the UPC prevents adoption from being used as a manipulative tool.

¹⁸⁰ See Rein, *supra* note 3, at 751.

¹⁸¹ Courts have used this fact to influence their decision in both directions. See Rein, *supra* note 3, at 757–58. In two California cases, the court denied adult adoptees inclusion in a class gift because the state had not legalized adult adoption at the time of execution. *Abramovic v. Brunken*, 94 Cal. Rptr. 303, 305 (Cal. Ct. App. 1971); *Williams v. Ward*, 93 Cal. Rptr. 107, 109–10 (Cal. Ct. App. 1971). As per their reasoning, the testator could not have contemplated such a beneficiary if he was unaware that it was legally possible. *Brunken*, 94 Cal. Rptr. at 305; *Ward*, 93 Cal. Rptr. at 109–10. In the Kansas case *In re Estate of Fortney*, however, the court held that the adoptee was included on the ground the decedent would have anticipated later changes in the law. 611 P.2d 599, 603 (Kan. Ct. App. 1980).

¹⁸² See UNIF. PROBATE CODE § 2-705 (amended 2008), 8 U.L.A. 141–42 (Supp. 2011).

¹⁸³ See *Bedinger v. Graybill’s Ex’r & Tr.*, 302 S.W.2d 594 (Ky. 1957).

¹⁸⁴ The primary goal of statutory interpretation is to effectuate the intention of the legislature. 73 AM. JUR. 2D *Statutes* § 61 (2010). In looking to the plain language of the statute first, courts presume that statutory language is the product of careful deliberation by the drafters. See *id.* § 124.

¹⁸⁵ See *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/s/same_sex_marriage/index.html (last updated Aug. 25, 2011) (reporting on the frequent developments in the same-sex marriage debate).

However, as was true in the intestacy context, there are some adult adoptions that serve to recognize true parent–child relationships.¹⁸⁶ In those situations, public policy tends to support inclusion of the adoptee in the class gift as the natural child of the adoptive parent. The UPC accounts for these cases by allowing the adult adoptee to be included in the gift when the adoptive parent is a stepparent, foster parent, or functioned as a parent before the adoptee turned eighteen years old.¹⁸⁷

This analysis not only supports the UPC approach, but also highlights the flaws in the common approach of states to give full discretion to the court to interpret the language of the will or dispositive instrument. As in the intestacy context, courts are likely to interpret the lack of distinction provided by the legislature as an indication that all adoptees should be treated alike. So instead of drawing a line between minors and adults, courts often draw distinctions on other improper grounds.

Courts commonly attempt to determine the testator’s intent by distinguishing between those terms that are considered to have a legal connotation and those that are considered to have a bloodline connotation.¹⁸⁸ This arbitrary wordplay undermines the policy of treating even minor adoptees as natural children, since presumably they could also be denied inclusion in a class on the same grounds. Additionally, it fails to consider the time that has lapsed since the document was executed and the precision with which the language was used, which may indicate that the connotation of the term was not considered by the decedent.¹⁸⁹ Overall, it fails to provide the specific guidance necessary to ensure consistent application and can leave future testators uncertain about the implications of drafting legal instruments. For these reasons, UPC section 2-705 more sufficiently reflects the decedent’s likely intent and sound public policy.

III. RECOMMENDATIONS

Based on the above analysis, it is clear that states should amend their statutes in order to most effectively comply with the decedent’s intent and to promote sound public policy. At the same time, this narrow approach may cut off protection of valuable rights that might not otherwise be available to the parties involved. This section sets forth a proposal for state intestacy and class gift provisions that more effectively embodies the goals of probate law and public policy than the current UPC provisions and explains why the approach should be adopted over another proposed

¹⁸⁶ See *supra* notes 17–21 (providing situations in which adoption recognizes a true parent–child relationship).

¹⁸⁷ § 2-705(f), 8 U.L.A. 141–42.

¹⁸⁸ See Rein, *supra* note 3, at 757.

¹⁸⁹ See Halbach, *supra* note 171, at 980 (“The draftsman is not likely to choose his language with an objective of producing a particular result with respect to this type of question, for if his attention were directed to this matter at the stage of drafting the question would not have been left unanswered.”).

strategy of handling these issues at the adoption phase. Additionally, this section provides an alternative to adult adoption for preserving rights that might otherwise be denied.

A. Proposed Statutory Provisions

With respect to class gifts, UPC section 2-705 properly addresses the relevant policy considerations while respecting the donor's intent. State legislators should look to the UPC when drafting their class gift provisions to specifically account for adult adoptees when the transfer is not from the adoptive parent.

In the intestacy context however, the UPC takes an overly broad approach. Instead of adopting the UPC intestacy scheme verbatim, states should adopt the approach of section 2-705(f).¹⁹⁰ This would allow the adult adoptee to inherit *from* the adoptive parent, but would limit the opportunity for the adoptee to inherit *through* the adoptive parent. It would take into account those circumstances in which a parent-child relationship exists, allowing inheritance in those cases. As discussed above, the relevant policy considerations and problems associated with decedent intent are nearly identical in both the class gift and intestacy contexts. Adult adoptees should therefore be treated the same under both provisions.

If adult adoptees are treated according to UPC section 2-705 for both class gifts and intestacy, the only potential obstacle is that the judiciary must address whether the adoptive parent "functioned as a parent."¹⁹¹ One could argue that this is too subjective a determination to be made in the probate context and that it would create too large an administrative burden. However, the judiciary has proved itself equipped to make such determinations both in the adoption and inheritance contexts.¹⁹² In any event, the judiciary should take a narrow approach when utilizing section 2-705(f)(3) and should limit its application to circumstances in which the parental functions of the adoptive parent are so visible that the judiciary's investigative role is negligible.¹⁹³ Only such a clear parent-child

¹⁹⁰ See § 2-705(f), 8 U.L.A. 141-42 (refusing to recognize an adult adoptee as the child of an adoptive parent for class gift transfers from third parties unless the adoptive parent was the adoptee's stepparent, foster parent, or functional parent before the adoptee reached 18 years old).

¹⁹¹ See *id.* § 2-705(f)(3), 8 U.L.A. 142.

¹⁹² One example of this can be seen in the doctrine of equitable adoption, whereby the court treats an individual as an adoptee for inheritance purposes although a formal adoption never took place. See *Welch v. Wilson*, 516 S.E.2d 35, 37-38 (W. Va. 1999) (allowing woman raised by her step-grandfather to inherit his estate based on evidence of a parent-child relationship).

¹⁹³ To reiterate, subsection 2-705(f)(3) states that an adult adoptee is considered a child of the adoptive parent for class gift purposes if the adoptive parent functioned as a parent before the adoptee reached 18 years old. 8 U.L.A. 142. Some factors that are readily available for a court to consider include: "(1) the age at which the adoptee entered the adoptor's home, (2) the length of time the adoptee lived there, (3) the length of time the adoptor actually supported the adoptee, and (4) the nature and extent of the parenting role assumed by the adoptor vis-à-vis the adoptee." Rein, *supra* note 3, at 765.

relationship would presumably affect the expectations of outside parties, specifically those parties who would be implicated in the intestacy and class gift contexts. Thus, a narrow view is likely more consistent with decedent intent.

B. *The Adoption Phase*

Some argue that inheritance considerations should be addressed in the adoption-granting phase by requiring the court to consider the petitioners' motivation for adoption and deny those adoptions whose primary purpose is to include the adoptee as a trust beneficiary.¹⁹⁴ However, these estate-specific issues surrounding adult adoption can more efficiently be resolved by clear and comprehensive intestacy and class gift statutes, such as the provisions suggested above. This allows the court to avoid making a subjective evaluation of adoptive intent and prevents the invasiveness involved in determining the nature of such a relationship.¹⁹⁵

Particularly with regard to same-sex couples, the motivation behind an adult adoption will likely be multifaceted.¹⁹⁶ It is, however, not in society's best interest to withhold these benefits solely because an inheritance or class gift objective is included. Instead, adult adoptions should be widely granted to ensure that these benefits remain available.¹⁹⁷ By barring the inclusion in class gifts and intestate succession for such adoptions once granted, the proposed provisions will force the parties to weigh their motivations and drop the petition altogether if the sole purpose is to obtain an unintended right that would violate the principles of estate law.

While same-sex marriage may be gaining momentum,¹⁹⁸ until it is fully adopted there is a strong public policy interest in maintaining a mechanism by which gay and lesbian couples can reap at least some of the matrimonial advantages. The relationship between the couple is similar to that of spouses, and it can be presumed that their intent with regard to their

¹⁹⁴ See McCabe, *supra* note 26, at 318.

¹⁹⁵ While it can be argued that the same type of subjective evaluation would be necessary to determine whether the adoptive parent "functioned as a parent" under subsection 2-705(f), the narrowness of the approach suggested will make it far less intrusive than the more extensive, and less defined, investigation proposed at the adoption phase. For example, Brynne E. McCabe, a scholar that proposes an adoption-phase determination, outlines an extensive list of potential factors that includes sexual intimacy and the true intent of the settlor of a trust that a court "might consider" or "attempt to determine." See *id.* at 314–19.

¹⁹⁶ See *supra* Part I.C.

¹⁹⁷ See McCabe, *supra* note 26, at 317–18. While McCabe suggests that adult adoptions for same-sex couples should be freely granted based on the validity of their motivations, her approach may in fact chill attempts to bring such petitions for fear of the invasive nature of the adoption process under her model. Additionally, placing the discretion to grant or deny such petitions in the hands of the judiciary gives too much leeway for judges to create their own policy considerations, decreasing the probability that those petitions will in fact be routinely granted.

¹⁹⁸ See *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, *supra* note 185.

benefits and rights toward each other follows the same pattern as married couples. For those benefits that are used as substitutes for a will (e.g., life insurance, pensions, etc.), decedent intent should remain a priority. If the couples have a way to legally enforce their relationships, it will ease administration and reduce the number of disputes among relatives that no longer have standing to challenge any will or will-like instruments. Additionally, providing access to health insurance, worker's compensation, and other employee benefits will serve society as a whole by providing for dependent individuals that do not otherwise receive spousal support.

C. *An Alternative: Reciprocal Beneficiaries*

While there is a strong societal interest in allowing adult adoption, there are many drawbacks for the parties involved.¹⁹⁹ However, without other options, same-sex couples may feel obligated to resort to adult adoption to block the possibility of collateral attack on their wills and to secure the transfer of one partner's estate to the other. Where same-sex marriage is legalized, adult adoption is unnecessary to preserve inheritance rights because the parties are treated as spouses under state law.²⁰⁰ Additionally, in states where alternative relationships are recognized, such as civil unions or domestic partnerships, the disadvantages of adult adoption can be avoided if the legislature amends its probate statutes to either include parties to such a relationship under the definition of "spouse" or to at least list them as receiving spousal rights.²⁰¹ This coincides with those states' policies in favor of conferring spousal-type benefits without full inclusion in the marital institution.

However, in states that do not recognize same-sex marriages, civil unions, or domestic partnerships, homosexual couples may feel forced into adult adoption as the only way to block their wills from collateral attack. This is also true in adult adoptions outside of the same-sex-couple context, where inheritance may be a driving force. One alternative is to adopt a system of reciprocal beneficiaries, which allows two adults to designate

¹⁹⁹ See *supra* Part I.C.2.

²⁰⁰ It is true that at the federal level, same-sex couples are still denied the benefits of marriage. See, e.g., Annick Persinger, Note, *Still Pioneers: Special Social and Economic Hardships for Elderly Gays and Lesbians*, 21 HASTINGS WOMEN'S L.J. 137, 143 (2010). This is another reason why adult adoptions should be widely granted and is something that couples should consider when deciding whether to enter into an adult adoption. However, because estate issues are generally a matter of state law, adult adoption will be unnecessary for the purpose of blocking collateral attacks and protecting inheritance plans if the couple weds in a state that recognizes same-sex marriage.

²⁰¹ The UPC supports such an approach, as explained in its revised note to Article II: "References to spouse or marriage appear throughout Article II. States that recognize civil unions, domestic partnerships, or similar relationships between unmarried individuals should add appropriate language wherever such references or similar references appear." UNIF. PROBATE CODE Art. II, legislative note (amended 2008), 8 U.L.A. 33-34 (Supp. 2011).

each other as beneficiaries not only for estate purposes, but also for access to other rights and benefits similar to marriage.

Hawaii, by adopting the Hawaii Reciprocal Beneficiaries Act in 1997, serves as an example of such an approach.²⁰² To register under the statute, parties sign a “declaration of reciprocal beneficiary relationship,” which must be notarized and filed with the Director of Health.²⁰³ Hawaii has adopted the UPC, and the amount that the beneficiary receives is determined in the same manner as the amount that a spouse receives.²⁰⁴ Additionally, the designation is revocable; revocation triggers the same legal effects as divorce.²⁰⁵ Through this process, the parties receive the same intestacy and class gift benefits that marriage provides, without the potential stigma of adult adoption.²⁰⁶ Additionally, the approach remedies what is arguably the largest drawback of adult adoption—its irrevocability. It also ensures that inheritance rights from each party’s natural families are not severed, decreasing the problems of notice that arise with adult adoption.²⁰⁷

Even in states that have decided not to recognize same-sex unions, a reciprocal beneficiary system may not violate public policy nor be against public sentiment. The system does not distinguish between the sexes of the parties and does not include the same connotation as a marriage or civil union. Hawaii itself has presented a strong opposition to gay marriage, passing a constitutional amendment in 1998 against the practice, yet its citizens have proved much more accepting of the reciprocal beneficiary system.²⁰⁸ One influential survey conducted in 1998 found that, while general sentiment was against gay marriage, “a substantial majority of the respondents . . . preferred the partner to take a share of the decedent’s estate,” and respondents “consistently preferred same-sex and opposite-sex committed couples be treated the same under the inheritance laws.”²⁰⁹ This shows that opposition to gay marriage can be compatible with recognizing certain rights for same-sex couples.

²⁰² See HAW. REV. STAT. § 572C-1 (2010).

²⁰³ See *id.* § 572C-5.

²⁰⁴ See Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 7 (1998).

²⁰⁵ See § 572C-7.

²⁰⁶ See *id.* § 560:1-201.

²⁰⁷ See *supra* notes 105–07 and accompanying text (noting that adult adoptees are not required to give notice to their relatives that might be affected).

²⁰⁸ See Brian Burnette, Note, *Hawaii’s Reciprocal Beneficiaries Act: An Effective Step in Resolving the Controversy Surrounding Same-Sex Marriage*, 37 BRANDEIS L.J. 81, 90 (1999); Kristin D. Shotwell, Note, *The State Marriage Cases: Implications for Hawai’i’s Marriage Equality Debate in the Post-Lawrence and Romer Era*, 31 U. HAW. L. REV. 653, 656–57 (2009).

²⁰⁹ Fellows, et al., *supra* note 204, at 89.

On the other side of the debate, gay-rights activists argue that a reciprocal beneficiary system does not go far enough.²¹⁰ While this may be true, a reciprocal beneficiary scheme may be the only viable option in a state like Hawaii where a constitutional amendment has been passed.²¹¹ Even in states that have not taken such drastic measures, a register for reciprocal beneficiaries may be a step in the right direction by giving voters an opportunity to adjust to and accept the legal recognition of relationships between same-sex couples.²¹²

CONCLUSION

Adult adoption is a widely used tool between both same-sex and opposite-sex couples. While various motivations may underlie an adult adoption, it inevitably has implications for intestate succession and class gifts. The UPC has taken the first step of treating adult adoptees differently in these contexts, but it must go one step further by eliminating the ability of adult adoptees to inherit through their adoptive parents.

This is, of course, not to say that the benefits of adult adoption should be outright denied. Instead, legislatures should grant adult adoptions broadly while clearly and explicitly addressing the rights that they provide under the state intestacy and class gift laws. Additionally, until same-sex relationships are more widely recognized, legislatures should, at a minimum, consider the alternative of recognizing self-designated reciprocal beneficiaries to ensure the protection of these benefits.

²¹⁰ See, e.g., *Let Me Reiterate: 'Reciprocal Benefits' Are a Joke*, GAY RTS. WATCH (May 3, 2005, 9:30 AM), <http://www.gayrightswatch.com/2005/05/let-me-reiterate-reciprocal-benefits.html>.

²¹¹ See Burnette, *supra* note 208, at 86–87.

²¹² See *id.* at 90.

