# INSIDERS AND OUTSIDERS: WHAT THE AMERICAN LAW INSTITUTE HAS DONE FOR GAY AND LESBIAN FAMILIES

MARY COOMBS*

## I. INTRODUCTION

Over the past decade, gays and lesbians have become increasingly engaged with questions of family law. Attempts to recognize gay family formation have been widespread, seeking either to eliminate any formal or presumed limitations of the right to marry to differently-sexed couples or—at a minimum—to institutionalize a status open to same-sex couples that is very similar to marriage.[1] Meanwhile, gay and particularly lesbian couples have increasingly created multi-generation families, by adding children through adoption or any of a variety of alternative reproductive means. These movements have been controversial and have experienced setbacks as well as progress.[2] The idea, however, that the "gay lifestyle"—or at least the lifestyle of large numbers of lesbians and gay men—includes committed, long-term relationships and, often, children, has become widely recognized within both the gay and non-gay communities.

There has been less public focus, however, on the dissolution of gay families. Part of the explanation is that the fight over same-sex marriage—which has involved challenges to statutes and which has taken place at the level of impact litigation and debates in Congress and state legislatures—is more visible and newsworthy. No one, so far as I know, has brought similar litigation seeking to grant gay and lesbian couples the right to legal divorce or some equivalent alternative. While there has been some highly publicized litigation around the question of continued access to children by non-biological parents after relationships have ended,[3] most dissolution-related disputes have been individual and have passed under the media radar.

Another part of the explanation, doubtless, is the desire of the gay and lesbian leadership to focus on the more positive aspects of community life. There

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* Professor of Law, University of Miami. Thanks to Elizabeth Schwartz for her helpful comments.

1. *See generally* David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 524-32 (1999). Current information on both marriage and domestic partnership can be found at the Lambda Legal Defense and Education Fund website, http://www.lambdalegal.org.

2. The most prominent setback has been the enactment of the Defense of Marriage Act, Pub. L. No. 104-99, 110 Stat. 2419 (codified as 28 U.S.C. § 1738C (1996) and 1 U.S.C. § 7 (1996)) and the parallel legislation in many states, denying recognition to same-sex marriages validly entered into in other jurisdictions.

3. *See infra* text accompanying notes 36-38.

may be a fear that too much attention to the dissolution of gay families may re-invigorate righ-wing arguments that gays are an inherently unstable, promiscuous lot.

Yet it is clear that gay and lesbian couples and families, like heterosexual ones, are not all destined to last " 'til death do us part." When these relationships end, some set of rules is needed to determine the economic consequences of dissolution for each partner. Courts have tended to assume that existing law regarding dissolution of marriage simply has no relevance to the dissolution of relationships not recognized as marriages. Other legal regimes, such as partnership law, may occasionally provide some relief for the partner disadvantaged by a legal rule that gives the relationship no significance, but they are, at best, a poor fit. Many of these consequences can be managed by a properly drawn agreement between the partners at the time they enter into the relationship. However, people in love and planning to enter a life together rarely expect to break up. They are either blind to the possibility of dissolution or hesitant to raise the topic for fear of the effect of such a discussion on the relationship itself. Thus, few gay relationships involve a lawyered agreement at the outset, just as few heterosexual marriages utilize a prenuptial agreement.

Issues involving rights and duties vis-à-vis children at the end of a gay or lesbian relationship are equally complex and too frequently "lawless." Again, a variety of existing legal tools are sometimes invoked, with varying degrees of appropriateness and success, but the primary body of law available for heterosexual parents whose relationship is ending—the body of law presumed to be most apt for ensuring the best interests of the children and, consistent with that, the recognition of the claims of the relevant adults—is generally unavailable to gay and lesbian parents.

This commentary will examine how the American Law Institute's *Principles of the Law of Family Dissolution*[4] might help fill these gaps. The first section briefly discusses the potential legal significance of the *Principles*, in a variety of contexts and through a variety of means. The second section provides a kind of nutshell guide to the *Principles* as they relate to gay and lesbian families. I hope that this may prove of value to lawyers engaged in representing parties to the dissolution of same-sex relationships.

## II. THE PRINCIPLES AS A SOURCE OF LAW

In considering the relevance of the *Principles* to legal decision making, both the author and title are significant. The *Principles* are bibliographically classified as the product of the "American Law Institute." That imprimatur makes them more influential than the same document attached solely to the names of its Reporters—Professors Ellman, Bartlett and Blumberg.[5] To a large number of

4. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Tentative Draft No. 4, 2000)[hereinafter ALI PRINCIPLES 2000].

5. For those unfamiliar with the processes by which the ALI produces its product, perhaps a brief and simplistic roadmap is in order. The organization, through its Council and executive leadership, chooses subject areas for which it believes an ALI project (or a revision of part or all of an existing project) is appropriate. Reporters, typically legal academics with a well-recognized expertise in the subject matter, are then appointed. The Reporters produce draft proposals, which will include

judges, lawyers and, to a lesser extent, legislators and the general public, the "authorship" of the American Law Institute serves a strong legitimizing function.[6] The organization is made up of judges, practicing attorneys and legal academics, who have the reputation as being among the "best and brightest," which a large number of them undoubtedly deserve.[7] It is also a fairly diverse group in terms of home states, areas of special expertise and perspectives on legal issues, although it remains an organization whose membership is disproportionately male, white and well-to-do.[8]

To the extent that an ALI product like the *Principles* resolves disputable legal issues in ways that provide more rather than less protection for less-empowered groups (such as gay and lesbian families), that resolution should be relatively more influential than the same approach taken in a purely academic publication. Unlike academia, the ALI is unlikely to be (falsely) tarred as a captive of left-leaning political correctness.

The *Principles of Family Law* is, however, a somewhat unusual ALI product. The vast majority of documents produced by the ALI's collective processes are either restatements or statutory proposals (in the form of model codes or, when produced in conjunction with the National Conference of Commission on Uniform State Laws (NCCUSL), uniform laws.) The former are, at least in theory, primarily summaries and clarifications of existing law, tracking the dominant rule among the multitudinous state jurisdictions. This is widely recognized, at least in some situations, as a legal fiction, obscuring the law-reforming aspect of the restatements.[9] (Were the restatement nothing but a reiteration of existing law in more succinct and clear language, there would not likely be such widespread citing of restatement language by lawyers and judges.) The restatements are also

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a black-letter statement of the relevant law, comments which expand on and illustrate the black letter statement and reporter's notes, which set the black letter statement and comments in the context of existing case law on the same subject. These drafts are modified in consultation with a panel of advisers, appointed for each project and a members consultative group, as well as by the Council which can reject provisions or require the Reporters to redraft them. The last step at each iteration is to present the draft to the full membership at the ALI's annual meeting. Members can propose changes from the floor, which the Reporters are expected to incorporate if they are approved by a floor vote. The project generally goes through a number of iterations before it is finally approved by the Council and membership and becomes an official ALI product. *See* Geoffrey C. Hazard Jr., *Reflections on Self-Study*, 23 LAW. & SOC. INQUIRY 641, 647-48 (1998).

6. The ALI points out that its products have no authority as such, *see id.* at 648, but also congratulates itself on their widespread influence. *Id.*

7. As a member of the Institute, I am modest enough to recognize that the relationship between membership and accomplishment, though highly positive, is not perfect.

8. As of 1997, "of the 2,651 elected members . . . 413 were women, 91 were African American, 28 Hispanic, and 17 Asian," which was a"truly radical, truly substantial" improvement from the Institute's past. John P. Frank, *The American Law Institute, 1923-1998*, 26 HOFSTRA L. REV. 615, 628 (1998). The Advisory Committee and Member's Consultative Committee for this project were considerably more gender balanced. *See* ALI PRINCIPLES 2000, *supra* note 4, at v-xiii.

9. The role of the Restatements was one of the issues discussed in a symposium on the American Law Institute. *See* Herbert P. Wilkins, *Symposium on the American Law Institute: Process, Partisanship, and the Restatements of Law*, 26 HOFSTRA L. REV. 567 (1998). In particular, Charles Wolfram argued for a law reform model at the margins. Charles W. Wolfram, *Bismarck's Sausages and the ALI's Restatements*, 26 HOFSTRA L. REV. 817, 818-20. *But see* J. Thomas Oldham, *The American Law Institute's Principles of the Law of Family Dissolution: Its Impact on Family Law*, 7 TEX J. WOMEN & L. 161, 161 (1998)(describing a Restatement as intended to state the current majority rule).

documents directed toward the judicial branch. The areas chosen for restatement are those, such as contracts and torts, in which the law is heavily common law, rather than statutory or regulatory. A restatement is expected to influence the actions of judges and of lawyers acting in the shadow of judge-made law.

Model codes and uniform laws, by contrast, are designed for the consideration of state legislatures. The latter are produced by the ALI in conjunction with the NCCUSL, a national organization whose membership is appointed by state governmental bodies. They are expected to reflect state, though not purely political, interests. Both kinds of documents are developed (or modified) for subject areas in which statutory law is dominant (or where the drafters believe a statutory displacement of common law is desirable). If such projects are successful, they will be adopted, with as few modifications as possible, by as many state legislatures as possible.[10]

The *Principles* are, however, neither fish nor fowl.[11] They are clearly not merely a restatement of existing law. Yet they are also not a uniform law, and were not produced in conjunction with the NCCUSL (a more politically and jurisprudentially conservative organization, which might have been resistant to some of the ways in which the *Principles* depart from existing law in many states). Their hybrid nature reflects in part the hybrid nature of family law itself. While some aspects of family law are highly statutory[12] and all of marriage dissolution law rests on at least a minimal statutory framework, the overlay of judge-made law is particularly rich, reflecting in part the highly fact sensitive nature of issues such as appropriate custody decisions, the rules regarding the continuing involvement of non-custodial parents, the extent of financial obligations between former spouses, and the relevance of economic interdependency during marriage.

However, one could equally well characterize them as both fish and fowl. That is, the influence of the *Principles* may occur in a variety of venues, both

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10. *See* Robert J. Levy, *Trends in Legislative Regulation of Family Law Doctrine: Millenial Musings*, 33 FAM. L.Q. 543, 553-58 (1999)(contrasting the Uniform Marriage and Divorce Act, promulgated by NCCUSL, and the ALI's *Principles* and suggesting that the structures of each organization, as well as the content of the products, made it unlikely that the *Principles* would be widely adopted by state legislatures). *Cf.* Oldham, *supra* note 9, at 161-62 (distinguishing the ALI and the Uniform Law Commissioners, and stressing that the former is somewhat less concerned with having their product widely adopted and somewhat more concerned with "shift[ing] the focus of debate").

11. For instance, the then-director of the ALI has suggested that the *Principles* should be viewed as a document in the same family as a restatement, but more consciously departing from current law. "The idea of Principles gives greater weight to emerging legal concepts than does a Restatement. Given the current disarray in family law—the unparalleled volume of litigation and legislation—this approach seems more appropriate." GEOFFREY C. HAZARD, JR., *Foreword* to the ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS at xiii (Proposed Final Draft Part I, 1997). Yet elsewhere he has used the *Principles* in a list of examples of "model legislation," that is, "text[s] intended for adoption by the legislative process." Geoffrey C. Hazard, *The American Law Institute is Alive and Well*, 26 HOFSTRA L. REV. 661, 665 (1998).

One of the Reporters has described the project as akin to a model act. *See* Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 WILLAMETTE L. REV. 467, 469 (1999).

12. This is particularly so in child support, because the federal government has made receipt of federal funds for state welfare payments contingent on adoption of statutes setting child support guidelines and providing particular means of facilitating collection of support payments.

legislative and judicial. With sufficient political support, a state legislature could adopt the *Principles* as a whole or enact particular provisions, grafting them onto the state's existing family law system. Alternatively, to the extent consistent with the relatively loose existing statutory framework in most states, lawyers could urge and judges could adopt the approach of the *Principles* selectively or (probably the hope of the drafters) in significant part, perhaps by a process of accretion.[13] Those aspects of the *Principles* which extend the legal framework for dissolution and its consequences to include the dissolution of non-marital relationships, including those between same-sex partners, are particularly amenable to such "selective incorporation" by judicial decision-making.[14]

This process may be facilitated by certain aspects of the *Principles*, in particular that such application would not require the recognition of "same-sex marriage." Provisions regarding claims over children are marriage-independent and do not even require that state law recognize a person as a legal parent to grant some rights vis-à-vis the children of a relationship. Provisions regarding economic issues between the former partners are dealt with in a chapter on "domestic partners," which applies to certain defined relationships, independent of the gender of the partners. Thus, even if a state does not recognize same-sex marriage—indeed, even if state law specifically forbade such recognition—a court could use the *Principles* to extend aspects of its family law to same-sex couples.

The *Principles* may also be useful in developing a set of rules and practices regarding the dissolution of same-sex relationships to be used in other contexts. As knowledge of the *Principles* becomes more widespread, lawyers advising couples at the onset of or during such relationships may use them as part of their tool kit in designing documents to acknowledge these relationships and provide for possible future disputes.[15] When a breakup is not too acrimonious,

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13. The Chief Reporter described a major goal of the *Principles* as to provide relatively clear rules to replace high levels of trial court discretion. Ira Mark Ellman, *Inventing Family Law*, 32 U.C. DAVIS L. Rev. 855, 875-76 (1999). This could occur legislatively or by courts' decisions to impose such rules on themselves (or on lower courts). *Cf.* John C. Shelton, *Anticipating the American Law Institute's Principles of the Law of Family Dissolution*, 14 ME. B.J. 18 (1999)(comparing the *Principles* to existing Maine law and examining where judges might adopt them without the need for statutory revision). For example, he suggests that a judge could refuse to consider a parent's sexual orientation, given the lack of statutory guidance, with the "estimable backing" of the ALI. *Id.* at 27. One court followed a similar path, citing the *Principles*. *See* Young v. Hector, 740 So. 2d. 1153, 1172 (Fla. Dist. Ct. App. 1999)(en banc)(*Schwartz, C.J.*, dissenting)(approvingly citing panel decision which sought to apply Section 2.09 to give custody to the father who had spent more time caretaking than the mother in recent years. The majority, however, reversed the panel decision for failing to give required deference to the trial court's determination.).

14. *Cf.* Merle H. Weiner, *Domestic Violence and Custody: Importing the American Law Institute's Principles of the Law of Family Dissolution Into Oregon Law*, 35 WILLAMETTE L. REV. 643 (1999)(suggesting a similar "selective incorporation" of the provisions of the *Principles* relating to domestic violence).

15. While, as noted above, such lawyered documentation is relatively rare at the beginning of any relationship, it may be more common in gay and lesbian relationships than heterosexual ones because of the recognition that the safety net of default rules that the legal system provides for heterosexual marriages is generally unavailable for gay and lesbian couples. Lawyers are also far more likely to be involved in same-sex relationships when the decision to become parents is made. Such parenting, unlike that in heterosexual relationships can never be inadvertent and knowledge of the

moreover, the couple may be willing to engage in various forms of alternative dispute resolution regarding the consequences (such as facilitated discussion or mediation, in some cases using institutional structures within the gay community). Mediators and counselors, who are not bound by the state's legal regime but are often in need of some kind of law-like framework to structure the discussion of particular solutions for particular couples, may find the *Principles* a rich source of ideas. For these purposes, they may look to any or all aspects of the *Principles* that might be relevant. To assist such professionals, as well as lawyers representing gay and lesbian clients who need guidance regarding the consequences of dissolution, the next section lays out a roadmap of the particular ways in which the *Principles* acknowledge non-traditional relationships and either assimilate them fully to the law applicable to marital dissolution or provide analogous or modified rules. The material is largely descriptive, though it occasionally notes particular ways in which the *Principles* are problematic for certain gay or lesbian family members.

## III. THE PRINCIPLES OF THE LAW OF (GAY AND LESBIAN) FAMILY DISSOLUTION: A ROADMAP

Family law can affect gays and lesbians in three different situations. First, many lesbians or gay men have children as a result of heterosexual marriages (or non-marital heterosexual relationships). The questions of custody and visitation rights vis-à-vis these children may be affected by arguments related to the sexual orientation of the parent. Second, many lesbian and some gay couples become parents together. At most one of the two adults can be the biological parent of the child, although some jurisdictions permit adoption by the second parent.[16] When only one of the adults is a biological or adoptive parent at the time the relationship ends, legal issues arise regarding the possible rights or duties flowing between the child and the other adult. Finally, when a same-sex couple ends their relationship, whether or not they have children, issues will arise regarding the allocation of assets that they have accumulated and obligations of future financial support of one partner by the other—issues that are dealt with in the marital dissolution context under the rubrics of "property division" and "alimony" or "spousal support."

This section will examine those portions of the *Principles* that deal with these issues in the particular context of gay and lesbian couples. To the extent

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risks to non-biological parents upon the end of a relationship is fairly widespread in the homosexual community.

16. *See, e.g.*, Adoption of Galen, 680 N.E.2d 79 (Mass. 1997); *In re* Adoption of Two Children by H.N.R., 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); *In re* Jacob, 660 N.E.2d 397, 636 N.Y.S. 2d 716 (N.Y. 1995); *In re* B.L.V.B., 628 A.2d 1271 (Vt. 1993). Where such an adoption has occurred, both adults are, under the laws of all jurisdictions, parents of the child and the legal rules governing support and custody should be unaffected by the gender of the parties or their sexual orientation. Although the availability of second-parent adoptions thus clearly benefits those gay and lesbian partners who are able to access this legal category, it may indirectly disadvantage non-biological co-parents who, for whatever reason, did not adopt the child prior to the breakup of the adult partnership. *See* Titchenal v. Dexter, 693 A.2d 682 (Vt. 1997) (rejecting equitable remedies to maintain a legally protected relationship between the child and the non-biological mother and citing the woman's failure to adopt in support of the decision). *See generally* Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17, 32-5 (1999).

the *Principles* call for the application of the same rules applied to the dissolution of heterosexual marriages, I simply point out this aspect of the document. Insofar as the *Principles* apply a modified version of the rules applicable to more traditional relationships, I point to how the rules are modified. Thus, this commentary does not provide a complete understanding of the law that would be applied to gay and lesbian relationships if a jurisdiction were to adopt the *Principles* in their entirety. I limit the scope of the commentary for two reasons: first, because to do more would require a treatise or a reproduction of the *Principles* themselves; and second, because the aspects of the *Principles* that recognize claims arising out of gay and lesbian relationships may serve as the basis for legal arguments even within a system that has not adopted the *Principles pro tanto.*

### A. Rights of Gay and Lesbian Parents to Children Produced During Previous Heterosexual Relationships

As has been widely recognized, family courts have frequently allowed the homosexuality of a parent to be counted against that parent in determining custody or visitation rights. The applicable criteria have ranged from a presumption, often quite strong,[17] that any indicia of homosexuality by a parent is a negative factor,[18] to a rule that allows consideration of sexual orientation only when it can be shown to have a nexus, i.e., an effect on the child.[19]

The *Principles*, in laying out the criteria for determining a "parenting plan"—which comprises what is traditionally referred to as custody and visitation—come out firmly in favor of the legal irrelevance of sexual orientation. Section 2.14 states that "in issuing orders under this Chapter, the court should disregard . . . the sexual orientation of a parent."[20] Homosexual behavior, like heterosexual behavior, is also discounted, and any such "extramarital sexual conduct of a parent"[21] should be disregarded "except upon a showing that it is harmful to the child."[22] The only limitation to this rule recognizes that such fac-

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17. *See, e.g.*, S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987)(signs of affection between mother and her partner "can never be kept private enough to be a neutral factor in the development of a child's values and character").

18. *See, e.g.*, Jacobsen v. Jacobsen, 314 N.W.2d 78, 80-82 (N.D. 1981); Constant A. v. Paul C.A., 496 A.2d 1, 5 (Pa. Super. Ct. 1985).

19. *See generally* Maradie v. Maradie, 680 So. 2d 538 (Fla. Dist. Ct. App. 1996); Pulliam v. Smith, 476 S.E.2d 446 (N.C. Ct. App. 1996); Van Driel v. Van Driel, 525 N.W.2d 37 (S.D. 1994)(discussing the various rules applied in custody cases involving homosexual parents). There is a strong, but not absolute, trend over time towards criteria that lessen the potential negative effect of homosexuality. *See* ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.14, cmt. f (Tentative Draft No. 3 Part I 1998) [hereinafter ALI PRINCIPLES 1998] for a collection of a sample of the relevant cases and academic literature.

20. ALI PRINCIPLES 1998, *supra* note 19, § 2.14(1)(d).

21. Comment f notes that this rule "applies equally to homosexual and heterosexual conduct." *Id.* § 2.14(1)(e), cmt. f. *See also id.* at ch. 1, introductory cmt. f. Such an approach would significantly help the claims of gay and lesbian parents who are sometimes faced with the attitude that such behavior as hand-holding or sharing a bedroom behind closed doors is "flaunting" when the lovebirds are of the same sex. *See, e.g.*, S.E.G. v. R.A.G., 735 S.W.2d 164 (Mo. Ct. App. 1987); Roe v. Roe, 324 S.E.2d 691 (Va. 1985).

22. Most of the arguments for presumed risk of harm that have been advanced by courts and commentators, such as impact on gender identity, risks of sexual abuse, as well as stigma and its

tors as race or sex[23] or sexual orientation might become relevant insofar as they were shown to relate to the "parent's ability to . . . meet[] a child's needs for a positive self-image."[24] In the comments, this concern is discussed in the context of the homosexual child, who needs a parent who can respond appropriately to that dimension of the child's experience.[25]

While the black-letter *Principles* are highly favorable to the claims of gay and lesbian parents, the comments include one somewhat disturbing explanation for the position, perhaps displaying a perceived need to reflect the views and concerns of many of those within the ALI. The argument that homosexuals should have only limited access to their children in order to protect the children from becoming gay is rejected solely on the empirical ground that there is no evidence of such transmission of homosexuality.[26] I would have preferred an additional statement that the state has no legitimate interest in protecting children from becoming homosexual.

Other aspects of the rules governing custody might have particular impact on gay parents. First, the rules are designed to encourage the parties to develop their own agreement regarding parenting and requires deference to such agreements.[27] If this were the law, without a clear legal commitment to ignoring sexual orientation when the parties could not agree, a gay or lesbian parent might yield too much in negotiation—for fear of facing a homophobic court—and find it difficult to argue against judicial acceptance of the agreement.[28] Similarly, the *Principles*, like much current law, permit some inquiry into the child's preferences.[29] While this is often valuable, in the context of a child adjusting to information about a parent's sexual orientation, a judge must be sensitive to both the ways in which children may articulate these concerns and the possibilities of undue influence by the other parent, in assessing the child's responses.[30]

On the other hand, the *Principles* reflect a strong commitment to stability. Modification is permitted, with minor exceptions, only on a showing that there are new facts that amount to a "substantial change" of circumstances and that "a

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effects, appear to lack empirical support. *See* ALI PRINCIPLES 1998, *supra* note 19, § 2.14 cmt. f; *see also* Kathryn Kendell, *Sexual Orientation and Child Custody*, 35 TRIAL 42 (1999).

23. Gays and lesbians should also be pleased to note that the comments, in rejecting the argument that "sex-matching" of child and primary custodial parent furthers the development of a child's gender identity, rejects the very concept as "the product of gender-role stereotyping" which the state has no right to further in its decision making. ALI PRINCIPLES 1998, *supra* note 19, § 2.14 cmt. c.

24. *Id.* § 2.14(2).

25. ALI PRINCIPLES 2000, *supra* note 4, § 2.14 cmt. e, illus. 17.

26. *Id.* § 2.14 cmt. e.

27. *Id.* § 2.07.

28. A party challenging such an agreement must meet the high standard of showing that "the plan would be harmful to the child." *Id.* § 2.07(1)(b).

29. Section 2.16 permits an interview of the child by the court or another person at the court's direction. Section 2.09(1)(b) allows the court to adjust the allocation of custodial responsibility "to accommodate the firm and reasonable preferences of a child" of sufficient age as set out in a statewide rule.

30. *See generally* Kirsten Lea Doolittle, Note, *Don't Ask, You May Not Want to Know: Custody Preferences of Children of Gay and Lesbian Parents*, 73 S. CAL. L. REV. 677 (2000).

modification is necessary to the child's welfare."[31] Cohabitation of a parent is explicitly excluded as a basis for modification unless the parents have agreed otherwise or "harm to the child is shown."[32] Thus, if this were the rule of a jurisdiction, a divorced custodial parent could begin a relationship with a same-sex partner secure that it did not threaten her custodial rights.

Finally, the *Principles* provide a basis for fighting against certain actions of a homophobic former spouse. If the ex-spouse were shown to have persistently interfered with the gay or lesbian parent's access to the child,[33] the court is authorized to take such remedial actions as adjustments of the allocation of custodial responsibility or supervision of custodial transfers.[34]

B. Rights and Duties of Gay and Lesbian Non-Biological Co-Parents

The current state of the law regarding claims of persons other than legal parents to share in rights of parenthood (typically claims for custody or visitation) is unclear, though there may be a trend toward a greater willingness to recognize such claims through such devices as *in loco parentis*[35] or equitable estoppel.[36] Many courts still, however, refuse to order visitation with, or grant custody to other people, regardless of their relationship with the child, over the objection of a fit, legal parent.[37] In the specific context of claims of lesbian co-mothers, there is a similar split of opinion.[38] Academic commentary, on the whole, has favored the recognition of such claims under a variety of theories, which focus on a mixture of such factors as the agreement of the legal parent, the past parenting behavior of the claimant, and the dependency and emotional linkage that has developed between claimant and child.[39] It is perhaps unsur-

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31. ALI PRINCIPLES 1998, *supra* note 19, § 2.18(1).

32. *Id.* § 2.18(3)(b). Unfortunately, although the black letter statement in the *Principles* refers to "remarriage or cohabitation" the corresponding comment speaks only of remarriage.

33. The section does provide an exception where the interference reflects concern to protect the safety of the child or another family member, but the comments make clear that this is designed to deal with the problem of domestic abuse. *Id.* § 2.13(1)(d) cmt. e.

34. *Id.* § 2.13(1)(d), (2)(a), (c).

35. *See, e.g.*, Bupp v. Bupp, 718 A.2d 1278 (Pa. Super. Ct. 1998)(holding that boyfriends have standing to sue for visitation).

36. *See, e.g.*, Jean Maby H. v. Joseph H., 676 N.Y.S.2d 677 (N.Y. App. Div. 1998)(allowing husband who was not child's biological father to seek visitation under a best interests of child standard).

37. *See, e.g.*, Stamps v. Rawlins, 761 S.W.2d 933 (Ark. 1988)(rejecting claim of stepfather).

38. The most widely cited cases rejecting co-mother claims include Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Cal. Ct. App. 1991), and Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991). More recent cases taking the same position that a court has no jurisdiction to grant visitation to a lesbian co-mother who is not a legal parent over the objection of a fit legal parent include West v. Superior Court (Lockrem), 69 Cal. Rptr. 2d. 160 (Cal. Ct. App. 1997), and McGuffin v. Overton, 542 N.W.2d 288 (Mich. Ct. App. 1995). Other cases recognize that lesbian co-mothers can bring such claims and have the courts consider them. *See e.g.*, E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999)(holding that trial court has equitable power to grant visitation; order so granting affirmed), J.A.L. v. E.P.H., 682 A.2d 1314 (Pa. Super. Ct. 1996)(holding that party who stands *in loco parentis* has standing; remanded for hearing on visitation), and *In re* Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995), *cert. denied sub nom.* Holtzman v. Knott, 516 U.S. 975 (1995)(holding that party with parent-like relationship has standing; remanded for hearing on visitation).

39. *See, e.g.*, Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299 (1997); Gilbert A. Holmes, *The Tie That Binds: The Constitutional*

prising that the *Principles* are relatively open to such claims since the Reporter for the chapter on custody issues is Professor Bartlett, the author of one of the leading articles advocating recognition of the rights of some persons who are not legal parents.[40]

The *Principles* as originally proposed left the question of who was a parent and who could claim rights to a share of custody almost entirely up to otherwise applicable state law, explicitly recognizing only a category of de facto parents with claims subordinate to those of legal parents. As finally adopted, however, the *Principles* also included a category of parent by estoppel, with rights equal to those of legal parents[41] and a new category of de facto parents.[42] Some same-sex co-parents will fall within each of these categories. The remainder of this section first ummarizes the criteria a person must meet to fit within each category and then lays out the rights and duties that are granted to each.

The category of parent by estoppel is designed to include certain non-biological co-parents. Where a same-sex couple plan to have a child together and to raise it as co-parents, it will generally be relatively easy to meet the *Principles'* criteria.[43] Note, however, that this rule has a few potential pitfalls.

First, the relevant section of the *Principles* requires that the court determine that recognition of the co-parent's status is in the child's best interest. While the commentary suggests that courts should usually find in favor of recognition,[44] it is worth noting that the claims of heterosexual men who have become parents by estoppel, either because they have been held liable for child support or because they acted as fathers to children they wrongly believed to be their biological offspring, are subject to no such "best interests" limitation.

Second, the relationship between co-parent and child must be pursuant to a "prior co-parenting agreement." The *Principles'* comments indicate that the agreement need not be formal or written, but they also note that the lack of such formalities, like the failure to adopt when adoption was possible, may be relevant to the factual determination whether there was such an agreement.[45] Given

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*Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358 (1994); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Need of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990). There has also been some commentary critical of such claims. *See e.g.*, John Dewitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351 (1998). Biological parents seeking to block claims of their lesbian former partners might also cite Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833.

40. *See* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879 (1984).

41. *See, e.g.*, ALI PRINCIPLES 2000, *supra* note 4, §2.03(1)(b) cmt. b.

42. *See id.* § 2.03(1)(c).

43. The *Principles* state:

> A parent by estoppel is an individual who, though not a legal parent, . . . [has] lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as a parent, as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition as a parent is in the child's best interest.

*Id.* § 2.03(1)(b)(iii).

44. *Id.* § 2.03 (1)(b)(iii) cmt. b(iii).

45. *Id.*

the risk that a case may come before a judge skeptical about, or even hostile toward, lesbian and gay co-parenting, it would behoove any risk-averse partner who will not be the biological parent to get a written agreement.[46]

Finally, the *Principles* require a prior agreement with both parents if there are two legal parents. Where the couple uses an anonymous sperm donor, the non-biological mother is protected, as a practical matter.[47] Some lesbian couples, however, prefer to use non-anonymous sperm donors, who may be expected to have any of a range of relationships with the resulting child, from none at all to regular visitation, with the child aware that the donor is his or her biological father. Gay couples who use a surrogate to bear a child of which one of them is the biological father will generally know the identity of the mother, and state law will recognize such a woman as a legal parent unless and until she formally gives up her rights. There is a significant risk in these situations that the same-sex couple planning to raise the child may neglect to obtain the agreement of the other legal parent to the co-parenting arrangement. Such failure may then make it impossible for the non-biological parent later to establish her/his parenthood by estoppel.

A co-parent who enters a child's life after birth may also establish a claim as a parent by estoppel if she lives with the child for at least two years, under criteria otherwise essentially parallel to those for co-parents *ab initio*.[48] The pitfalls discussed above, however, are likely to be fatal in many such cases. The parent-child relationship is more likely to develop over time and, even where the partner has fully concurred with the non-biological partner taking on "full and permanent responsibilities" as parent, the agreement is less likely to be reduced to writing and will thus be harder to prove. Additionally, there is much more likely to be another legal parent. He or she may not agree to such a co-parenting arrangement; even if this person does agree in fact, the agreement may be hard to prove (especially if the biological residential parent is now disputing the co-parent's claims). The *Principles* indicate that such an agreement by the non-residential legal parent should not be implied if that parent exercises his or her parental rights at even a modest level.[49] Finally, even if both legal parents agree to the co-parenting relationship, "the case for recognition of an additional parent is weaker" when applying the best interests sub-test.[50]

While these are the only two categories of gay/lesbian parents by estoppel that the *Principles* seem to contemplate, a plausible reading of section 2.03(1)(b)(i), granting that status to an individual who is liable for child support, could include certain same-sex co-parents. The commentary cross-references section 3.02A, and limits the rights of parents by estoppel under section 2.03 to those who are held liable for support, not extending it to those whom the bio-

46. This, of course, means that non-biological parents who are poorer or less legally sophisticated, are more likely to lose the parental rights they expected to have.

47. As a matter of formal doctrine, the statutes denying a legal parent-child relationship for sperm donors are often written only to protect married donee women and their husbands against such claims. *See e.g.*, COLO. REV. STAT. ANN. § 19-4-106, N.Y. McKinney's DOM REL LAW. § 73 (1999). The relevant statutes are collected in Adoption Law & Practice §14.02[1] (Joan Hollinger, ed. 1998).

48. ALI PRINCIPLES 2000, *supra* note 4, § 2.03(1)(b)(iv).

49. *Id.* § 2.03 cmt. (b)(iv).

50. *Id.* § 2.03 cmt. (b)(iii).

logical parent does not seek to hold liable. A biological parent might, however, seek support or be entitled to it under section 3.02A if she can show that the child was born while the partners were cohabiting or that the child's conception was pursuant to an agreement that they would share responsibility for the child and each be a parent to it.[51] Furthermore, even if the biological parent were not seeking to impose a support obligation on her partner, one can imagine a situation in which, at the time of the dissolution of a same-sex relationship, the biological parent agrees to accept child support from the former partner. If such an agreement were accepted by the court, at that point the non-biological parent would arguably be "liable" for support. If so, she has the rights of a parent by estoppel, as opposed to the lesser rights of a de facto parent, in any future dispute, even if she had not met all the criteria of sections 2.03(1)(b) (iii) or (iv).

A non-biological co-parent who cannot prove herself as a parent by estoppel may still meet the less stringent standards to be recognized as a de facto parent. This requires, first, that she or he has lived with the child for at least two years.[52] Second, the claimant must show the agreement of a legal parent to her formation of a parent-child relationship and that the relationship was not carried out primarily for financial compensation.[53] Finally, the claimant must have regularly performed either a majority of the caretaking functions or as much of these functions as the residential parent.[54]

This claim is easier to show in two ways. First, no agreement by any legal parent other than the claimant's intimate partner is necessary. Second, the required agreement is less sweeping; it need not provide that the claimant have full parental rights or that the claimant's responsibilities of parenthood be permanent. In one way, however, it may be more difficult to show than parenthood by estoppel. The claimant must perform at least as much of the caretaking as the legal parent. Thus, if the couple agrees that one of the co-parents will be the primary breadwinner, though playing an important part in the child's daily life, it would behoove the non-biological parent to take on the primary caretaking role.[55]

The consequences of establishing parenthood by estoppel are essentially identical to the consequences of being a legal parent. A parent by estoppel has the same standing to bring an action regarding custodial or decisionmaking responsibility for a child and the same right to be given notice of any such action regarding the child.[56] She has the same presumptive right to share in decision making responsibility,[57] and the same right to a share of custodial responsibility

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51. *Id.* § 3.02A(1)(b). Note that the criteria here are somewhat less stringent than those in section 2.03 for the non-biological parent claiming a right of parenthood by estoppel.

52. The two year requirement is a minimum. In some cases, a longer period may be required to meet the qualitative test of "a significant period of time" depending on the child's age, the frequency of contact, and the intensity of the relationship." *Id.* § 2.03 cmt. c(iv).

53. *Id.* § 2.03(1)(c)(ii).

54. ALI PRINCIPLES 2000, *supra* note 4, § 2.03(1)(c). I am assuming here that the biological parent with whom the claimant lives is the primary residential parent of the child.

55. *See* Julie Shapiro, *De Facto Parents and the Unfulfilled Promise of the New ALI Principles*, 35 WILLAMETTE L. REV. 769, 778-80 (1999).

56. ALI PRINCIPLES 2000, *supra* note 4, § 2.04(1)(b).

57. *Id.* § 2.10(2).

paralleling the proportion of caretaking she provided during the relationship.[58] The parent by estoppel and the legal parent have the same priority over de facto parents and people who are not parents.[59]

De facto parents' rights are more circumscribed. They are only entitled to bring an action if they have lived with the child, or have "consistently maintained or attempted to maintain the parental relationship" within the previous six months.[60] They are only entitled to notice of an action regarding the child during the same six-month period or once they have been allocated custodial or decisionmaking responsibilities.[61] The text of section 2.10, regarding decision-making authority, refers only to parents, and to allocation of such authority to "one parent or two parents jointly." Only in the *Principles'* comments is it clear that courts may allocate such authority to a de facto parent; the same comment makes clear that "the presumption of joint decisionmaking applies only to a child's legal parents."[62] Thus, when a same-sex relationship ends, the parent who has been unable to establish parenthood by estoppel may be cut out from any voice in decisions over the child's education, medical care or religious upbringing.

Finally, the claims of a de facto parent for a share of custody are subsidiary to those of legal parents and parents by estoppel. The basic provision for allocating custodial time, section 2.09, applies only to "parents," a term which does not include de facto parents. Rights of de facto parents are set out in section 2.21. This section calls for the application of section 2.09 with two important provisos. First, a de facto parent cannot be granted primary custodial responsibility so long as a legal parent who has been exercising a reasonable share of parenting is fit and willing unless she can show that granting custody to that parent would not be harmful to the child.[63] Thus, when a same-sex relationship ends, the de facto parent would, in effect, have to prove the legal parent unfit in order to obtain the greater share of custodial time.[64] Second, the de facto parent's time with a child can be restricted or even eliminated if there are other legal parents, or persons allocated custodial responsibility under a prior parenting plan, and it "would be impractical" to add another adult with legally enforceable claims on the child's time.[65] This provision is particularly likely to apply where a legal par-

58. *Id.* § 2.09(1). In addition, she has an "override" providing a presumptive right to a minimum amount of time as set out in a general rule of the jurisdiction so long as one performed at least a reasonable share of parenting functions. *Id.* § 2.09(1)(a).

59. *Id.* §§ 2.21(1)(a), 2.21(2).

60. *Id.* § 2.04(1)(c). The latter part of the provision is designed to avoid either penalizing a person who has unsuccessfully attempted to maintain contact with the child through non-legal means and whose patience in this effort has resulted in a lapse of contact for longer than 6 months or forcing her into possibly unnecessary and premature litigation to protect her rights. ALI PRINCIPLES 2000, *supra* note 4, § 2.04 cmt. d, illus. 5.

61. *Id.* § 2.04(1)(c), (e).

62. *Id.* § 2.10 cmt. c.

63. *Id.* § 2.21(1)(a).

64. It seems most unlikely that granting custody to a fit parent would be found to be demonstrably harmful to the child or that one partner in a gay or lesbian family did not even perform a reasonable share of the parenting, which can include breadwinning.

65. *Id.* § 2.21(1)(b).

ent brings a child into an intimate partnership, whether the child is the product of a previous heterosexual or homosexual relationship.[66]

Parents by estoppel and de facto parents differ in their obligations as well as their rights. Parents by estoppel should be liable for child support under the same terms as legal parents.[67] De facto parents, however, are not obligated to pay child support under state law, nor under section 3.02A (since if they were, they would be entitled to the rights of parents by estoppel as well). The comments indicate that, at least where de facto parents are provided only a small amount of custodial responsibility, they are neither eligible to receive child support nor obligated to pay it.[68] If they were granted the rights of a primary caretaker or dual-residence caretaker, they would be entitled to receive support from the legal parent(s).[69]

One should also note the treatment of the claims of biological parents who are not legal parents. This category is designed to include non-anonymous sperm donors or surrogate mothers who have an agreement with the legal parent by which they have retained some parental rights or responsibilities. The *Principles* do not provide for the enforcement of such agreements. However, they do authorize courts to grant these men and women some visitation with the child over the objections of the legal parent.[70]

Claims of non-parents, including de facto parents, may be more limited in practice than the *Principles* would permit. If lawyers attempt to apply the *Principles* through judicial processes, they may be confronted with statutes or well-established state law principles in which parental autonomy acts as a barrier to legally enforceable claims of non-parents. For example, many states require a non-parent to show that the parent is unfit in order to prevail in a custody action.[71] Legislative adoption of this aspect of the *Principles* would remove these

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66. Where the previous relationship was heterosexual, there are two legal parents, each of whom has priority, so it is the de facto parent whose claims must give way. Where there is more than one claimant who is only a de facto parent, the court can reduce or eliminate the time allocated to either or both. *Id.* § 2.21 cmt. b, illus. 4. Although Section 2.21 uses the term "legal parent" to define the class of persons with priority over de facto parents, the better reading is that parents by estoppel have the same priority. Thus the same-sex co-parent from one relationship may have priority over the same-sex co-parent from an earlier or later one, if one is a parent by estoppel and the other only a de facto parent.

67. The *Principles* began with the concept of establishing parental duties by estoppel under Section 3.02A and then added the rule that such a person automatically obtained the rights of a parent by estoppel under section 2.03(1)(b)(i). The relationship between right and duty is, however, inferentially mutual for all categories of parents by estoppel.

68. ALI PRINCIPLES 2000, *supra* note 4, § 3.17 cmt. c, illus. 3.

69. *Id.* § 3.17(1).

70. *Id.* § 2.21(2)(b); *see also id.* § 2.21 cmt. c. *Cf. In re* Thomas S. v. Robin Y., 618 N.Y.S. 2d 356 (1994)(granting gay sperm donor who had had a relationship with child (who knew he was her biological father), but had never had custody or provided support, an order of filiation over protest of lesbian biological mother and co-mother who were raising child). Under the *Principles,* grandparents or other relatives who have "developed a significant relationship with the child" are the only other category of "non-parents" who are granted such rights. *Id.* § 2.21(2)(a). Like de facto parents, they are generally outside the child support rules. *See id.* § 3.17.

71. *See, e.g.*, Schuh v. Roberson, 788 S.W.2d 740, 741 (Ark. 1990); McDonald v. Wrigley, 870 P.2d 777, 779 (Okla. 1994).

impediments, but a constitutional barrier may remain. In *Troxel v. Granville*,[72] a badly fractured Supreme Court reversed the grant of grandparent visitation under a Washington state statute as an unconstitutional interference with parents' rights. *Troxel* is readily distinguishable from the typical claim of a lesbian co-mother who has shown herself to be a de facto parent; the grandparents in *Troxel* had never been co-resident with the child or carried out significant caretaking functions and the mother was willing to grant them some visitation, though less than they wished. The Washington statute was also breathtakingly broad—far more than the *Principles*—in the category of persons who could bring an action seeking visitation. At a minimum, however, *Troxel* puts in doubt the claims of biological, but not legal, parents who have never lived with the child, and its full implications await elaboration in future cases.

### C. Financial Consequences of Dissolution of a Same-Sex Relationship

In most jurisdictions, there are no legal consequences that necessarily flow from the dissolution of a non-marital intimate relationship. The parties are free to walk away with whatever property is titled in their name and there are no continuing obligations. One exception is Vermont, where statutory law provides for the application of marriage-like rules at the end of a civil union, as well as marriage-like benefits vis-à-vis the state and third parties during the relationship.[73] The significance of the Vermont statute in cases where partners to a dissolving civil union do not live in Vermont is unclear. Other states may allow parties to a non-marital partnership to assume legally enforceable rights and duties through contract. States vary, however, in their willingness to find an enforceable contract;[74] decisions sometimes seem to stretch contract doctrine in order to allow the recognition of a claim better explained as based in principles of equity.[75]

In contrast, the *Principles* choose to adopt an explicitly equitable, status-based approach, allowing those who meet the definition of domestic partners to assert claims against each other at the dissolution of the relationship almost identical to those available to spouses. In this section, I briefly set out the *Principles*' definition of domestic partner, the consequences of meeting that definition, and the availability of contractual means to vary these consequences.

The definition of domestic partner is designed to reach both same-sex couples and different-sex couples who "for a significant period of time share a primary residence and a life together as a couple."[76] That standard is reduced to a

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72. 530 U.S. 7 (2000).

73. VT. STAT. ANN. tit. xv, § 1201-06 (1999). Hawaii provides a similar set of benefits to same-sex couples who register as "reciprocal beneficiaries," while concurrently denying them the right to marry. 1997 Haw. Sess. Laws 383 (the codification is scattered through the Hawaii statutes).

74. *Compare* Posik v. Layton, 695 So. 2d 759 (Fla. Dist. Ct. App. 1997)(requiring that such contracts be in writing to be enforced) *with* Marvin v. Marvin, 557 P.2d 106 (Cal. 1976)(holding that implied contracts are enforceable) *and* Morone v. Morone, 413 N.E.2d 1154 (N.Y. 1980)(express contracts, whether oral or written, are enforceable).

75. *See* Watts v. Watts, 448 N.W.2d 292 (Wis. Ct. App. 1989)(finding for plaintiff on a quasi-contract unjust enrichment claim). *See generally* ALI PRINCIPLES 2000, *supra* note 4, § 6.03 cmt. b, reporter's notes.

76. ALI PRINCIPLES 2000, *supra* note 4, § 6.03(1).

rule-like presumption that a couple are domestic partners if they have lived together for the cohabitation period.[77] The *Principles* also provide for a multi-factor standard that can be used either to establish that members of a couple are domestic partners when they have been together for less than the cohabitation period,[78] or to rebut the presumption when the durational rule has been met.[79]

The list of factors is an interesting potpourri. Six of the first seven factors relate to ways in which the relationship involves economic interdependence or changes in the lives of the parties with economic consequences.[80] Three relate to a variety of concrete, public manifestations of the intent to be a couple. The first—a reflection of the existing law regarding contract-like behavior—could arise in either same-sex or different-sex relationships.[81] The others are directed primarily towards one or the other flavor of non-marital couple. Gay and lesbian partners can cite, as evidence of a domestic partnership, their "participation in some form of commitment ceremony or registration as a domestic partnership."[82] The black letter *Principles* explicitly limit themselves to situations where the ceremony or registration "does not give rise to the rights and obligations established by this Chapter . . . under applicable law." The *Principles'* comments indicate that this addition was included since in such cases, "this Chapter is unnecessary."[83]

This seems to me be a mistake. The question of what the applicable law is,[84] and whether the proviso applies if the applicable law provides a much more restricted set of rights *inter se*,[85] could be very complex. There seems no reason to require a claimant to fight those battles, since the deletion of the proviso would

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77. *Id.* § 6.03(3). This period is to be "set in a uniform rule of statewide application." *Id.* In the examples and discussion in the comments, the Reporters use a three-year period. In order to invoke this presumption, they must "maintain a common household," i.e., be living together as a couple rather than as two persons within a larger group living arrangement with non-relatives. The *Principles* also provide for a shorter time period to invoke the rule that a couple are domestic partners, where the couple are living together with their common child. *Id.* §6.03(2). This provision could apply to a same-sex couple if each partner is a legal parent or a parent by estoppel of the child, but not if one of the adults is only a de facto parent. *Id.* § 6.03(5).

78. *Id.* § 6.03(6). In addition, the proponent must show that the couple was together for a "significant period," measured in large part by "the extent to which [aspects of the relationship] have wrought change in the life of one or both parties." *Id.*

79. ALI PRINCIPLES 2000, *supra* note 4, § 6.03(3).

80. *Id.* § 6.03(7)(b-f).

81. *Id.* § 6.03(7)(a)("oral or written statements or promises made to one another, or representations jointly made to third parties, regarding their relationship").

82. *Id.* § 6.03(7)(j). Section 6.03(7)(k) provides analogous significance for proof that the parties had participated in a void or voidable marriage. While this might in theory be applicable to same-sex couples, a court is more likely to avoid sticky legal questions by characterizing the facts as constituting a "commitment ceremony," which has the identical legal significance.

83. *Id.* § 6.03 cmt. g.

84. For example, one might dispute whether Vermont law continued to provide the "applicable law" in the context of a couple who had entered into a civil union in that state, when one or both parties had since left Vermont for a state which did not recognize civil unions.

85. For example, the *Principles* provide for compensatory payments through a set of rules that are somewhat different than the criteria for spousal support currently in effect in any state. A partner to a dissolved domestic partnership thus might be entitled to different rights in a state that had adopted Chapter 6, but had not adopted the *Principles* in their entirety.

have simply made the *Principles* superfluous where the identical rights were otherwise available.

The remaining criteria involve facts suggesting that the partners thought of themselves or presented themselves to others as a couple, including—as one among thirteen factors—the "emotional or physical intimacy of the parties' relationship."[86] It might seem odd that the structure seems to make it relatively unimportant, in determining whether two people form a domestic partnership, whether they are intimate, sexual partners. The downplaying of this factor, however, is probably wise. It avoids the concern over "rewarding" meretricious relationships that appear in some of the case law, and that leads to agreements between partners that studiously avoid any mention of the expectation of sexual intimacy.[87] It also avoids, in most cases, the need for discovery or testimony regarding the existence and extent of such intimacy. Gay couples, in particular, are likely to benefit from rules that do not require judges to think about gay sex.

Assume now that two people have been deemed to be domestic partners; what flows from that? Subject to certain limitations and exceptions, the consequences are the same as for a marriage; the right to a share of domestic partnership (marital) property[88] and, in certain situations, to compensatory payments (formerly known as alimony or spousal support).

The most significant limitation is when one of the domestic partners is married to someone else during part of the period of the domestic partnership. The domestic partner's claims are always subordinate to those of the spouse.[89] Consider, for example, a man, Albert, who realizes he is gay and moves out of the marital home he shared with Jane and establishes a domestic partnership with his male lover, Donald. While ordinarily Jane's marital property rights are fixed as of the separation, the transition may be sufficiently ambiguous so that the same property is subject to claims by both Jane and Donald. Jane's claims have priority (though Albert, rather than Donald, might end up bearing the cost of the double claims). Similarly, Jane's claims for compensatory payments are to be paid first out of Albert's resources, and Donald's claims recognized only insofar as this would not compromise Jane's rights.[90] The establishment of a lesbian or

86. ALI PRINCIPLES 2000, *supra* note 4, § 6.03(7)(i).

87. *See, e.g.*, Marvin v. Marvin, 557 P. 2d 106, 110, (Cal. 1976); *Posik*, *supra* note 74, 695 So. 2d at 761. Substantively, it also means that domestic partnership status may be available to, for example, a pair of Boston spinsters, who may or may not have been physically intimate, so long as their lives were intertwined in other ways.

88. The definition of domestic partnership property explicitly tracks the definition of marital property, with the necessary modification that the starting point—which cannot be the marriage date—is when "the domestic partners began sharing a primary residence" unless it is shown that they did not become a couple until a later date. ALI PRINCIPLES 2000, *supra* note 4, § 6.04(2)(a). While the starting date is "no later than" the date of conception in the case of a common biological child, a gay couple who plans a child together is not subject to this rule (though it is very unlikely that a couple would make such plans prior to sharing a primary residence; accidental pregnancies are a heterosexual issue).

89. *Id.* § 6.01(5).

90. *See id.* § 6.01 cmt. c, illus. 4.

gay intimate partnership by a person who had been married may also affect that person's claim to continued support from a prior spouse under the *Principles*.[91]

The treatment is less generous than in the case of marriage in regard to recharacterization. The *Principles* provide a default rule for marriages that recharacterizes an increasing share of separate property as marital property as the duration of the marriage increases.[92] They explicitly reject the application of this rule to domestic partnerships, with only the explanation that no state applies such a rule to cohabitants.[93] No attempt is made to provide a policy reason for this distinction and the *Principles'* authors do not generally seem to feel bound to follow current law.

Finally, the *Principles* recognize, as a basis for compensatory payment, the situation of a spouse who is staying home to care for his or her own child.[94] By contrast, a domestic partner can only make such a claim where the partner who has been the primary breadwinner is a legal parent of the child or a parent by estoppel.[95] If the primary breadwinner is "only" a de facto parent, she cannot be ordered to make payments to reflect the economic situation, even if the two had agreed that the legal parent would spend most of her time on childcare activities and not in the paid labor market. This is particularly likely to disadvantage the woman with a child who enters into a same-sex relationship. So long as the biological father maintains a modicum of connection with the child, her new partner cannot be more than a de facto parent, and the mother will be unable to obtain payments reflecting an established pattern of interdependency by which she is substantially economically disadvantaged at dissolution.

In general, these rules are default rules, rather than absolute rules, for both domestic partners and spouses. Chapter Seven of the *Principles* lays out the rules governing agreements. Almost all the rules, other than those dealing with child support, can be changed by agreement, whether before the relationship begins, during the relationship, or at separation/dissolution. Because the relationships are between intimates, who are often less able or willing than parties dealing at arms' length to assess accurately the risks or to protect their own interests, the *Principles* lay down a series of procedural devices to provide some assurance that the parties to premarital, marital and domestic partnership agreements have adequate opportunities to assess and protect their interests.

Because gay and lesbian couples have generally had none of the status protections of marriage, they have, perhaps, been more aware of the need to create contracts to protect themselves. Such legal instruments provide rights that parties would not otherwise have—over property at dissolution, over property

91. If the payee has been in such a relationship for a sufficient period to meet the criteria for a domestic partnership under Chapter 6, payments from a former spouse presumptively terminate. If she is shown to have been in such a relationship for three months or more, the payments are suspended. *See* ALI PRINCIPLES 1997, *supra* note 11, § 5.10.

92. *Id.* § 4.18.

93. ALI PRINCIPLES 2000, *supra* note 4, § 6.04(3). While the comment does note that domestic partners could contract for such recharacterization, the underlying view of Chapter 6 is that the default rules should be changed so that one needs to contract out of obligations to one's partner, not contract into them. *See id.* § 6.04(3) cmt. b.

94. ALI PRINCIPLES 1997, *supra* note 11, § 5.06.

95. ALI PRINCIPLES 2000, *supra* note 4, § 6.06(2).

at death, regarding children who are legally the child of only one partner. The creation of such contractual instruments has been a significant part of the practice of attorneys serving a primarily gay and lesbian clientele. It will be interesting to see, insofar as the *Principles* are adopted, if gay and lesbian couples will be more inclined than heterosexual engaged couples and spouses to use contractual arrangements to protect the property and income of the more powerful partner against what would otherwise be the enforceable claims of the weaker partner.

It is also interesting to speculate about the likely effect of Chapter Six. If it were adopted by a state legislature, it would substantially alter the legal landscape for gay and lesbian couples. That fact, however, may produce substantial political resistance to such enactment, as the passage of the Defense of Marriage Act and the similar state statutes in the latee 1990s suggests.[96] On the other hand, a legislature might be persuaded that Chapter Six provides a fair compromise; gays and lesbians are still denied the symbol of marriage and even the benefits of marriage vis-à-vis third parties, while being granted rights and duties *inter se*. The only class of persons substantively disadvantaged by the adoption would be a subset of the gay/lesbian population—the partners in dissolving same-sex relationships who would now have to share property or future income streams.

Could the principles enunciated in Chapter Six be useful in some context other than legislative adoption? The reference to a "cohabitation period, set in a uniform rule of statewide application" argues against this, although a state supreme court could possibly adopt this part of the *Principles* as a common law rule if there were no statute forbidding it.

Chapter Six might also have influence in a less global sense. Judges who could be persuaded of the general correctness of the approach might use some of the language or commentary as a basis for more modest adjustments to existing law. For example, in applying state law allowing implied contractual arrangements between cohabitants, a court might look to the factors in section 6.03 as indicative of such a contract, perhaps even adopting a presumptive rule that the parties intended to undertake mutual financial obligations if they had lived together as a couple for longer than a fixed period.

Such creative uses of the rules and general approach of Chapter Six might be particularly attractive to members of a civil union. If their relationship dissolves and one of the partners brings an action in a state that has not itself recognized civil unions, the court might avoid choice-of-law questions by construing the fact of the civil union as intent to be bound *inter se* by marriage-like rules and then applying those to the parties as contract law, citing the *Principles* as support by analogy. Similarly, where the partners have agreed, either in a prior contract or at the dissolution of the relationship, to use some form of alternate dispute resolution to deal with the financial consequences of their relationship, the mediator or arbitrator might look to the *Principles* as a template for a regime of marriage-like obligations for members of a domestic partnership.

It is far too soon to know what the influence of the *Principles* will be in general, or for gay and lesbian couples in particular. It is not too soon to realize that

96. *See supra* note 2 and accompanying text.

they open up a range of possibilities limited only by the imagination and creativity of lawyers and their clients.