

MEMORANDUM

To: Gail Hagerty, Chair, & Barbara Atwood, Vice Chair, Study Committee on the Economic Rights of Unmarried Cohabitants
From: Naomi Cahn
Re: Statutory and Scholarly Approaches to the Economic Rights of Unmarried Cohabitants
Date: October 14, 2017

This memo provides an overview of statutory approaches to cohabitants' rights. It briefly addresses statutes of fraud issues, reciprocal beneficiaries, designated beneficiaries, civil unions, domestic partnerships, and common law marriage (which are, sometimes, validated by statute). The memo also notes some of the international approaches before turning to discuss the proposals of the American Law Institute ("ALI") and various scholars.

The statuses discussed differ as to whether they are opt-in — established only upon the filing of a document and often, a minimal fee — or opt-out — established by cohabiting and sharing a life (albeit proved in court). The statuses also differ as to whether they impose rights and responsibilities during the relationship, at its termination, or both. Two of the statutes and one of the proposals cover relationships between non-intimate partners.

Part 1: Statutes

1. STATUTE OF FRAUDS ISSUES: A few states regulate contracts between nonmarital cohabitants through their statute of frauds, including Minnesota, New Jersey, and Texas.¹ For example, New Jersey requires a writing, "signed by the party to be charged therewith," in order to enforce:

A promise by one party to a non-marital personal relationship to provide support or other consideration for the other party, either during the course of such relationship or after its termination. For the purposes of this subsection, no such written promise is binding unless it was made with the independent advice of counsel for both parties.²

The states do not otherwise include legislative regulation of these contracts.

¹ See MINN. STAT. ANN. § 513.075 (West 1980) ("Cohabitation; property and financial agreements"). "If sexual relations between the parties are contemplated, a contract between a man and a woman [sic] who are living together in this state out of wedlock, or who are about to commence living together in this state out of wedlock, is enforceable as to terms concerning the property and financial relations of the parties only if: (1) the contract is written and signed by the parties; and (2) enforcement is sought after termination of the relationship." *Id.* The Texas statute of frauds explicitly covers an agreement made "on consideration of marriage or on consideration of nonmarital conjugal cohabitation." TEX. BUS. & COM. CODE ANN. § 26.01(b)(3) (West 2005).

² N.J. STAT. ANN. § 25:1-5(h) (West 2010).

2. **RECIPROCAL BENEFICIARIES:**³ In 1997, Hawaii developed the status of reciprocal beneficiaries.⁴ Those who register are subject to a set of state-mandated rights and responsibilities.

Qualifications: Any two unmarried adults over the age of 18 who are not eligible for marriage either because they are of the same sex [sic] or because they are related to each other can register as reciprocal beneficiaries. The enacting legislation uses, as an example, a widowed mother and her unmarried son.⁵ The applicants must register their status by filing a signed notarized declaration of reciprocal beneficiary relationship with the director of health.⁶

Benefits: Reciprocal beneficiaries receive a set of rights relating to health insurance, hospital visitation, healthcare decision making, suits for wrongful death, time off for bereavement, and some property rights, including the ability to hold property in a tenancy by the entirety. A reciprocal beneficiary is treated as a spouse for purposes of intestacy, the elective share, and a premarital will.⁷ The status does not impose post-relationship responsibilities if the relationship is voluntarily terminated.

Termination: The relationship can be terminated: (1) when either party files a signed notarized declaration of termination of reciprocal beneficiary relationship; or (2) automatically, when either party enters into a marriage or civil union.⁸

3. **DESIGNATED BENEFICIARIES:**⁹ Colorado established the status of “designated beneficiary” in 2009. It is an opt-in status, with individuals allowed to specify which responsibilities attach to their relationship.

Qualifications: The status is available to any two unmarried people over the age of eighteen regardless of sex or familial relationship, although they must not be in a civil union or marriage

³ For an overview of many of the different statuses, see *Marriage, Domestic Partnerships, and Civil Unions: Same-Sex Couples Within the United States*, NAT’L CTR. FOR LESBIAN RTS. (last updated June 2017), http://www.nclrights.org/wp-content/uploads/2013/07/Relationship_Recognition.pdf.

⁴ HAW. REV. STAT. ANN. § 572C-1 et seq. (West 2017).

⁵ Reciprocal Beneficiaries Act § –2, H.B. 118, 383 Leg. (Haw. 1997) (“Legislative Findings”); HAW. REV. STAT. ANN. § 572C-2 (West 2013) (still unchanged to recognize *Obergefell* as of October 7, 2017). See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁶ HAW. REV. STAT. ANN. § 572C-5 (West 2017).

⁷ HAW. REV. STAT. ANN. § 560:2-102 (West 2017) (intestacy); § 560:2-202 (“Elective share”); § 560:2-301 (premarital will). It appears when adopting the UPC, Hawaii added “or reciprocal beneficiary” after the word “spouse.” HAW. REV. STAT. ANN. § 560:2-402 (West 2017) (“Homestead allowance”).

⁸ HAW. REV. STAT. ANN. § 572C-7 (West 2012) (no mention of death in the statute); see HAW. DEP’T OF HEALTH, *About Reciprocal Beneficiary Relationships*, <http://health.hawaii.gov/vitalrecords/about-reciprocal-beneficiary-relationships/#register> (last visited Oct. 13, 2017) (providing the forms and links for registering and terminating the reciprocal beneficiary relationship).

⁹ COLO. REV. STAT. ANN. §§ 15-22-101; 15-22-112 (West 2009).

or another designated beneficiary relationship.¹⁰ The agreement must be properly recorded to be valid.

Benefits: The individuals can each choose to include or to exclude any of the sixteen rights and protections including jointly owning property, inheriting through intestacy, making health care decisions, suing for wrongful death, and benefitting from workers' compensation.¹¹ The statutory sample form is attached in Appendix A, although only substantial compliance is necessary. The status does not impose post-relationships responsibilities if the relationship is voluntarily terminated.

Termination: Either party can revoke a designated beneficiary by recording a revocation in the county in which the agreement was recorded, and the revocation is effective immediately.¹² The death of either party ends the agreement.¹³

4. CIVIL UNIONS: Civil unions generally offer the same rights as marriage, and, while some are limited to same-sex couples, others include opposite-sex couples as well. Vermont was the first to recognize civil unions, although, as of 2009, they are no longer available there.¹⁴ Civil unions are currently available in Colorado, Hawaii, Illinois, and New Jersey.¹⁵

5. DOMESTIC PARTNERSHIPS: Domestic partnerships carry a variety of benefits, depending on the jurisdiction. The following jurisdictions allow domestic partnerships: California, the District of Columbia, Maine, Nevada, New Jersey, Oregon, Washington, and Wisconsin. Many employers and municipalities also recognize domestic partnerships.¹⁶ As an example, California only allows domestic partnerships to couples of the same sex or those over the age of 62.¹⁷ The benefits, rights, and responsibilities are the same as marriage.¹⁸

¹⁰ COLO. REV. STAT. ANN. § 15-22-104 (West 2013) (“Requirements for a valid designated beneficiary agreement”).

¹¹ COLO. REV. STAT. ANN. § 15-22-105 (West 2017).

¹² COLO. REV. STAT. ANN. § 15-22-111 (West 2013).

¹³ COLO. REV. STAT. ANN. § 15-22-112 (West 2009).

¹⁴ The legalization of same-sex marriage resulted in other states withdrawing the option of civil unions. *See, e.g.,* NAT’L CONF. OF ST. LEGISLATURES, *Civil Unions & Domestic Partnership Statutes* (last updated Nov. 18, 2014), <http://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx>; *Relationship Recognition Other Than Marriage*, LESBIAN, GAY, BISEXUAL & TRANSGENDER FAMILY LAW (Courtney G. Joslin, Shannon P. Minter, & Catherine Sakimura, eds. 2017); Jessica R. Feinberg, *The Survival of Nonmarital Relationship Statutes in the Same-Sex Marriage Era: A Proposal*, 87 TEMP. L. REV. 47, 54–55 (2014).

¹⁵ COLO. REV. STAT. ANN. §§ 14-15-107; 14-15-117 (West 2017); D.C. CODE ANN. §§32-701; 32-710 (West 2016) (passed as B18-0010, 2009-2010 Council, 18th Period (D.C. 2009)); HAW. REV. STAT. ANN. §§ 572B-1 et seq. (West 2012); 750 ILL. COMP. STAT. ANN. 75/1 (West 2011); N.J. STAT. ANN. §§ 37:1-28; 37:1-36 (West 2007), *invalidated by Garden State Equal. v. Dow*, 79 A.3d 1036 (N.J. 2013).

¹⁶ *See generally Civil unions and comprehensive domestic partnership*, 1 SEXUAL ORIENTATION AND THE LAW § 2:4 (2017).

¹⁷ CAL. FAM. CODE § 297 (West 2012)(note that there are additional criteria, such as mental capacity, but that same-sex couples remain able to access the status regardless of whether they are under the age of 62, as of Oct. 14, 2017).

¹⁸ CAL. FAM. CODE § 297.5 (West 2007).

6. **COMMON LAW MARRIAGE:** A minority of states recognizes common law marriages.¹⁹ The requirements for a common law marriage typically include: (1) the parties must be eligible for marriage; (2) they must cohabit; (3) they must hold themselves out as married; and (4) they must have the mutual intent to be married. While the status truly is common law in most of the states that recognize it, a few have enacted statutes legitimating common law marriage.²⁰ Some states also recognize *putative spousehood*,²¹ an equitable doctrine that accords relief to a cohabitant who was married, believing in good faith there was no impediment to the marriage (although one existed).

7. **OTHER COUNTRIES:** Other countries range as to whether they offer “opt-in” or “opt-out” forms of legal recognition for cohabitants (or any recognition at all).²² In 1999, France adopted *Pacte Civil de Solidarite* [Civil Solidarity Pact] (“PACS”) to address the legal issues of cohabitating couples.²³ PACS set out various rights and duties for cohabitants; a PACS begins upon registration of a written agreement with the appropriate civil official.²⁴ Once registered, the couple receives many of the benefits of marriage, including income, estate, and gift tax benefits, and they are also jointly responsible for each other's debts.

In Canada, all of the provinces (except Quebec) have established an opt-out system for cohabitants.²⁵ After either having a child together or living together for a certain period of time, the couple is considered common law married and is entitled to many of the same rights as marital partners.²⁶

¹⁹ Kaiponanea T. Matsumura, *Choosing Marriage*, 50 U.C. DAVIS L. REV. 1999, 2066 (2017) (listing Colorado, Iowa, Kansas, Montana, New Hampshire, Rhode Island, South Carolina, Texas, Utah, and the District of Columbia).

²⁰ Montana, New Hampshire, Texas, and Utah have statutes concerning the status. See MONT. CODE ANN. § 40-1-403 (West 2017) (pending legislation under S.B. 375, 65th Leg., 2017 Sess., (Mont. 2017)); TEX. FAM. CODE ANN. § 2.401 (West 2005), *invalidated by Ranolls v. Dewling*, 223 F. Supp. 3d 613, 623 (E.D. Tex. 2016) (pending legislation in H.B. 573, 85th Leg. (Tex. 2017)); UTAH CODE ANN. § 30-1-4.5 (West 2011). For example, the New Hampshire statute provides that “[p]ersons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of 3 years, and until the decease of one of them, shall thereafter be deemed to have been legally married.” N.H. REV. STAT. ANN. § 457:39 (West 2017). Colorado establishes the eligibility requirements. COLO. REV. STAT. ANN. § 14-2-109.5 (West 2006).

²¹ E.g., UNIF. MARRIAGE AND DIVORCE ACT § 209 (UNIF. LAW COMM’N 1973).

²² See Lawrence W. Waggoner, *Marriage is on the Decline and Cohabitation is on the Rise: At What Point, if Ever, Should Unmarried Partners Acquire Marital Rights?*, 50 FAM. L.Q. 215, 235 (2016) (suggesting that the ULC study issues of marital rights for cohabitants, and noting that “the ULC will find helpful the Anglosphere marital-rights legislation. . .”).

²³ See, e.g., Consulate General of France in New York, *Civil Union (PACS)* (2013), <https://newyork.consulfrance.org/Civil-Union-PACS>.

²⁴ That is, the registrar of town halls as of Nov. 1, 2017. See *Pacs: en mairie à partir du 1er novembre 2017*, FR. PUB. SERV. (May, 16, 2017), <https://www.service-public.fr/particuliers/actualites/A11143>.

²⁵ See Robert Leckey, *Cohabitation, Law Reform, and the Litigants*, 31:2 INTL. J.L. POL’Y & FAM. 131 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2886520 (last visited Oct. 13, 2017).

²⁶ Amanda Kazie, *4 myths about common-law relationships*, CAN. B.C. NEWS (Mar. 20, 2013, 1:18 PM), <http://www.cbc.ca/news/canada/4-myths-about-common-law-relationships-1.1315129>; Leckey, *supra* note 25. The types of rights vary by province.

Part 2: Proposals

In addition to the statutes, the ALI and numerous scholars have suggested different systems to control the rights of nonmarital cohabitants.

1. **The ALI:**²⁷ The ALI has developed a status-based approach that affects the financial claims for property distribution and compensatory payments (alimony) of cohabitants upon termination of their relationship,²⁸ with no effect during the course of the relationship.

Qualifications: Couples are deemed to be “domestic partners” if, “for a significant period of time,” they “share a primary residence and a life together as a couple.” They can satisfy these requirements by having lived together for a state-set period of time, lived together with a child for a state-set (possibly lesser) period of time, or, if these two requirements are not satisfied, they can prove that they lived together and “shared a life together.” The determination of whether they “share a life together as a couple” is based on thirteen factors, such as financial interdependence, and emotional and physical intimacy.²⁹

Consequences: The consequences upon termination for property distribution and alimony are the same as when a marriage ends. The ALI does not address inheritance rights.³⁰

2. **Academic proposals** (organized alphabetically):
 - a. John Culhane (Widener/Delaware) has proposed a Model Designated Beneficiary Act, patterned on the Colorado statute.³¹ He would establish a state-wide registry for designated beneficiary agreement. He would authorize multi-party arrangements and allow for more than one agreement at a time. It would permit couples to choose an option through which they could gradually integrate their property interests over time.
 - b. Jessica Feinberg (Mercer) proposes federal recognition of state-based nonmarital statuses that meet certain requirements, including that they: (1) are available to both same- and opposite-sex couples, unless they are married or registered for a nonmarital status with another person; (2) allows for either party to dissolve the status without court involvement, such as with the same entity with which they filed for recognition of the status, unless children are involved (states may choose different procedures in that situation); (3) establishes a default regime that does not involve the creation of “partner” property, so the presumption is that property remains separate during and after the

²⁷ See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 6.01–6.06 (A.L.I. 2002) (referencing the “ALI Principles”).

²⁸ See *id.* § 6.01(1).

²⁹ See *id.* § 6.03.

³⁰ Cf. § 4.03 cmt. e (concerning the death of a spouse after a dissolution action is filed, but before the final court decree).

³¹ John G. Culhane, *After Marriage Equality, What's Next for Relationship Recognition?*, 60 S.D. L. REV. 375, 386 (2015). John also has shared with me an unpublished book manuscript that addresses these issues, so some of these details are drawn from chapter 5 of that book. JOHN CULHANE, UNTITLED BOOK (draft 2017).

relationship; and (4) ensures rights and responsibilities that provide basic minimum protections for the partners and the children, such as eligibility for family and medical leave and hospital visitation.³² Inheritance rights would be discretionary.³³

- c. Gary Spitko (Santa Clara) has proposed intestacy reform to allow a nonmarital committed partner to take an intestacy share.³⁴ The basic concept is that a “surviving committed partner” is entitled to receive an intestacy portion of the decedent’s estate, with the portion increasing in proportion to the duration of the relationship.

Qualifications: A “committed partner” is someone who lived with the decedent “as a couple in an emotionally and physically intimate partnership such that the intestacy scheme should protect the decedent’s interest in donative freedom” or the surviving partner’s “reciprocity or reliance interests.”³⁵ Although Spitko at one point believed that a minimum cohabitation period of three years should prompt application of the act, he instead believes that even short-term relationships might qualify.³⁶

Consequences: The survivor receives 100% of the intestate estate if the relationship lasted 15 years or longer. If there are non-joint issue, a parent/parents but no issue, or if the relationship ended within a two-year period before the decedent’s death, then the portion is reduced by a specified percentage.³⁷

- d. Lawrence Waggoner (Michigan) has proposed a “Draft De Facto Marriage Act” that would transform cohabiting relationships into de facto marriages that are equivalent to, and have the same status as, a formal marriage.³⁸ The Draft Act is set out in Appendix B.

Qualifications: Both partners must be unmarried; not prohibited from marrying each other; and currently sharing, or have shared, “a common household in a committed relationship (Section 2).

A common household means that they share the same household, even if one (or both) had other places of residence, and even if there was no joint legal title to the household (Section 3). A “Committed Relationship” is established through a series of factors, including whether they held themselves out as married or emotionally and financially committed to one another, the extent to which they intermingled finances and established legally binding obligations to one another

³² Feinberg, *supra* note 14, at 82–89.

³³ *Id.* at 89.

³⁴ E. Gary Spitko, *Intestate Inheritance Rights for Unmarried Committed Partners; Lessons for U.S. Law Reform from the Scottish Experience*, 103 IOWA L. REV. (forthcoming 2018); E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255 (2002).

³⁵ Spitko, *Intestate Inheritance Rights*, *supra* note 34 (draft at 30).

³⁶ *Id.* (draft at 33).

³⁷ *Id.*; Spitko, *An Accrual/Multi-Factor Approach*, *supra* note 34, at 345–46. For example, if the relationship ended between less than two, but more than one, year before the decedent’s death, then the intestate share percentage portion is reduced by 75 percent. *Id.* at 346.

³⁸ Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What about Marital Rights for Unmarried Partners?*, 41 ACTEC L. J. 49 (2015).

(such as through health care powers of attorney or retirement beneficiary plans). The couple is presumed to have been in a committed relationship they shared a common household with their minor child for four or more years (Section 5).

Consequences: “The parties to a de facto marriage are spouses.” (Section 1). They thus have rights under state law and federal law.³⁹

Other: Waggoner would require a court order to establish a *de facto* marriage.⁴⁰

³⁹ Waggoner, *supra* note 36, at 93.

⁴⁰ *Id.* at 90 (the act “is not set up to be self-executing”).

Appendix A: Colorado statutory form for designated beneficiaries

COLO. REV. STAT. ANN. § 15-22-106

§ 15-22-106. Statutory form of a designated beneficiary agreement

(1) The following statutory form shall be the standard form for a designated beneficiary agreement:

DESIGNATED BENEFICIARY AGREEMENT

DISCLAIMER

Warning: While this document may indicate your wishes, certain additional documents may be needed to protect these rights.

This designated beneficiary agreement is operative in the absence of other estate planning documents and will be superseded and set aside to the extent it conflicts with valid instruments such as a will, power of attorney, or beneficiary designation on an insurance policy or pension plan. This designated beneficiary agreement is superseded by such other documents and does not cause any changes to be made to those documents or designations. The parties understand that executing and signing this agreement is not sufficient to designate the other party for purposes of any insurance policy, pension plan, payable upon death designation or manner in which title to property is held and that additional action will be required to make or change such designations. The parties understand that this designated beneficiary agreement may be one component of estate planning instructions and that they are encouraged to consult an attorney to ensure their estate planning wishes are accomplished.

We, _____, (insert full name and address) referred to as party A, and _____, (insert full name and address) referred to as party B, hereby designate each other as the other's designated beneficiary with the following rights and protections, granted or withheld as indicated by our initials:

TO GRANT ONE OR MORE OF THE RIGHTS OR PROTECTIONS SPECIFIED IN THIS FORM, INITIAL THE LINE TO THE LEFT OF EACH RIGHT OR PROTECTION YOU ARE GRANTING. TO WITHHOLD A RIGHT OR PROTECTION, INITIAL THE LINE TO THE RIGHT OF EACH RIGHT OR PROTECTION YOU ARE WITHHOLDING.

A DESIGNATED BENEFICIARY AGREEMENT SHALL BE PRESUMED TO GRANT ALL OF THE RIGHTS AND PROTECTIONS LISTED IN THIS FORM UNLESS THE PARTIES WITHHOLD A RIGHT OR PROTECTION IN THE MANNER SET FORTH IMMEDIATELY ABOVE.

TO GRANT A RIGHT
OR PROTECTION
INITIAL

Party A

Party B

TO WITHHOLD A RIGHT
OR PROTECTION
INITIAL

Party A

Party B

___	___	The right to acquire, hold title to, own jointly, or transfer inter vivos or at death real or personal property as a joint tenant with me with right of survivorship or as a tenant in common with me;	___	___
___	___	The right to be designated by me as a beneficiary, payee, or owner as a trustee named in an inter vivos or testamentary trust for the purposes of a nonprobate transfer on death;	___	___
___	___	The right to be designated by me as a beneficiary and recognized as a dependent in an insurance policy for life insurance;	___	___
___	___	The right to be designated by me as a beneficiary and recognized as a dependent in a health insurance policy if my employer elects to provide health insurance coverage for designated beneficiaries;	___	___
___	___	The right to be designated by me as a beneficiary in a retirement or pension plan;	___	___
___	___	The right to petition for and have priority for appointment as a conservator, guardian, or personal representative for me;	___	___
___	___	The right to visit me in a hospital, nursing home, hospice, or similar health care facility in which a party to a designated beneficiary agreement resides or is receiving care;	___	___
___	___	The right to initiate a formal complaint regarding alleged violations of my rights as a nursing home patient as provided in section 25-1-120, Colorado Revised Statutes;	___	___
___	___	The right to act as a proxy decision-maker or surrogate decision-maker to make medical care decisions for me pursuant to section 15-18.5-103 or 15-18.5-104, Colorado Revised Statutes;	___	___
___	___	The right to notice of the withholding or withdrawal of life-sustaining procedures for me pursuant to section 15-18-107, Colorado Revised Statutes;	___	___
___	___	The right to challenge the validity of a declaration as to medical or surgical treatment of me pursuant to section 15-18-108, Colorado Revised Statutes;	___	___
___	___	The right to act as my agent to make, revoke, or object to anatomical gifts involving my person pursuant to the "Revised Uniform Anatomical Gift Act", part 2 of article 19 of title 15, Colorado Revised Statutes;	___	___
___	___	The right to inherit real or personal property from me through intestate succession;	___	___
___	___	The right to have standing to receive benefits pursuant to the "Workers' Compensation Act of Colorado", article 40 of title 8, Colorado Revised Statutes, in the event of my death on the job;	___	___
___	___	The right to have standing to sue for wrongful death in the event of my death; and	___	___
___	___	The right to direct the disposition of my last remains pursuant to article 19 of title 15, Colorado Revised Statutes.	___	___

THIS DESIGNATED BENEFICIARY AGREEMENT IS EFFECTIVE WHEN RECEIVED FOR RECORDING BY THE COUNTY CLERK AND RECORDER OF THE COUNTY IN WHICH ONE OF THE DESIGNATED BENEFICIARIES RESIDES. THIS DESIGNATED BENEFICIARY AGREEMENT WILL CONTINUE IN EFFECT UNTIL ONE OF THE DESIGNATED BENEFICIARIES REVOKES THIS AGREEMENT BY RECORDING A REVOCATION OF DESIGNATED BENEFICIARY FORM WITH THE COUNTY CLERK AND RECORDER OF THE COUNTY IN WHICH THIS AGREEMENT WAS RECORDED OR UNTIL THIS AGREEMENT IS SUPERSEDED IN PART OR IN WHOLE BY A SUPERSEDING LEGAL DOCUMENT.

Signature of designated beneficiary

Signature of designated beneficiary

STATE OF COLORADO

County of _____

This document was acknowledged before me on _____ date by

My commission expires _____

[Seal]

Notary Public

(2) The instructions to each party regarding how to grant or withhold a right or protection by initialing and the words "Party A" and "Party B" shall appear at the top of each page of the statutory form above the columns for the initials of the designated beneficiaries.

(3) A designated beneficiary agreement shall be presumed to extend all of the rights and protections listed in the statutory form unless the parties to the agreement explicitly exclude a right or protection.

(4) A party to a designated beneficiary agreement may limit the scope of a designated beneficiary agreement by the terms of the agreement or by executing a superseding legal document that controls and supersedes part or all of the designated beneficiary agreement.

Appendix B: Draft De Facto Marriage Act – Lawrence W. Waggoner⁴¹

Section 1. [De Facto Marriage; De Facto Spouses; Consequences.]

For purposes of all statutes in this state, two individual are married to one another in fact if their relationship meets the requirements of this section. If so, their marriage is a de facto marriage and they are de facto spouses. A de facto marriage has the same status as a formal marriage. The parties to a de facto marriage are spouses. If one of them dies, the survivor is the decedent's surviving spouse.

Section 2. [De Facto Marriage; Requirements.] To be married de facto, the individuals must (i) be unmarried adults; (ii) not be prohibited from marrying each other under the law of this state by reason of a blood relationship; and (iii) must be or have been sharing a common household in a committed relationship.

Section 3. [Common Household.] For purposes of sections 2 and 5, “sharing a common household” or “shared a common household” means that the individuals shared the same place to live, whether or not one or both had other places to live and whether or not one or both were physically residing somewhere else at the time in question. The right to occupy the common household need not have been in both of their names.

Section 4. [Committed Relationship; Factors.] For purposes of section 2, a “committed relationship” is a relationship in which two individuals have chosen to share one another's lives in a long-term and intimate relationship of mutual caring. Although no single factor or set of factors determines whether a relationship qualifies as committed, the following factors are among those to be considered:

- (1) the purpose, duration, constancy, and degree of exclusivity of the relationship;
- (2) the degree to which the individuals intermingled their finances, such as by maintaining joint checking, credit card, or other types of accounts, sharing loan obligations, sharing a mortgage or lease on the household in which they lived or on other property, or titling the household in which they lived in joint tenancy;
- (3) the degree to which the individuals formalized legal obligations, intentions, and responsibilities to one another, such as one or both naming the other as primary beneficiary of life insurance or employee benefit plans, as agent to make health care decisions, or as a significant beneficiary of a will or trust;
- (4) whether the couple shared in parenting a child and the degree of joint caring and support given the child; and
- (5) the degree to which the individuals held themselves out to others as married or the degree to which the individuals held themselves out to others as emotionally and financially committed to one another on a permanent basis.

⁴¹ Waggoner, *supra* note 38, at 87–88.

Section 5. [Presumption.] Two individuals are presumed to be or have been in a committed relationship if they shared a common household with their minor child for a continuous period totaling [four] or more years. A child is “their child” if the child is treated as their child under the law of this [state]. The presumption can only be rebutted by clear and convincing evidence.