

**Minnesota State Bar
Association
Unmarried Couples
Task Force
Report**

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Executive Summary

The Minnesota State Bar Association is committed to fostering diversity and preventing discrimination in Minnesota's legal community, which includes lawyers and clients alike. To this end, the Minnesota State Bar General Assembly approved a resolution creating the Task Force on the Rights of Unmarried Couples in April 2008. In particular, the Task Force was charged as follows:

That, in light of the disparity between legal rights and protections available to same-sex couples as compared to different-sex couples, the President of the Minnesota State Bar Association create a task force to review the current state of Minnesota law and to make recommendations as to desirable changes, if any, in the law to address this disparity.

The Task Force prepared the following Report, which represents a “piecemeal” fix to a global problem – protecting the rights of unmarried couples under Minnesota law. In preparing the Report, the Task Force conducted a comprehensive review of Minnesota law to identify key instances of disparate treatment between unmarried and married couples. From this, the Task Force recommends to the Minnesota State Bar Association specific areas of law that are ripe for legislative change. Identifying certain areas for possible reform, while seeming to ignore others, should not be interpreted as saying that these other areas are irrelevant; arguably, unmarried couples are harmed by denial of even “minor” legal rights. Ultimately, though, the purpose of this report is to suggest ways in which to begin remedying the disparate impact of Minnesota law on unmarried couples.

Why Should Unmarried and Married Couples be Treated Equally Under Minnesota Law

Marriage, as a state-sanctioned institution, affords a couple certain legal rights and obligations. Marriage, as a social institution, affords couples a particular social status. Indeed, “marriage” is a globally-recognized means of affirming the importance and validity of the relationship between two people, and of affording that relationship legal protections based on the understanding that doing so provides benefits not only to the couple involved, but to society as a whole.

Unlike states such as Pennsylvania and Texas, Minnesota does not recognize common-law marriage, thus preventing committed cohabitating opposite-sex couples holding themselves out to the world as spouses from receiving the rights afforded those couples in state-sanctioned marriages. Though these opposite-sex couples have the ability to have their relationships recognized by the state, some choose not to for religious, personal or political reasons. In addition to avoiding disparate treatment of same-sex couples, Minnesota law should not penalize opposite-sex couples exercising their religious, personal or political beliefs around the institution of marriage.

Minnesota, though, openly limits the scope of the state-sanctioned institution of marriage to that between a man and a woman. And unlike a cohabitating heterosexual couple who may choose to marry, a committed same-sex couple is wholly excluded from Minnesota's state institution of marriage, and the rights and responsibilities that flow therefrom. The deprivation of access to

marriage these couples experience works real harm. Though in most other respects indistinguishable from heterosexual couples who affirm their commitment through marriage, same-sex couples are systematically denied the legal protections and obligations marriage would provide, leaving these couples and their families vulnerable to concerns and disparities not faced by married couples. In many instances, there are no means available to these couples to arrange these protections outside of marriage, e.g., through private contract. This absolute exclusion fosters a state approved, second class-citizenship, and casts same-sex couples into a legal void.

Further, as stated in Minnesota Statute § 363A.02, “It is the public policy of this state to secure for persons in this state, freedom from discrimination in employment...housing and real property...public accommodations...public services...and education because of...marital status...[and] sexual orientation” because “[s]uch discrimination threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy.”

As the report of Project 515 – Unequal Under the Law¹ – evidences, Minnesota’s legal scheme encompasses an alarming number of statutes that impact unmarried couples differently than married couples, thereby violating Minnesota’s codified public policy interest in preventing discrimination based on a citizen’s marital status or sexual orientation. Though not all statutes examined by the Task Force or Project 515 deal with the enumerated matters of Minnesota Statute § 363A.02, the public policy reason remains. It is imperative to amend Minnesota laws to remove all instances of discrimination and ensure equal treatment for married and unmarried couples.

An Evolving Issue

The Minnesota State Bar Association undertakes this review of the rights afforded to unmarried couples against the backdrop of a significant debate about the degree of legal recognition, if any, which should be provided to same-sex couples. A number of states now recognize same-sex marriages – Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, and Maine – while others are considering legislation that no longer limits state-sanctioned marriage to only between a man and a woman. Minnesota, however, remains one state that continues to deny same-sex couples all access to marriage. This absolute limitation is the impetus for this Report.

Further, it is undeniable that various parts of Minnesota law continue to disparately impact unmarried couples over married couples. Such disparity based on a couples’ legal status as married raises significant concerns for Minnesota’s legal community. Though a comprehensive solution to this disparate impact exists – marriage for all persons and may well be desirable – such a solution is not imminent, nor was evaluating a global solution part of this Task Force’s charge.

As this report reflects, the impact of the disparate treatment is far reaching and detrimental to couples who are not afforded the opportunity to seek the legal protections and obligations of marriage, or who, for various reasons, choose not to have the state sanction their relationships.

¹ *Unequal Under the Law: 515 Ways Minnesota Laws Discriminate Against Couples and Families*. Project 515. October 2007.

The legislative amendments recommended herein are priority areas that are critical to ensuring Minnesota's legal system recognizes the very real fact that committed couples exist outside the state institution of marriage. Failing to recognize this simple fact results in a disservice to our fellow Minnesotans, who rely on Minnesota law for various legal rights and protections.

Where Next?

Steps must be taken to ensure that Minnesota law reflects the people it is meant to serve, which includes unmarried couples. This report provides the first steps necessary to provide unmarried couples the critical legal protections afforded to married couples. Indeed, the proposed legislative amendments should be seriously considered, as they provide useful benefits to couples and reflect Minnesota's public policy against discrimination. Further, the provision of equal protections to unmarried couples does not disturb or infringe on the rights already afforded to Minnesota's married couples. But we must remember that this Report only scratches the surface of laws that discriminate based on marital status. The changes proposed herein will not effectuate comprehensive equality for unmarried couples, and should not be seen as a sufficient alternative to a comprehensive solution.

Nevertheless, the Minnesota State Bar Association views the following proposals for discrete reform as limited – but potentially important – steps the State may take in the short term to afford unmarried couples critical legal protections, while moving toward a viable long-term solution to the problem of the wholesale exclusion of same-sex couples from the protection of our legal system.

CHAPTER 1: Family Law Subcommittee Report

The Family Law Subcommittee of the MSBA Unmarried Couples Task Force reviewed the differences in the legal rights and protections available to unmarried couples as compared to married couples under Minnesota family law. The Subcommittee identified four areas in the law where disparities exist, and such disparities could be lessened by the following changes: 1) allowing unmarried couples to bring claims for real or personal property together with custody or paternity proceedings; 2) allowing unmarried couples as interested third parties in custody proceedings; 3) allowing unmarried couples rights to children's records; and 4) clarifying individuals' rights and responsibilities in the area of assisted reproductive technology.

The Subcommittee also considered the issue of how unmarried couples are treated in terms of placement and permanency decisions during the child protection court process (CHIPS – Child In Need of Protection or Services). This is a complicated area of law, intersecting with federal law to a degree. The Subcommittee is, therefore, not recommending any change at this time. The Subcommittee also considered amendments to Minn. Stat. § 513.075, regarding cohabitation agreements. The subcommittee decided not to evaluate Minn. Stat. § 513.075 as it relates to domestic partnership agreements.

The Subcommittee proposes the following statutory amendments to ameliorate disparities, and all amendments are indicated by underscored language:

I. Consolidation of real or personal property actions with custody or paternity proceedings.

The Subcommittee suggests a consolidation of otherwise separate judicial proceedings. Specifically, actions involving real and/or personal property of unmarried couples consolidated with custody or paternity proceedings involving the same parties.

Many unmarried couples in committed relationships purchase homes, home furnishings and personal goods and decide to have children without entering into marriage. At present, the claims an unmarried couple has with respect to jointly titled real property, any shared personal property and custody, parenting time and support are governed separately under the partition statute, the claim and delivery statute, common law, and the custody and/or paternity statutes. The Subcommittee's proposed changes are not aimed to modify or recodify the existing substantive law found under these statutes. Instead, the changes provide the Court with jurisdiction to resolve all claims arising between the same parties in one proceeding.

The present situation is disparate because an unmarried couple is required to bring separate actions to obtain redress from the courts. These separate actions may involve different judicial officers, and multiple court filing fees. If an unmarried couple seeks to divide their interest in real property, they must file an action under the partition statute. If one party seeks to recover personal property wrongfully withheld by the other party, they must file an action under the claim and delivery statute. If an unmarried couple needs to equitably divide personal property, they must seek redress under the common law. If this same couple has paternity, custody, parenting time and/or support issues, they must file an action in family court. If our

courts exist to serve our public, it simply makes sense for unmarried couples to be able to file one action consolidating their claims and issues in one proceeding. Unmarried couples should have the ability to consolidate their claims, specifically, a partition action under Chapter 558, a claim and delivery action to recover personal property under Chapter 565, a common law action to equitably divide personal property, and family court actions (custody, parenting time and support) under Chapters 257 (paternity), 257C (third party custody/visitation), 518 (custody), and 518A (child support), into the same proceeding to be heard before the family court division.

It is also in the interests of judicial economy to consolidate resources and encourage expeditious results. Even though the court would collect fewer fees, streamlining these cases would cut overall case load. The family court division is the most logical place to consolidate these cases, where marital dissolution proceedings currently address the same types of issues.

The Subcommittee's requested procedural changes would require unmarried couples to conform a combined Petition to the requirements of each applicable Chapter and include all language required by each Chapter. The consolidation process would only apply if both parties to the family court proceeding were the only two parties with an ownership interest in the real property or personal property, as long as the parties to all actions are identical. In the event there is a third party ownership interest to the property, the parties would be required to bring the action for partition separately.

The parties would still be required to follow all procedural notice requirements to lien holders under the partition statute. However, in the interests of privacy and to limit a lien holder's access to paternity files, a protective order could be issued by the Court in these cases.

It is the Subcommittee's hope that the proposed modifications listed below will achieve equal protection under the law for married couples and unmarried couples.

Proposed Statutory Changes:

The Subcommittee proposes to amend Minn. Stat. § 257.59, subd. 1 as follows:

Subdivision 1. Court jurisdiction. The district court has jurisdiction of an action brought under sections 257.51 to 257.74. The action may be joined with an action for dissolution, annulment, legal separation, custody under chapter 518, or reciprocal enforcement of support. The action may also be joined with an action for partition of real estate under chapter 558 and/or with an action for claim and delivery under chapter 565, provided the parties to all actions are identical. Pursuant to Rule 18.01 of the Minnesota Rules of Civil Procedure, a party to an action under sections 257.51 to 257.74 may also join a claim against an opposing party to equitably divide personal property held in common. If notice requirements under chapters 558 or 565 require that notice be given to interested parties that would normally not be a party to an action brought under sections 257.51 to 257.74, the Court may issue a Protective Order appropriately limiting access to the parts of the court file that are ordinarily protected under section 257.70.

Amend Minn. Stat. § 257C.02 to add a subdivision (d) as follows:

(d) An action commenced under this chapter may be joined with an action for partition of real estate under chapter 558 and/or with an action for claim and delivery under chapter 565, provided the parties to all actions are identical. Pursuant to Rule 18.01 of the Minnesota Rules of Civil Procedure, a party to an action under this chapter may also join a claim against an opposing party to equitably divide personal property held in common.

Amend Minn. Stat. § 518.156 to add a subdivision 3 as follows:

Subdivision 3. Additional jurisdiction. If the parties in an action commenced under this section are not married, the action may include a claim for partition of real estate under chapter 558 and/or a claim for claim and delivery under chapter 565, provided the parties to all actions are identical. Pursuant to Rule 18.01 of the Minnesota Rules of Civil Procedure, a party to an action under this section may also join a claim against an opposing party to equitably divide personal property held in common.

II. Unmarried Partners of Parents as Interested Third Parties in Custody Cases.

The Subcommittee suggests modification of Minn. Stat. §257C.03, subd. 7 to better address the interests of partners to parents of children who have also parented the children. As a matter of public policy, it is better for children to have the continued involvement of individuals who have significantly parented them and developed a substantial relationship with them under the appearance of a legal parent than to exclude these individuals from seeking custody because they lack status as an interested third party.

Proposed Statutory Changes:

The following proposed statutory amendments better serve the best interests of minor children whose parents are unmarried couples.

Minnesota Statute § 257C.03, subd. 7:

(a) To establish that an individual is an interested third party, the individual must:

(1) show by clear and convincing evidence that one of the following factors exist:

(i) the parent has abandoned, neglected, or otherwise exhibited disregard for the child's well-being to the extent that the child will be harmed by living with the parent;

(ii) placement of the child with the individual takes priority over preserving the day-to-day parent-child relationship because of the presence of physical or emotional danger to the child, or both; or

(iii) other extraordinary circumstances, including, but not limited to, the circumstance where a child resides with one legal parent and an individual who:

(a) shared significant romantic involvement with the legal parent;

(b) functioned as a co-parent for a substantial amount of time relative to the age of the child;

(c) was held out to others and to the minor child as a parent, but not a step-parent, of the child on repeated occasions; and

(d) has a substantial relationship with the child which could not be maintained with an award of visitation pursuant to Minn. Stat. 257C.08;

(2) prove by a preponderance of the evidence that it is in the best interests of the child to be in the custody of the interested third party; and

(3) show by clear and convincing evidence that granting the petition would not violate section 518.179, subdivision 1a.

(b) The following factors must be considered by the court in determining an interested third party's petition:

(1) the amount of involvement the interested third party had with the child during the parent's absence or during the child's lifetime;

(2) the amount of involvement the parent had with the child during the parent's absence;

(3) the presence or involvement of other interested third parties;

(4) the facts and circumstances of the parent's absence;

(5) the parent's refusal to comply with conditions for retaining custody set forth in previous court orders;

(6) whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence;

(7) whether a sibling of the child is already in the care of the interested third party; and

(8) the existence of a standby custody designation under chapter 257B.

(c) In determining the best interests of the child, the court must apply the standards in section 257C.04.

III. Placement and Permanency Decisions for Children of Unmarried Couples

The Subcommittee considered the issue of how unmarried couples are treated in terms of placement and permanency decisions during the child protection court process (CHIPS – Child In Need of Protection or Services) and what changes can be made to simplify and improve the process of placement in these cases. How an unmarried partner of a parent going through the CHIPS is treated is complicated and varies based on the partner’s legal status with the child’s custodial parent (the one who is the subject parent of the court process). The partner may be the child’s father, adjudicated or unadjudicated, or may be the cohabiting boyfriend or girlfriend of the custodial parent. Placement decisions for children in CHIPS cases are supposed to be based on the best interest of the child factors in Minn. Stat. § 260C.212, subd. 2, which is to include the child’s relationship to current caretakers, parents, siblings and relatives, among other factors. The placement preference is first with an individual who is related to the child by blood, marriage, or adoption. The second placement preference is with an individual who is an “important friend with whom the child has resided or had significant contact.”

These placement preferences often mean that a child cannot continue living with the parent’s partner who has developed a significant relationship with the child. There are other legal barriers that may also pose a problem for the child’s placement or permanency with such an individual, such as the requirement that that person qualify for foster care licensing (which contains requirements, for example, that do not exist in a step-parent adoption, to give a relevant comparison). Put simply, although many unmarried couples in CHIPS cases may have marriage-like relationships, they do not have marriage-like rights.

While we recognize this is a significant and important issue, the Subcommittee cannot make recommendations at this time. This is a complicated area of law, intersecting with federal law. The Subcommittee simply has not had time to consider the full implications of statutory changes, in particular, how any proposed changes might affect relatives of the child. Any statutory changes should also be consistent with, or at least consider, statutory changes proposed by the Unmarried Couples Task Force to the interested third party statute of Minn. Stat. § 257C.

IV. Right of Access to a Child’s Records

The Subcommittee suggests amendment of Minn. Stat. § 518.17, subd. 3(b) (right of access to school, medical, etc. records); Minn. Stat. § 518.68, subd. 1 (notice of rights – Appendix A to court orders); Minn. Stat. § 257.75, subd. 3 (recognition of parentage); and Minn. Stat. § 257.66, subd. 3 (paternity) to address the rights of unmarried couples to access their children’s records.

Current Minnesota law embeds the rights of parents to access school, medical and other important records in the marriage dissolution chapter in Minn. Stat. § 518.17, pertaining to custody of children. Embedding these rights in this statute may have made sense when divorcing families were the predominant family form seen in family court. Divorcing parents automatically obtain these rights (unless the court makes specific findings why not) simply by the virtue of a judgment and decree addressing custody or parenting time. Now, however, there are many parents who are not covered by this statute, such as fathers whose children were not born during a marriage but who sign a voluntary Recognition of Parentage. Minnesota Statute § 518.17, as written, should apply to fathers whose paternity is adjudicated by a court order (because custody

and parenting time in paternity cases is decided under § 518.17), but to provide clarity, we recommend amending the paternity statute as well. Recent research indicates that the over fifty percent of children born outside of marriage in urban areas in the United States are born to cohabiting couples. (Fragile Families and Child Wellbeing Study, Baseline National Report, 2003). These couples are the most likely (of all unmarried parents) to sign a voluntary paternity form. (Fragile Families and Child Wellbeing Study, Research Brief Number 30, 2005). Changing the statute to apply the rights to access records to any legal parent, absent a court order to the contrary, would make it clear that there is not a division of rights based on whether or not the parents were married.

Proposed Statutory Changes:

The Subcommittee proposes the following changes:

1. Amend Minn. Stat. § 257.75, subd. 3:

Subd. 3. Effect of recognition.

Subject to subdivision 2 and section 257.55, subdivision 1, paragraph (g) or (h), the recognition has the force and effect of a judgment or order determining the existence of the parent and child relationship under section 257.66. If the conditions in section 257.55, subdivision 1, paragraph (g) or (h), exist, the recognition creates only a presumption of paternity for purposes of sections 257.51 to 257.74. Once a recognition has been properly executed and filed with the state registrar of vital statistics, if there are no competing presumptions of paternity, a judicial or administrative court may not allow further action to determine parentage regarding the signator of the recognition. An action to determine custody and parenting time may be commenced pursuant to chapter 518 without an adjudication of parentage. Until an order is entered granting custody to another, the mother has sole custody. Unless a court order has been entered restricting the rights contained in 518.17, subd. 3(b), the signators of a recognition of parentage have all of the rights listed in 518.17, subd. 3(b). The recognition is:

(1) a basis for bringing an action to award custody or parenting time to either parent, establishing a child support obligation which may include up to the two years immediately preceding the commencement of the action, ordering a contribution by a parent under section 256.87, or ordering a contribution to the reasonable expenses of the mother's pregnancy and confinement, as provided under section 257.66, subdivision 3, or ordering reimbursement for the costs of blood or genetic testing, as provided under section 257.69, subdivision 2;

(2) determinative for all other purposes related to the existence of the parent and child relationship; and

(3) entitled to full faith and credit in other jurisdictions.

2. Amend Minn. Stat. § 257.66, subd. 3:

Subd. 3. Judgment; order.

The judgment or order shall contain provisions concerning the duty of support, the custody of the child, the name of the child, the Social Security number of the mother, father, and child, if known at the time of adjudication, parenting time with the child, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child. Custody and parenting time and all subsequent motions related to them shall proceed and be determined under section 257.541. Unless a court order has been entered restricting the rights contained in 518.17, subd. 3(b), the parents of the child have all of the rights listed in 518.17, subd. 3(b). The remaining matters and all subsequent motions related to them shall proceed and be determined in accordance with chapters 518 and 518A. The judgment or order may direct the appropriate party to pay all or a proportion of the reasonable expenses of the mother's pregnancy and confinement, including the mother's lost wages due to medical necessity, after consideration of the relevant facts, including the relative financial means of the parents; the earning ability of each parent; and any health insurance policies held by either parent, or by a spouse or parent of the parent, which would provide benefits for the expenses incurred by the mother during her pregnancy and confinement. Pregnancy and confinement expenses and genetic testing costs, submitted by the public authority, are admissible as evidence without third-party foundation testimony and constitute prima facie evidence of the amounts incurred for those services or for the genetic testing. Remedies available for the collection and enforcement of child support apply to confinement costs and are considered additional child support.

V. Assisted Reproductive Technology

The Subcommittee suggests amendment of Minn. Stat. § 257.56 which currently permits donation of sperm to married couples only where a donor's parental rights are terminated by statute. The current statute only addresses and facilitates the resolution of male infertility for a married couple (through sperm donation) and does nothing to address or facilitate the resolution of female infertility (in part, through egg or embryo donation).

In 1982, when Minn. Stat. § 257.56 was originally passed, artificial insemination was the only fertility treatment available to infertile persons. Since then, *in vitro* fertilization has become widely accepted and reliable, and now both egg and embryo donation are common. In light of these advances in assisted reproductive technology, this statute may currently be infirm on equal protection grounds. Furthermore, it is discriminatory to exclude unmarried heterosexual couples, unmarried same sex couples, and single women (it is estimated that up to 65% of donor sperm is used by unmarried women) from benefiting equally from the administrative termination of a donor's parental rights as embodied in the current statute. As a policy matter, it is also inadvisable to subject the children who result from sperm, egg, or embryo donation to random

and unpredictable litigation over parental rights when the parties' initial intent to establish a donor relationship with no attendant parental rights is clear.

Medical advances necessitate concurrent legislative changes. Furthermore, ideas about what constitutes a "traditional family" have evolved substantially over the last 27 years. Families that include unmarried heterosexual couples, unmarried same sex couples, and single parents of both sexes are now becoming much more common and deserve equal status under the law of gamete and embryo donation. The following new Minn. Stat. § 257.56 accomplishes this goal.

Proposed Statutory Language:

257.56 ASSISTED REPRODUCTION

Subdivision 1. [INTENDED PARENTS TREATED AS BIOLOGICAL PARENTS.] (a) If a woman undergoing artificial insemination under the supervision of a licensed physician and with the consent the other intended parent, if any, is inseminated using semen from a donor other than an intended parent, the other intended parent, if any, is treated in law as the biological parent of a child thereby conceived.

(b) The intended parents are treated in law as if they were the biological parents of a child gestated and delivered if a woman receiving the embryo transfer is under the supervision of a licensed physician, has the consent of the other intended parent, if any, and:

(1) the embryos are created with eggs and sperm donated by persons who are not the intended parents; or

(2) the embryos are created with eggs donated by a woman who is not the intended parent and the sperm of an intended parent.

(c) Intended parents must consent in a record that they intend to become the legal parents of the resulting child. Consent must be retained by the supervising physician for at least four years after the confirmation of a pregnancy that occurs during the process of artificial insemination or embryo transfer.

(d) All papers and records pertaining to the insemination or embryo transfer, whether part of the permanent record of a court or a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

Subd. 2. [DONOR NOT TREATED AS BIOLOGICAL PARENT.] If the donor of semen, eggs, or embryos provided to a licensed physician for use in assisted reproduction is not an intended parent, the donor is treated in law as if he, she, or they were not the biological parent of a child thereby conceived, gestated, and delivered.

Subd. 3. [EFFECT OF NONCOMPLIANCE.] In the event of noncompliance with any of the requirements or terms of subdivision 1, a court of competent jurisdiction shall determine

the respective parental rights and obligations of the parties, including both the intended parents and donor(s), based solely on evidence of the parties' original intent.

Subd. 4. [EFFECTIVE DATE.] Subdivisions 1, 2, and 3 are effective the day following final enactment and apply to any donations made before, on, or after the effective date of this act.

CHAPTER 2

Medical Assistance Subcommittee Report

I. Issues Related to Medical Assistance/Minnesota's Medicaid Program

Medical Assistance is Minnesota's Medicaid program. It is a state and federal program where the expenses of the program are divided almost equally between state and federal governments. There are federal and state laws, regulations, agency policies and agency memoranda that govern the day-to-day operation of the Medical Assistance Program. Thus, changes to the program at the state or the federal level will affect how individuals in Minnesota are treated.

Because the program is a federal program, state Medical Assistance law must conform to federal law. It may be less restrictive than the federal law; it may not be more restrictive. If Minnesota chooses to make changes to the program to expand the definition of spouse to include domestic partners (for lack of a better word) there could be financial consequences. This is not unprecedented. In February, the Commonwealth of Massachusetts changed its definition of spouse to include the state's definition which is more expansive than the definition under federal law. Benefits granted to individuals using the more expanded definition would then be paid with state dollars, rather than federal dollars.

Our Subcommittee recognizes that in this area, it would be equitable to include all people who are in a domestic partnership within the definition of spouse thereby subjecting domestic partnerships and married couples to the same rights and responsibilities under the code. To be sure, there are some instances where it is beneficial not to be married. Below are five different areas where the stark difference in treatment between married and unmarried couples is evident and results in harm to individuals in domestic partnerships. There are more, and that is why a change in the definition is much easier than attempting to remedy every difference.

Terminology pertinent to understanding Medical Assistance issues

Medical Assistance: A state and federal program that provides health care coverage to eligible individuals. It is an entitlement program, meaning that if an individual meets the eligibility criteria, he or she must be granted access to the program. *See* Minn. Stat. 256B *et seq.*, 42 U.S.C. 1396 *et seq.*, and the Minnesota Department of Human Services Health Care Programs Manual, hereinafter referred to as HCPM.

Eligible individual: There are different categories of eligible individual but most generally, dependent children, MFIP families, blind, aged, and disabled individuals. (Minn. Stat. § 256B.055).

Basic financial eligibility: An individual is eligible for Medical Assistance if his or her available assets are less than \$3,000 and income is applied to care (homestead, car, burial funds are not available, they are excluded).

Long-term care services: LTC services include skilled nursing facility (SNF) care, nursing facility care in an inpatient medical hospital or intermediate care facility, or services covered by home and community-based waiver programs. Individuals must be determined disabled or over the age of 65 to receive these services.

Spouse: A person who is legally married to another person; a husband or wife. HCPM § 17.

Long-term Care Spouse: A legally married person who resides in a medical or nursing facility or who receives Elderly waiver services for home health care. Hereinafter referred to as the “**ill spouse.**” HCPM § Glossary

Community Spouse: a person legally married to a long-term care spouse. HCPM § Glossary

II. Five Areas in Which Legally Married Individuals are Treated Differently Than Domestic Partners under Medical Assistance Law

- 1. Household Composition.** Minn. Stat. § 256B.055 and 056; HCPM § 17. In all public benefit programs, one component to eligibility is household composition. Individuals not legally married to each other are not considered spouses and that status affects eligibility.

Discussion: Household composition is a fundamental element of eligibility. The size of the household and the relationship of its members will play a role in determining eligibility and premium and monthly waiver obligations or long-term care spenddown amounts. The relationship individuals in a domestic partnership have is not recognized by the Medical Assistance program. In all cases they are treated as two individuals. While sometimes this is beneficial, it can be devastating to the community spouse if the ill spouse was the breadwinner.

For instance, Mary and Ellen have lived together for 25 years; Ellen is disabled. She receives Medical Assistance and Social Security Disability based on the fact that she is a household of one. Mary is the breadwinner and pays virtually all the bills and maintains the household. If something should happen to Mary so that Mary needed to reside in a nursing home, none of Mary’s income could be used to allow Ellen to remain in the home. Whether or not the assets will be protected depends entirely on how they are titled. In this case, it is beneficial that they are not married if Mary is always healthy and able to care for the family. It will devastate this family if Mary is catastrophically injured or needs long-term care.

- 2. Transfers between spouses.** Minn. Stat. § 256B.0595 Subds. 3 and 4. Spouses may transfer assets to each other at any time without penalty. *See also* (42 U.S.C. § 1396r-5).

Discussion: If an individual transfers assets for less than fair market value (i.e., gifts) and then applies for Medical Assistance for long-term care within 60 months of the transfer, there will be no coverage for long-term care for a specific period of time depending upon the amount of the transfer. For instance, if John gives his domestic partner Jerry \$25,000 and then applies for long-term care coverage, coverage will be denied for 5.24 months. Minn. Stat. § 256B.0595. If,

however, Jim gave \$25,000 to his wife, there would be no penalty and if he were otherwise eligible, Medical Assistance would pay for his long-term care.

Likewise, if an ill spouse were to inherit \$50,000 while receiving Medical Assistance, he could transfer the entire inheritance to his community spouse and retain eligibility. Similarly, when applying for benefits, if all of the assets are in the ill spouse's name, they can be transferred to the community spouse without penalty. Transferring assets between domestic partners, however, will always result in a transfer penalty.

Right now, assume Jim and Judith are legally married and under the age of 65. John is the breadwinner and most assets are in his name. He is catastrophically hurt in a car accident and requires 24 hour care. He could transfer all of his assets to Judith and become eligible for home and community based services. John and Jerry do not have that option; the family would have to impoverish itself to obtain services. Assume John has been supporting Jerry for years and John suddenly needs home health care. Would he be found to have been making transfers to Jerry daily for the past five years?

- 3. Treatment of the homestead during life.** The homestead is excluded in determining eligibility if it is owned and occupied by the individual, the individual's spouse, the individual's disabled or dependent child, or a child or grandchild of any age who resided there for at least two years prior to institutionalization, in a caregiving capacity without which the MA recipient would not have been able to remain at home. Minn. Stat. § 256B.056.

Discussion: The homestead of an individual is an excluded asset if the individual resides in the home. If the individual moves to a long-term care facility, the homestead is excluded for the first six months. This means it is not counted as an available asset. The home is sacrosanct for the spouse. Even if the home is titled in the ill spouse's name, the well spouse's interest in the home is protected for her life. This is not true in the case of an unmarried couple. If for instance, in Mary and Ellen's case, the home were in Mary's name and she needed to reside in a nursing home, the home would have to be sold and Ellen would lose her home of 25 years. The homestead should be protected for the domestic partner during his or her lifetime.

- 4. Treatment of the homestead at the death of the ill spouse.** At the death of an individual who has received Medical Assistance, the state will attempt to recover the cost of benefits paid to the individual. Minn. Stat. § 256B.15. During the individual's life, a lien may be placed on the individual's property in order to secure payment. Minn. Stat. § § 514.980-985. A spouse's rights in the homestead are protected from liens and enforcement thereof during the spouse's lifetime. *Id.*

Discussion: Jim and Judith are married and own their home in Joint tenancy. They purchased their newest home in 2005. John has a stroke, moves to a nursing home, and Medical Assistance pays the cost of his care for one year, or approximately \$60,000. Judith may reside in the home and may continue to reside in the home for the rest of her life. She can sell the home and pocket the proceeds - or purchase another home. Her interest in the home will not be subject to a lien or to the threat of the state trying to satisfy the lien during her life time. At her death, the state will have a claim in the property to the extent of John's legal interest in the

property on the date of his death. Minn. Stat. § 256B.15. The extent of the claim is currently on appeal to the United States Supreme Court. *In re the Estate of Francis E. Barg*, 752 N.W.2d 52 (Minn. 2008). By order filed March 2, 2009, the U.S. Supreme Court granted the motion of the Minnesota Commissioner of Human Services to intervene in the Court's consideration of the petition of Mille Lacs County for Writ of Certiorari in the Barg case. The Court also invited the Acting U.S. Solicitor General to file a brief to express the views of the United States regarding the County's petition. No timeline was set for submission of the Solicitor General's brief. Certiorari has not been granted, pending receipt of the Solicitor General's brief and further review of the petition. The County's petition is filed under the name *Leo Vos, Director, Mille Lacs County, Minnesota, Family Services and Welfare Department v. Michael F. Barg, Personal Representative of the Estate of Francis E. Barg, Supreme Court Docket No. 08-603*.

John and Jerry have lived together for 25 years. They purchased their most recent home in 2005. They own the home in Joint Tenancy. John has a stroke and moves to a nursing home. Jerry's interest is not protected. The state may place a lien against the home and currently there Jerry has no protection against the lien being satisfied. At John's death, Jerry will own the property subject to a lien up to one half of the value of the home or the cost of Medical Assistance provided by the State of Minnesota, whichever is less. He cannot sell the home and purchase another home during his life time.

Legislation currently proposed to ameliorate this disparity is simply a good start. (See Senate File Number 1208, posted on March 26, 2009). If this bill passes, individuals who own property in joint tenancy will not be forced from their homes; however they may be forced to pay off the lien during life – and not have the homestead funds available to them to pay for their own care later in life. The law should be changed to provide domestic partners with the same protection in the homestead as spouses have.

5. Spousal Impoverishment laws. When a married individual of any age needs MA to pay for the cost of nursing home care or is over the age of 65 and needs home health through the Elderly Waiver program, spousal impoverishment rules apply to protect the community spouse. In these situations, the income and asset eligibility rules differ from those set forth above as follows.

1. Assets. In addition to the \$3,000 the individual applying for MA may retain, the community spouse is entitled to a **community spouse asset allowance** of half of the total available assets, with a minimum of \$31,094 and up to a maximum of \$109,560 (adjusted in July each year based on the cost of living).
2. Spousal Income Allocation. The community spouse is allowed a **minimum monthly income allowance** of at least \$1,751 each month. It can be higher, up to \$2,739, depending upon the community spouse's shelter costs. If the community spouse's income is less than the minimum income allowance, she is allocated some income from her spouse to bring her income up to this amount. If her income exceeds the income allowance, she will not receive any of her spouse's income. In other words, instead of her spouse paying all excess income to the nursing home, some of that income may be allocated to

the community spouse – up to the minimum income allowance. (These figures change in January and July each year). The community spouse is not required to pay any of her income for the long-term care costs of the long-term care spouse.

Discussion: Jim and Judith are married and Jim has always been the breadwinner. He has income of \$3,000 per month and Judith has no income as she is the homemaker and not yet eligible for Social Security. Should Jim be institutionalized and need Medical Assistance to pay the cost of his care, up to \$2,739 of his income can be allocated to Judith depending on her needs. This is not available to John and Jerry. Jerry would be completely impoverished and unable to maintain his home. Likewise, assets of the marriage are combined so that the community spouse may keep all exempt assets (the home, one car, burial funds for both spouses, a business interest if it generates appropriate amounts of income, etc.) and non-exempt assets up to \$109,560. This is not available for John and Jerry.

RECOMMENDATION: The subcommittee recommends that domestic partners be afforded the protections of the spousal impoverishment rules.

CHAPTER 3: Probate and Trusts Subcommittee Report

I. Issues Relating to the Minnesota Probate Code and Probate Proceedings

The Probate Code is a set of laws relating to the personal concerns of decedents, missing persons, minors and incapacitated or incompetent persons. Chapters 524 and 525 focus on the intent decedents may have in distribution of property, effecting the distributions, guardianship and conservatorship. The public policy generally is to give priority to a spouse in these matters. In probate matters there are no assumptions or defaults to protect a surviving domestic partner. In guardianship and conservatorship matters, near the bottom of the list of persons having priority to serve is a category described as “an adult with whom the respondent has resided for more than six months before the filing of the petition,” a category that may include a domestic partner but is given seventh priority in a list of seven.

The inequities are pervasive throughout the probate laws. The Subcommittee chose to prioritize the following issues that have disparate impact on the lives of unmarried couples. These items are generally all the more poignant because they come up at a time of grief and loss, the death of a partner, the loss of capacity.

1. “Heirs” and “Interested Persons.” For purposes of the probate code and issues relating to decedents, these terms are defined as follows:

“Heirs” means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent. Minn. Stat. § 524.1-201(21)

“Interested person” includes heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against the estate of a decedent, ward or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding. Minn. Stat. § 524.1-201(24)

Unmarried couples are not included in either definition. Consider the impact of this omission:

- a. Partners are not entitled to get notice of probate proceedings as notice is required only for **“any interested person.”** Minn. Stat. § 524.1-401(a); Minn. Stat. § 524.1-403(3)(i); Minn. Stat. § 524.3-306 Orville and Agnes are unmarried but living together as partners in their retirement years. Orville dies and his children initiate probate proceedings without notifying Agnes. Even though they cohabitated for 20 years, Agnes is entitled to none of Orville’s property.
- b. A decedent’s intestate estate is considered to be any part of his or her estate not allowed by preferences in the code to the spouse or descendants under the code, and

not, of course, covered in a will. **“The intestate estate passes by intestate succession to the decedent’s heirs...”** Minn. Stat. § 524.2-101(a). Sor and Bee are an unmarried couple. Sor dies without a will. Bee is not entitled to any of her partner’s estate.

- c. The shares of heirs other than a surviving spouse include, in this order, the decedent’s descendants, if none, parents, if none, siblings, if none, nieces and nephews, if none, grandparents, or aunts and uncles, or cousins of whatever degree, or other next of kin. Minn. Stat. § 524.2-103 **A blood relative of any degree takes above an unmarried partner. An unmarried partner is not entitled to any intestate property.** If there are no heirs, of whatever degree, the estate passes to the state. Minn. Stat. § 524.2-105 On its face, this law is fundamentally unfair to unmarried couples who have committed to one another. The unfairness is compounded by the fact that many decedents die estranged from their families because of rejection by the family members for reasons including the decision to live with a partner but not marry, or in the case of a same sex couple, over issues of sexual identity. Julio’s parents cut off all contact with him when he comes out as a gay man. Julio dies without making a will or other provisions for his partner Miguel. Julio’s parents take his entire probate estate as his “heirs”. Miguel gets nothing.

RECOMMENDATION: The Subcommittee recommends that domestic partner be added to the definitions of “heir” and “interested persons” to give parity status to surviving partners.

2. Public policy favors protective and preferential treatment for a spouse. “Spouse” is not defined in the probate code. “Marriage,” as it relates to a transfer by the decedent during marriage, means any marriage of the decedent to the decedent’s surviving spouse.” Minn. Stat. § 524.2-201(3) [This raises an interesting question about whether same-sex couples who have married under the laws of states that now permit such marriages might boot-strap themselves into the code’s provisions for surviving spouses.] One does not have to have been a “good” spouse, or caring or hard working or faithful or meet any other peg of societal approval to be entitled to the protections of the probate code. One merely needs to be the “surviving” spouse. No amount of devotion or length of relationship earns an unmarried partner a single protection.

- a. A surviving spouse is entitled to an elective share of the estate **even if the decedent disinherited the spouse by executing a will that does not include the spouse.** Minn. Stat. § 524.2-202. In these cases, the duration of the marriage does come into play. A marriage that is only one year old would still entitle the surviving spouse 3% of the augmented estate; a marriage of 15 years or more entitled the surviving spouse to take 50%, in a “disinherited” situation. Partners may have shared their lives for 50 years but there is no elective share for a surviving partner.
- b. “If there is a surviving spouse, **the homestead...descends free from any testamentary or other disposition of it...if there is no surviving descendant of decedent, to the spouse;** or if there are surviving descendants of decedent...to the spouse for the term of the spouse’s natural life...” Minn. Stat. § 524.2-402. Thus

even if there are children, the surviving spouse gets a life estate in the homestead. The homestead is not protected in any manner for a partner who is not already on the title to the property. Judy and Jean are partners. Judy already owned the home before Jean moved in. They do not add Jean to the title or prepare estate planning documents. Judy dies. Judy's brothers - her nearest kin - get the house.

- c. The **surviving spouse is entitled to \$10,000 of property (furniture, appliances, personal effects) and an automobile of any value**, in addition to the homestead. Minn. Stat. § 524.2-403(a) Again, a surviving partner gets nothing.
- d. A **surviving spouse is entitled to a family allowance of up to \$1,500 a month** during administration of the estate (up to a year in an insolvent estate and 18 months in a solvent estate). Minn. Stat. § 524.2-404(a) A surviving partner gets no allowance.

RECOMMENDATION: The Subcommittee recommends that surviving domestic partners be afforded the same protections and preferential treatments as surviving spouses.

3. Uniform Guardianship and Protective Proceedings Act. When an individual lacks capacity to make or communicate responsible decisions in his or her personal matters, and has demonstrated an inability to meet basic medical care, food, clothing, shelter or safety needs, the court may find them to be an “incapacitated person” and appoint a guardian and/or conservator. Minn. Stat. 524.5-102, subd.6 (definition of incapacitated person). Minnesota law, as it relates to guardianship and conservatorship, was overhauled in 2003. At that time, for the purposes of this Act, the definition of the term “interested person” was expanded to include “an adult person who has lived with a ward, protected person, or respondent for a period of more than six months.” While the newer definition affords some protections to partners, they are minimal.

- a. If the incapacitated person did not execute a health care directive naming someone else, a spouse has priority to be appointed the guardian of the person. This priority is followed by an adult child, a parent, and then an adult with whom the incapacitated person has resided for more than six months. In fact **even ahead of the adult co-habitant are persons nominated in the wills of deceased spouses and deceased parents.** Minn. Stat. § 524.5-309(a)
- b. A spouse has priority to be appointed conservator of the estate, followed by an adult child, then parent of the person found to be incapacitated. Last in priority is “an adult with whom the respondent has resided for more than six months before the filing of the petition.” Minn. Stat. § 524.5-413(a). Furthermore, **a spouse, adult child or parent “may designate in writing a substitute to serve instead and thereby transfer the priority to the substitute.”** Minn. Stat. § 524.5-413(b)

RECOMMENDATION: The Subcommittee recommends that domestic partners be afforded the same priority as spouse for the purpose of appointment as guardian and/or conservator of an incapacitated or incompetent partner.

4. Anatomical Gifts. Unless a decedent indicated during lifetime that he or she did not want to be an organ donor, any member of the following classes, in strict priority, may make an anatomical gift. The priority is spouse, adult son or daughter, either parent, adult sibling, grandparent or health care agent or proxy under a valid living will. **A partner has no authority to make an anatomical gift if the partner has not been named in a health care directive or similar document.** Partners Thor and John had discussed their willingness to be organ donors many times but neither had ever put their wish into writing. Thor died. John has no standing to consent to an anatomical gift on Thor's behalf. Minn. Stat. § 525.9212

RECOMMENDATION: The Subcommittee recommends that domestic partners be afforded the same priority as spouse for the purpose of consenting to anatomical gifts.

II. Issues Relating to Trusts

There are no trust issues that rise to the level of importance of the Medical Assistance homestead problem or the failure of the intestacy statutes to include unmarried couples. In addition, some of the issues that arise regarding trusts are primarily tax issues that would be addressed automatically if the tax laws were changed to include unmarried couples.

Therefore in the Subcommittee's opinion any issues described below would be of a lower priority than the issues in the other areas being reviewed by our Subcommittee (see below).

The following is a description of statutes governing trusts that have a differential impact on unmarried couples.

- 1. Minn. Stat. § 501B.07.** Purchase money resulting trust. If a spouse pays the purchase price on an asset and the asset is put in the name of the other spouse, a gift is presumed. If the same transaction takes place with an unmarried couple a purchase money resulting trust is presumed to be created, unless the person making the purchase payment manifests a contrary intention.

Discussion: This is problematic because it could frustrate the intentions of unmarried couples. For example if one party puts in all of the money to buy a house which is titled in the name of both parties, the funds might later be deemed to be held in trust for the party providing the funds if the transaction is revisited if the parties end their domestic partner relationship, or for tax purposes in the event of the death of one of the parties.

- 2. Minn. Stat. § 501B.86.** If a married person wishes to reject an inheritance, his or her spouse must consent in order for the disclaimer to be binding against the spouse. An unmarried partner does not have the same protection.

Discussion: For couples who work well together this would not be a problem, and could allow them to avoid some of the technicalities of disclaimers. For some individuals they could lose out on assets the partner might disclaim, but the fact that a partner has no inherent rights to their partner's assets renders this a non issue. For example, consider partners Mary and Jane. If

Mary is entitled to an inheritance and disclaims it, thereby letting it pass to Mary's siblings, Jane really does not lose anything, because even if Mary accepted the inheritance Jane would have no rights to it as an unmarried partner.

- 3. Minn. Stat. § 501B.89.** The formation of a special needs trust requires that neither the beneficiary nor their spouse fund the trust. The unmarried partner of a special needs trust beneficiary can be the settlor.

Discussion: This gives unmarried couples a planning opportunity spouses do not have.

- 4. Minn. Stat. § 501B.895.** Revocable trusts formed after July 2005 with assets for the benefit of an individual or their spouse are revocable for the purpose of determining eligibility for long-term care assistance. The State does not have the same power to reach trusts established by, or for the benefit of, an unmarried partner, even if the couple is living together as a single economic unit.

Discussion: This gives unmarried couples a planning opportunity spouses do not have.

- 5. Minn. Stat. § 501B.90.** If a trust authorizes or directs a benefit to a spouse who then divorces, it is presumed that the trust will no longer provide such assets to the spouse; if provisions are revoked solely by this section, then they are revived by remarriage of the same parties. The same is not true for an unmarried couple.

Discussion: Unmarried couples have to update their documents when a relationship ends.

- 6. Minn. Stat. § 524.3-916.** Provides for exclusion of property passing to a surviving spouse in trust for the purpose of certain taxes. The same is not true if a trust is established for an unmarried partner.

Discussion: This is a tax issue/corollary.

- 7. Minn. Stat. § 525.528.** A trustee of a decedent has a duty to be fair in selecting assets to pass to the surviving spouse to satisfy a bequest or transfer within the meaning of the marital deduction provisions of section 2056 of the United States Internal Revenue Code. A surviving unmarried partner does not have the same protection.

Discussion: This is a tax issue/corollary.

- 8. Minn. Stat. § 529.05.** It is presumed that if a husband and wife are both beneficiaries of a custodial trust, there is survivorship. An unmarried partner does not benefit the same presumption.

Discussion: This is another default protection of the rights of spouses to succeed to one another's property.

9. **Minn. Stat. § 529.12.** A “member of beneficiary’s family,” defined in Minn. Stat. § 529.10 to include a spouse, can petition to remove a custodial trustee for cause, to furnish security for performance of duties, or to provide other relief. An unmarried partner does not have access to these remedies.

Discussion: There are limited circumstances where this would create a problem, but in those limited circumstances it would be a real hardship. This would be very problematic if the trustee was biased against the partner. This would be very problematic if the beneficiary had a legal family member serving as a guardian or conservator (because the beneficiary didn’t have a legal document naming the partner in that capacity) and the guardian or conservator also was biased against the partner.

CHAPTER 4: Labor and Employment Subcommittee Report

The Labor and Employment Subcommittee of the MSBA Unmarried Couples Task Force reviewed the differences in the legal rights and protections available to unmarried couples as compared to married couples under Minnesota law with a focus on disparities that exist in labor and employment laws. The Subcommittee has determined that the most significant disparity in Minnesota labor and employment law is a failure to provide unmarried employees in domestic partner relationships with the same earned employment benefits that are provided to employees who are married.

The Subcommittee is pleased to report, however, that the Minnesota State Legislature, in its 86th legislative session (2009-2010), is considering proposed legislation that requires state employers to provide employee health, dental, and life insurance benefits to the domestic partners of unmarried state employees if such benefits are made available to the spouses of married state employees. Under the proposed legislation, a “domestic partner” is defined as follows:

43A.02, Subd. 18a. **Domestic partner.** “Domestic partner” means a person who has entered into a committed interdependent relationship with another adult, where the partners: (1) are responsible for each other’s basic common welfare; (2) share a common residence and intend to do so indefinitely; (3) are not related by blood or adoption to an extent that would prohibit marriage in this state; and (4) are legally competent and qualified to enter into a contract.

For purposes of this subdivision, domestic partners may share a common residence, even if they do not each have a legal right to possess the residence or one or both domestic partners possess additional real property.

If one domestic partner temporarily leaves the common residence with the intention to return, the domestic partners continue to share a common residence for the purposes of this subdivision.

H.F. No. 1219 and S.F. No. 1153, as introduced - 86th Legislative Session (2009-2010).

The Subcommittee supports the proposed legislation and recommends its full adoption by the State Legislature and immediate enactment by the Governor. The provision by state employers of these employment benefits to both married employees and unmarried employees in domestic partner relationships addresses myriad social and economic purposes, including (1) increased success in attracting and recruiting qualified and highly-skilled workers due to an expanded potential candidate pool; (2) increased retention of existing employees through the elimination of voluntary employee separations due to a lack of available benefits; (3) increased employee productivity as a result of decreased economic stress; and (4) easy adaptation to the changing needs of state employees by expanding existing employment benefits programs while ensuring fairness and equality in the workplace.

State employees who are unmarried but are in domestic partner relationships perform the same duties and bear the same responsibilities as do married state employees. State employees

who are unmarried but in domestic partner relationships pay the same union dues, pay the same health insurance co-payments and deductibles, and make the same retirement contributions as do married state employees. The currently proposed legislation properly provides state employees who are unmarried but in domestic partner relationships with the same recognition and benefits that their married counterparts presently enjoy.

While the Subcommittee wholly embraces the importance and significance of the proposed employment benefits legislation currently under consideration, the Subcommittee believes that it does not go far enough to eradicate the disparities that presently exist in Minnesota's labor and employment laws. To that end, the Subcommittee identifies the following additional areas in the law where disparities that exist can be lessened by the addition of the same "domestic partner" language currently under consideration: (1) allowing unmarried employees with domestic partners to use vacation time to pay for expenses due to a partner's illness; (2) allowing unmarried employees with domestic partners to take time off work to attend criminal proceedings related to the crime if their partner is the victim of a heinous crime; (3) allowing domestic partners of unmarried Minnesota employees to participate in statewide insurance programs designed to provide employers and eligible individuals with a large pool for insurance purchasing; and (4) allowing unmarried employees with domestic partners to have standing to sue if a domestic partner is injured or killed on the job.

I. Use of Vacation Time to Pay for Partner's Illness

Similar to married persons, unmarried persons in committed relationships purchase homes, raise children, support elderly parents, pay taxes and are productive employees. At present, Minn. Stat. § 43A.181 allows a married civil service employee the right to use his/her unused vacation benefit for illness in his/her family (defined as the employee, spouse or dependent), however an unmarried employee in a similarly committed relationship cannot use the unused vacation benefit in the same fashion. The disparate result is that unmarried employees, who have similarly earned the vacation benefits, are further stressed by the financial burdens of illness and/or injury. Currently, the majority of Minnesota's Fortune 500 companies offer domestic partner benefits to their employees including 3M, Best Buy, General Mills, Target Corporation and UnitedHealth. A modification to Minn. Stat. § 43A.181 would assist civil employers to be able to effectively "recruit, select and develop an effective, productive and responsive work force representative of the labor market"² and make equitable the ability of all civil service employees to realize benefits earned.

The Subcommittee's intent is not to create a special protection or benefit for unmarried couples, but that the proposed modification will recognize the unmarried employee's earned benefit and allow equal protection under the law for both married employees and unmarried employees in committed domestic partner relationships.

² Minn. Stat. § 43A.01, Policies.

Proposed Statutory Changes:

The Subcommittee proposes to amend Minn. Stat. § 43A.181 Unreimbursed Medical Costs Vacation Donation Program, Subd. 3. Use of account assets, as follows:

Expenditures from the account established by subdivision 2 may be made to pay unreimbursed medical expenses when the total of those expenses is at least \$10,000 and the expenses are incurred because of the illness of or injury to a state employee, or the employee's spouse or domestic partner, or the employee's dependent. Up to 40 percent of the funds donated to an individual employee's account may be used to pay for housing and transportation accessibility costs required by the employee who suffered an injury. Any money remaining after all of the expenses incurred by the employee named to benefit from a donation have been paid may be transferred to a general pool. The commissioner may use the pool to pay unreimbursed medical expenses for another state employee named to benefit from donated vacation time but whose unreimbursed expenses exceed the monetary value of the donated time.

II. Time Off to Attend Criminal Proceedings³

Similar to married couples, unmarried couples in committed relationships depend on each other during periods of distress. At present, Minn. Stat. § 611A.036 allows a married employee of a Minnesota private or public employer the right to take a reasonable amount of time off work if a member of his/her family (defined as the spouse or immediate family member) is a victim of a violent crime to attend criminal proceedings related to the victim's case. However, an unmarried employee in a similarly committed relationship cannot. The disparate result is that unmarried employees, who have similar concerns for the victim, are not able to be present and supportive of the victim, which results in increased stress for the employee and increased stress for the victim of the violent crime. Further, if the unmarried victim has less support at the criminal proceedings, the victim may be less inclined to assist in the prosecution of the crime.

Proposed Statutory Changes:

The Subcommittee proposes to amend Minn. Stat. § 611A.036 Prohibition Against Employer Retaliation, Subd. 2, Victim's spouse or immediate family members, as follows:

An employer must allow a victim of a violent crime, as well as the victim's spouse or domestic partner, or immediate family members, reasonable time off from work to attend criminal proceedings related to the victim's case.

III. Unmarried Employees' Participation in Statewide Insurance Program

Minnesota Statute § 43A.317 provides for the creation of a statewide insurance program for eligible Minnesota employers offering them the advantage of a large pool for insurance purchasing in an effort to advance the welfare of Minnesota citizens. Minnesota's workforce is

³ This statute is also addressed below by the Criminal Law subcommittee report.

comprised of both married and unmarried individuals, yet the employment benefits available under Minn. Stat. § 43A.317 are presently limited to current or retired employees and their spouses, dependent children and dependent grandchildren, and employees' surviving spouses, dependent children and dependent grandchildren under certain circumstances. The exclusion of unmarried partners of employees in domestic partner relationships from participation in a statewide insurance program unfairly deprives unmarried employees of equal access to employment benefits that are received by married employees despite the fact that these unmarried employees perform the same duties and bear the same responsibilities as their married employee counterparts. The disparate result is that unmarried employees are burdened with additional financial stress and responsibility associated with providing health, dental, and life insurance benefits for their families.

Moreover, similar to the state's public employers, all Minnesota employers engaged in business or public service will benefit from the provision of employment benefits to both married employees and unmarried employees in domestic partner relationships through increased success in recruiting and retention of employees, increased employee productivity due to a reduction in employee stress regarding financial burdens associated with the provision of health care and insurance benefits to their families, and easy adaptation of existing benefits programs to ensure fairness and equality in the workplace.

Proposed Statutory Changes:

The Subcommittee proposes to amend Minn. Stat § 43A.317 Minnesota Employees Insurance Program, subdivisions 5(e) and 6(c) as follows:

Subd. 5 Employer Eligibility. (a) ... (e) Private Employer. A private employer is not eligible for coverage unless it has two or more eligible employees in the state of Minnesota. If an employer has only two eligible employees and one is the spouse, domestic partner, child, sibling, parent or grandparent of the other, the employer must be a Minnesota domiciled employer and have paid Social Security or self employment tax on behalf of both eligible employees.

Subd. 6. Individual eligibility.

(a) ... (c) Other individuals. An employer may elect to cover under its plan:

- (1) the spouse or domestic partner, dependent children, and dependent grandchildren of a covered employee;
- (2) a retiree who is eligible to receive a pension or annuity from the employer and a covered retiree's spouse or domestic partner, a covered retiree's dependent children, and a covered retiree's dependent grandchildren;
- (3) the surviving spouse or domestic partner, dependent children, and dependent grandchildren of a deceased employee or retiree, if the spouse, domestic partner, or grandchildren were covered at the time of the death;

IV. Standing to Sue if a Domestic Partner is Injured or Killed on the Job

Minnesota Statutes §§ 219.77 and 219.82 provides the spouse, children, parents and next of kin⁴, in that order, standing to sue an employer who operates a common carrier if the employee suffers injury or death while engaged in that employment. Minnesota's workforce is comprised of both married and unmarried individuals, yet an unmarried domestic partner of an employee who is harmed would at best, stand in line behind children, parents and siblings rather than be given the recognition the domestic partner deserves. At worst, the domestic partner would have no standing even if no "next of kin" existed. The current status and nebulous definition of "next of kin" would leave domestic partners at the mercy of the judicial system as to whether the domestic partner could have standing to sue for wrongful death.⁵ Continuing this ambiguity does not support judicial economy or benefit Minnesotans' varying family structures.

Proposed Statutory Changes:

The Subcommittee proposes to amend the interrelated Minn. Stat. §§ 219.77 and 219.82, which involve common carriers and the rights to death benefits of the employee.

Minn. Stat. § 219.77, Railroad Employer Liability.

A company, person, or corporation, owning or operating as a common carrier or otherwise a steam railroad or railway in the state, is liable in damages to an employee suffering injury while engaged in that employment; or, in case of death of the employee, to the personal representative for the benefit of the surviving spouse ~~or and children~~ domestic partner of the employee and the children of the employee; and if none, then to the employee's parents; and if none, then to the next of kin dependent upon the employee, for injury or death resulting in whole or in part from the negligence of the officers, agents, or employees of the employer, or by reason of a defect or insufficiency in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment due to the employer's negligence.

Minn. Stat. § 219.82, Survival of Right of Action.

A right of action given by sections 219.77 to 219.83 to a person suffering injury survives to the personal representative for the benefit of the surviving spouse or ~~and children~~ domestic partner

⁴ "Next of kin" has been defined by one Minnesota statute as the "nearest proper relative." (Minn. Stat. § 182.6545) "Nearest proper relative" has been defined by another Minnesota statute as "in the order listed: the patient's spouse, parent, adult child, or adult sibling." (Minn. Stat. § 253B.03, subdivision 6, paragraph (c)) However, Minn. Stat. § 219.77 refers to the last possible person to have standing as "next of kin dependent upon the employee," which makes it unclear whether a dependent sibling, aunt or even domestic partner would be included.

⁵ The Minnesota State Legislature is also currently considering this issue during the 86th Session via H.F. No. 1494 and S.F. No. 341, which would give a surviving domestic partner standing to sue for wrongful death and other state tort claims.

and children of the employee; and if none, then of the employee's parents; and if none, then of the next of kin dependent upon the employee, but in such cases there shall be only one recovery for the same injury.

V. Conclusion

In Conclusion, the Subcommittee commends the current efforts of the State Legislature in addressing and working to rectify the disparities that exist in the law's provision of employment benefits to married employees and unmarried employees in domestic partner relationships. However, the Subcommittee recognizes that the legislation described above as H.F. No. 1219 and S.F. No. 1153 has a weakness in that there is no proof required for two persons who claim to be in a domestic partnership.

If the currently proposed legislation does not pass on this or similar grounds, the Subcommittee suggests the implementation of a more formal domestic partnership documentation requirement that would serve as a formal recognition of the domestic partnership in the eyes of the law. Such a documentation system could include the submission of an affidavit sworn to by both members of the domestic partnership and delineating the factors set forth in the currently pending legislation. The Subcommittee believes that the specific contours and requirements of any such formal documentation system, including whether such documentation would be produced at an employer, local or state level, is subject to further study given the relationship and impact such a system would have on other state laws. The Subcommittee does, however, promote the ideal that a domestic partner employee should not be subject to a level of scrutiny beyond that of a married employee, nor continued denial of those rights already afforded spouses.

CHAPTER 5: Real Property Subcommittee Report

Unmarried couples, opposite or same sex, encounter challenges not encountered by married couples when owning and/or residing in real property during the course of their relationships. There are unique reasons for why a committed couple has either chosen to marry or not marry. In the case of same sex couples they are prohibited from marriage. Regardless of the reasoning and rationale behind a couple maintaining an “unmarried” status, unmarried couples are effectively treated differently under many of our current Minnesota statutes that address these interests. Common law concepts of “joint tenancy” have been modified in some instances by statute that results in clear inequity to unmarried couples. If the purpose of Minnesota law is to move toward justice and fairness to individuals regardless of their status, then change is warranted in the language of the statutes examined by the Real Property Subcommittee so that discriminatory results based purely on an individual’s marital status are not allowed to continue.

The Real Property Subcommittee met and examined a number of Minnesota Statutes which result in disparate treatment in real property ownership based upon a person’s marital status. For the purposes of this report, the subcommittee focused on problem areas identified in an unmarried couple’s ownership of real property in joint tenancy in these three areas: 1) where there is a dissolution of their relationship and a fight develops over their respective ownership interests when there may have been a disparity in contributions (Minn. Stat. § 558); 2) unfair outcomes for unmarried couples who owned real property in joint tenancy where there had been a statutory modification of the common law under Minn. Stat. § 256B.15; and 3) problems associated with a non-fee title owner attempting to protect his or her financial or equitable contributions to real property.

I. Partition Statute

Minnesota Chapter 558 outlines the procedure for partitioning of real property. This Chapter is oftentimes used as a tool for unmarried couples to address their respective ownership interests in real property where the parties own the real property in joint tenancy but dispute how much each has contributed to the maintenance and improvement of the real property. In the context of marital relationships, statutes related to the dissolution of the marital relationship presume equal ownership of the homestead at a point in time going forward from the date of the marriage to the date of dissolution, with the opportunity for one of the spouses to claim a nonmarital interest in the real property. There is no such protection for unmarried couples. This can spawn costly litigation with unpredictable results, as there is little or no legislative guidance on how to evaluate such claims.

Proposed Statutory Changes:

The Subcommittee recommends a revision in Chapter 558 that clearly establishes that a property owned in joint tenancy carries with it a rebuttable presumption of equal ownership

starting at the time of the creation of the joint tenancy.⁶ The following amendment is proposed to Minn. Stat. § 558.01:

558.01 Partition, Sale; Determination of Rights; Who May Bring Action

When two or more persons are interested, as joint tenants or as tenants in common, in real property in which one or more of them have an estate of inheritance or for life or for years, an action may be brought by one or more of such persons against the others for a partition thereof according to their respective rights and interests of the parties interested therein, or for a declaration of ownership rights in the real property without sale, or for a partition and sale of such the property, or a part thereof, if it appears that a partition without sale cannot be had without great prejudice to the owners. Where two or more persons own property in joint tenancy, they shall be a rebuttable presumption that they each own an equal interest in the property irrespective of unequal contributions at the time of the creation of the joint tenancy.

II. Medical Assistance Liens as related to Joint Tenancy

The medical assistance lien statutes are primarily subject to examination by the probate and estate planning subcommittee, however, the real property subcommittee deemed it important to weigh in on that part of Minn. Stat. § 256B.15, which deviates from traditional common law concepts of joint tenancy and results in blatant discriminatory results premised solely on the basis of marital status, as well as an unconstitutional results as suggested by Torgelson v. Real Property, 749 N.W.2d 24 (Minn. 2008).

With the goal of equality, fairness and constitutionality, the subcommittee recommends that the unfairness to unmarried couples be eliminated, or language of the statute modified to reflect the same treatment of individuals unrelated to their marital status and recommend adoption of the bill currently supported by Project 515 and attached hereto as Attachment No. 1.⁷

III. Inchoate-Like Protections

Unmarried couples are often in the position wherein only one is the fee title owner over a number of years, but they both have made financial contributions toward a homestead's acquisition or improvement or both, or have made unequal sweat contribution, with the intent that they both in some way would recover their respective investments in the event their relationship ended; but they never got around to writing anything down. Without a written agreement memorializing their understandings and agreements, an individual not in title must engage constructive trust litigation to prove that his or her investment of money and labor is reflected in the homestead's value and be protected and returned to him or her. In a marital

⁶ Wisconsin's statutes on the characteristics of joint tenancy has codified the following: Characteristic of joint tenancy. 700.17(2)(a): (a) Each of 2 or more joint tenants has an *equal interest in the whole property for the duration of the tenancy, irrespective of unequal contributions at its creation*. On the death of one of 2 joint tenants, the survivor becomes the sole owners; on the death of one of 3 or more joint tenants, the survivors are joint tenants of the entire interest. If a survivor disclaims under s. 854.13(2)(b), the joint tenancy is severed as of the date of death with respect to the disclaimed interest. [Emphasis Added]

⁷ Since the Subcommittee met, the attached bill has been significantly revised by the active amendment process on-going in the Minnesota House and Senate, but the Subcommittee still supports the spirit and intention of the attachment.

context, this type of property interest arising from the marital relationship is protected by statutes which require spouses as a practical matter to both sign on any conveyance of real property owned during the course of their marriage, regardless of when the property was acquired. Minn. Stat. § 507.02.

In some instances, it may be that a couple and/or an individual truly desire that the fee title ownership remain solely in the name of one person with no possibility of claims by another occupant. In other cases, there may be a fear that a conveyance may trigger a 'due on sale' clause in a mortgage. The subcommittee believes that a resolution to these problems may lie in the execution and recording of a simple statement notifying third parties and fee title owners of potential claims.

Proposed Statutory Changes:

The subcommittee suggests the adoption of a new statutory provision for abstract property which tracks the language of the existing adverse claims statute set forth in the Torrens statutes. See Attachment No. 2.

IV. Conclusion and Examples

The foregoing changes are intended to make additional tools available to unmarried couples to prevent the inequitable results such as the case of "Sue" and "Barb." Sue and Barb had been residing together for over 10 years in a home owned in fee title by Sue. Barb had three minor children from a previous marriage who resided with them in their home. While Barb had made financial contributions to the maintenance of their domestic life together, such as paying utility bills, buying groceries, making car payments and insurance payments on cars held jointly, Sue used her income to make the monthly mortgage payment and made no contribution to the other expenses of maintaining the home. The relationship deteriorated and Sue told Barb she had to move out immediately with her children. On a cold Minnesota winter night, Sue changed the locks on Barb and her minor children and took the position that despite the 10-year relationship, Sue had no legal or equitable interest in the home and should get nothing.

Or the case of "Dan" and "Tom" where they owned their home in joint tenancy, but Tom made three times the income of Dan and had encouraged Dan to take time off to take care of their newly adopted child for five years until the child was ready for school. While Dan could not make equal financial contributions, he did provide sweat equity improvements to the home in the form of remodeling projects, landscape projects and doing many of the domestic tasks that supported Tom in his business success. At the end of their relationship, Tom discounted Dan's domestic contributions in caring for their child and the sweat equity contributions Dan had made that increased the value of their home.

CHAPTER 6

Insurance Subcommittee Report

Insureds are individuals that are entitled to benefits of or coverage under an insurance policy. The kind(s) of benefits or coverage available depends upon the kind of claim that the insured makes. For example, an insured may make a homeowners' insurance claim for storm damage to her house. Or, an insured may seek coverage from his car insurer if he is sued by someone as the result of a car accident that he was involved in. But an insured may receive benefits or be entitled to coverage only if he or she is an "insured" under the particular policy that is at issue.

The terms and definitions of any given insurance policy govern whether a particular individual is entitled to the policy's benefits. And insurance policies must provide at least as much coverage as Minnesota law requires. (An insurer may provide more coverage than is required by statute.)

The definition of "insured" differs from statute to statute. And the definition of "insured" differs from policy to policy. (At the very least, the policy's definition of "insured" must conform to the respective statute's minimum requirements.) Undoubtedly, each statute's and each policy's definition of "insured" includes the named insured on the policy. A statute and/or policy may then go on to provide that in addition to the named insured on the policy, "insured" also includes a "relative living in the household" and/or a "spouse". Then, the statute and/or insurance policy may very well define "relative living in the household" and/or "spouse" as "a person living in the household of the named insured and related to such person by blood, marriage or adoption". This definition of "relative living in the household" and/or "spouse" does not – in and of itself - provide coverage to both unmarried individuals who live together in the same household.

One example of how a Minnesota statute does not provide benefits to both unmarried individuals who live together in the same household is contained in Minnesota's No-Fault Act. Minn. Stat. §§ 65B.41 – 65B.71 comprises the Minnesota No-Fault Automobile Insurance Act. (Like all insurance statutes, this No-Fault Act requires insurers to comply with the requirements of the statute. Again, insurers may provide more coverage than is required by Minnesota law.) The No-Fault Act – and the respective no-fault insurance policy endorsements - provide that an insured is entitled to make a claim for no-fault benefits for injuries that arise out of the maintenance or use of a motor vehicle. (Also, pedestrians are entitled to no-fault benefits if struck by a motorcycle.) An insured may claim medical expense benefits for medical treatment that is reasonable, necessary, and related to the accident; wage loss benefits for wage loss that results from the insured's inability to work; and essential services benefits that the insured reasonably incurs in getting normal and needed substitute services in place of those the injured person would have performed for the direct benefit of himself and his household.

The No-Fault Act defines "insured" as follows:

Subd. 5. Insured. “Insured” means an insured under a plan of reparation security as provided by sections 65B.41 to 65B.71, including the named insured and the following persons not identified by name as an insured while (a) residing in the same household with the named insured and (b) not identified by name in any other contract for a plan of reparation security complying with sections 65B.41 to 65B.71 as an insured:

- (1) a spouse,
- (2) other relative of a named insured, or
- (3) a minor in the custody of a named insured or of a relative residing in the same household with a named insured.

A person resides in the same household with the named insured if that person's home is usually in the same family unit, even though temporarily living elsewhere.

If a no-fault insurance policy endorsement provides the minimum coverage per Minnesota law, then both unmarried individuals who live together in the same household would not receive the same coverage. However, some recent no-fault insurance policy endorsements appear to contain additional coverage in order to provide coverage for both unmarried individuals who live together in the same household. The typical no-fault policy provides no-fault benefits to an “eligible injured person”. According to this policy, an “eligible injured person” includes the named insured on the policy or a relative. “Relative” is defined as “the spouse or any person living in the household of the named insured and related to such person by blood, marriage or adoption”. This language would not include both unmarried individuals who live together in the same household. However, a recent no-fault insurance policy endorsement further defines “eligible injured person” as “any other person who sustains bodily injury while occupying, or while a pedestrian as a result of an accident involving the insured motor vehicle”. This additional subsection to the definition of “eligible injured person” provides coverage and benefits to both unmarried individuals who live together in the same household.

The standard homeowners policy will not provide coverage to both unmarried individuals who live together in the same household in the same way it would for a married couple. Pursuant to the standard homeowners policy, the insurer will pay “compensatory damages for which any insured is legally liable because of bodily injury or property damage caused by an occurrence”. The policy defines “insured” as “you” (the named insured), as well as the named insured’s relatives and “any other person under the age of 21 in [the named insured’s] care of in the care of [the named insured’s] resident relatives”. The policy does not define the word “relative”.

Example: A and B are an unmarried couple living together in their home. A secures the homeowners policy and names herself as the named insured. B takes care of the maintenance around the house and was outside with a ladder and tools. Neighbor comes over to the property and steps on the tools, thereby terribly injuring himself. Neighbor sues B, claiming that B negligently left the tools laying about. B asks its insurer to defend him.

The insurer denies coverage, saying that there is no coverage because B is not an insured pursuant to the terms of the policy. However, had A and B been married at the time of the accident, there would have been coverage.

Other kinds of insurance policies that may not include coverage to both unmarried individuals who live together in the same household in the same way it would for a married couple are as follows.

I. LIFE INSURANCE

Minn. Stat. § 576.121

Minn. Stat. § 576.122

Minn. Stat. § 61A.12, subd. 2

Minn. Stat. § 61A.12, subd. 4

Minn. Stat. § 61A.24

II. HEALTH / EMPLOYMENT – PROVIDED / GROUP HEALTH INSURANCE

Minn. Stat. § 60A.082

Minn. Stat. § 61A.092

Minn. Stat. § 62A.03

Minn. Stat. § 62A.10

Minn. Stat. § 62A.146

Minn. Stat. § 62A.17

Minn. Stat. § 62A.20

Minn. Stat. § 62A.21

Minn. Stat. § 62C.142

Minn. Stat. § 62D.101

Minn. Stat. § 62D.105

Minn. Stat. § 62E.04

Minn. Stat. § 62L.02

Minn. Stat. § 62L.03

Minn. Stat. § 62L.04

Minn. Stat. § 62L.045

Minn. Stat. § 62L.05

Minn. Stat. § 62L.056

Minn. Stat. § 62L.08

Minn. Stat. § 62L.12

III. MISCELLANEOUS

Minn. Stat. § 47.016

Minn. Stat. § 60K.42

Minn. Stat. § 64B.39

CHAPTER 7: Tax Law Subcommittee Report

The Tax Law Subcommittee of the MSBA Task Force on the Rights of Unmarried Couples reviewed the differences in the legal rights and protections available to unmarried couples as compared to married couples under Minnesota tax law. The Subcommittee recognized that related-parties provisions of the federal tax system foster inequitable tax treatment between married and unmarried couples. The Internal Revenue Code contains countless favorable rules applicable to the taxation of persons related by marriage. Because Minnesota's tax system adopts the federal definition of marriage and mimics the federal related-parties provisions unmarried couples are subject to unfavorable tax treatment.

The Subcommittee determined that equitable tax treatment is possible if Minnesota redefines related-parties, recognizing the relationship of an unmarried couple. This approach has met with success in states that have legalized same-sex marriage or have enacted civil unions. In essence, the creation of such a related-parties provision will allow an unmarried couple to elect a tax filing status that is equitable to the tax filing status of a married couple.

The Subcommittee identified three areas in which a change in the related-parties provision would result in an unmarried couple obtaining favorable tax treatment: 1) recognize the family unit of an unmarried couple in the term "dependent", 2) recognize a surviving partner of an unmarried couple for purposes property transfers, and 3) recognize the family unit of an unmarried couple that participates in employer-provided health insurance.

I. Equitable Tax Treatment of Dependents

A taxpayer is unable to claim dependency and tax credits for a child if the child is not the biological or adoptive child of the taxpayer and the taxpayer cannot evidence support for the child, even when the child resides in the home of the taxpayer and his or her unmarried partner.

Policy Description:

A "dependent" is defined under IRC § 152. The definition does not recognize dependents of a non-biological or non-adoptive parent where the family unit is comprised of an unmarried couple. The State adoption of the federal definition of "dependent" categorically excludes the treatment of a child as a dependent for one partner of an unmarried couple. The State further excludes this category of dependents from tax credit benefits, which provides monetary incentive for the working poor.

Proposed Statutory Changes:

The State can decouple from the federal statute, with a relatively simple solution to change the State's definition of dependent or to extend the language to include a taxpayer's domestic partner. Further, once a domestic partnership exists it will not terminate through dissolution.

The Minnesota Department of Revenue should implement a process whereby an unmarried couple may elect to treat itself in the same manner as a married couple, similar to processes currently utilized in states with same-gender marriage and civil unions.

The definition of dependent, qualifying child, qualifying individual and similar language should include children who are members of the family household composed of an unmarried couple. Specifically, the following State statutes should be amended as set forth:

Minnesota Statute § 290.67: Dependent Care Credit; allowing the income-earning taxpayer who is not biologically related to the child and legally unable to become a step-parent to exercise the Dependent Care Credit..

Minnesota Statute § 290.0671: Working Family Credit; allowing unmarried couples to elect to stand in the same position as married couples.

Minnesota Statute § 290.0674: Education Credit; allowing unmarried couples to elect to stand in the same position as married couples.

Providing more favorable tax treatment - in the form of dependency exemptions and tax credits - for low-income families with children is derived from public policy sentiment in support of the working poor.

II. Inequitable Tax Treatment of Property Transfers to the Surviving Spouse

Upon death, property transferred to a surviving partner of an unmarried couple is subject to state taxation, but a surviving spouse of a married couple is not subject to said taxation on the same transfer.

Policy Description:

Minnesota calculations for state estate tax purposes are dependent upon federal law, which does not recognize unmarried couples or treat them equally to married couples. By limiting deductibility of transfers to married couples, the surviving partner of an unmarried couple receives inequitable tax treatment when the surviving partner inherits from the deceased partner's estate, regardless of whether the unmarried couple's relationship is recognized by the state.

Minnesota Statute § 524.3-916: Apportionment of Estate Taxes and Generation-Skipping Tax; provides a means for the surviving spouse to avoid state estate taxes on property passing to the spouse or to trust for the benefit of the spouse. This section allows for an exception by which property passing to a surviving spouse that is deductible (under federal law) can be excluded from computation of estate tax liability of the beneficiaries.

Minnesota Statute § 525.528: Federal Estate Tax; Marital Deduction; requires fairness by a fiduciary when selecting assets from a decedent's estate to distribute to the surviving spouse in order to satisfy transfers under the federal marital deduction allowance.

Proposed Statutory Changes:

Because the State has already decoupled from the federal statute, it may also decouple to grant equality in terms of deductions to similarly situated couples. This would require a new statute to be inserted providing for a deduction for transfer of property at death for unmarried couples. Further, the State's definition of surviving spouse should be expanded to include the surviving partner of an unmarried couple. The Minnesota Department of Revenue can implement a process whereby an unmarried couple may elect to be treated under the same provisions as a married couple, similar to processes currently utilized in states with same-gender marriage and civil unions.

For example, Terry and Rick own everything together. Their home, cars, bank accounts and vacation home are owned jointly. They are the beneficiaries of each other's retirement plans and life insurance. Their Last Will and Testaments give all their property to each other. They serve as each other's Power of Attorney and Health Care Agents. The only thing that does not treat them equally is the law. If Terry and Rick were a heterosexual couple, the surviving spouse would be entitled to favorable tax treatment based on their legally-sanctioned relationship at the time of the other partner's death. But if Terry and Rick were a same gender couple, their relationship would not be recognized for purposes of property transfers, even though the outcome from a property transfer standpoint would be the same. That is that the surviving spouse, either of an opposite-gender or same-gender union, is the beneficiary of their deceased spouse's estate.

PROPOSED STATUTE:

When the surviving spouse of a decedent is eligible under the marital deduction provisions of section 2056 of the United States Internal Revenue Code or such cognate provisions of federal law as may hereafter be applicable, and correspondingly, under Minnesota law, for an estate tax deduction on transfers of assets from the decedent spouse, a comparable deduction will be applied on a state level to transfers from the decedent member of a civil union or decedent partner of a domestic partnership to the surviving member or partner.

Application / Implementation:

The intent of the proposed modifications to the Code is to provide unmarried couples with the same eligibility for tax-free transfers of wealth that is afforded to couples in marital relationships. To accomplish this, the surviving member of an unmarried couple will prepare a pro forma 706 federal estate tax return, indicating the transfer made by the decedent partner as if the partners' relationship was recognized as a marriage under federal law. The individual will then base his or her Minnesota M706 (estate tax return) on the pro forma federal 706, and thus, be able to claim a deduction for the transfer at the state level. Similarly situated states, such as California and Massachusetts, have enacted comparable statutes in response to the estate planning issues facing same-sex partners in their states.

Domestic Partner / Civil Union Definition:

To qualify as a domestic partnership or civil union, the couple must make a sworn statement to the taxing authority attesting that the two individuals are in a committed relationship and that they shall notify the taxation authority if their relationship terminates within 30 days of the termination.

The definition of domestic partnership or civil union will be by reference to a separate statute, which this Subcommittee did not tackle.

III. Inequitable Tax Treatment of Employee Benefits

Generally, fringe benefits provided through one's employer are included in the employee's taxable income for federal and state personal income tax reporting. The disincentive to the employee is that he or she may decline a fringe benefit if the employee feels that his or her "take home" pay is not sufficient to support his or her family. To resolve this conflict so that an employee may fully appreciate an employment fringe benefit, employer provided fringe benefits, such as medical coverage for the employee's family, receive favorable federal and State tax treatment.

Policy Description:

The employer expenses associated with employer provided medical coverage offered as a fringe benefit to an employee's spouse or the spouse's dependent(s) is not considered taxable income to the wage earner.

Conversely, the employer expenses associated with employer provided medical coverage offered as a fringe benefit to an employee's non-spousal partner and/or partner's dependent(s) is included in the wage earner's taxable income.

Proposed Statutory Change:

Change Minnesota Statute § 290.01 Subd 19b to provide a State add-back provision as follows:

Minnesota Statute § 290.01 Subd. 19b: Subtractions from federal taxable income. For individuals, estates, and trusts, there shall be subtracted from federal taxable income:

(18) If an individual participates in an employer-provided health insurance plan, any amount which, but for this section, would be included in gross income of the individual by reason of coverage under the plan of the domestic partner and/or domestic partner's dependent(s).

Although the proposed change does not fully resolve the inequity between married and unmarried couples, it does provide for a tax relief for unmarried couples at the State level. Add-

backs to a person's State taxable income is a well-established practice within the State, which would result in a nominal cost to the Minnesota Department of Revenue.

CHAPTER 8: Criminal Law Subcommittee Report

The Criminal Law Subcommittee reviewed statutes that impacted the area of criminal law, whether that is from the standpoint of an alleged criminal or a victim of a crime. Although there are a vast number of statutes conferring special rights and benefits to married couples, the subcommittee chose to focus on areas that would provide the most impact for unmarried couples.

First, Minnesota statutes provide for a series of victim's rights under the law; many of those rights are not available to unmarried couples. Secondly, the marital and spousal privileges afford those in a married relationship benefits that are unavailable to unmarried couples. The Subcommittee proposes the following thoughts and changes to Minnesota law.

I. Victim's Rights

Minnesota provides a number of procedural and substantive rights to crime victims. In those cases where the crime victim is deceased or incapacitated, many of those rights (described collectively here as "victim's right") are transferred to the victim's spouse or other family member. Victim's rights encompass such diverse rights as the right to be informed of a plea agreement by the defendant, the right to request an expedited trial, the right to a waiting area in the courthouse separate from the area used by the defendant or his or her family, the right to reasonable time off work to attend court proceedings, and the right to make and have considered an impact statement submitted as part of a sentencing, parole, or supervised release hearing.

Unmarried partners of crime victims, however, do not currently enjoy these rights in the event of their partner's death or incapacity, by virtue of their lack of a legally recognized family status. Yet their loss is no different from the loss of a legal spouse, and the state's interest in securing the unmarried partner's participation in the judicial process is just as compelling as its interest in securing that of an opposite-sex spouse.

Proposed Statutory Changes:

To make clear that unmarried couples are to be afforded the same victim's rights as are married couples, the Criminal Law Subcommittee recommends the following changes.

243.05 COMMISSIONER OF CORRECTIONS; POWERS, LIMITATIONS.

Subd. 1b. Victim's rights. (a) This subdivision applies to parole decisions relating to inmates convicted of first-degree murder who are described in subdivision 1, clauses (a) and (b). As used in this subdivision, "victim" means the murder victim's surviving spouse, domestic partner, or next of kin. For the purposes of this section, "domestic partner" means a person in a relationship with another person where those persons: (1) are of the same sex; (2) are adults and mentally competent to enter into legally binding contracts; (3) have assumed responsibility for each other's basic common welfare, financial obligations, or well being; (4) share a common domicile and primary residence with each other on a permanent basis; (5) have a committed interdependent relationship with each other, intend to continue that relationship indefinitely, and do not have this

type of relationship with any other person; (6) are not married to another person and have not entered into a domestic partnership that is currently in effect; and (7) are not related by blood or adoption so that a marriage between them would be prohibited under section 517.03, subdivision 1, paragraph (a), clause (2) or (3).

(b) The commissioner shall make reasonable efforts to notify the victim, in advance, of the time and place of the inmate's parole review hearing. The victim has a right to submit an oral or written statement at the review hearing. The statement may summarize the harm suffered by the victim as a result of the crime and give the victim's recommendation on whether the inmate should be paroled at that time. The commissioner must consider the victim's statement when making the parole decision.

244.05 SUPERVISED RELEASE TERM.

Subd. 5. Supervised release, life sentence. (a) The commissioner of corrections may, under rules promulgated by the commissioner, give supervised release to an inmate serving a mandatory life sentence under section 609.185, clause (3), (5), or (6); 609.3455, subdivision 3 or 4; 609.385; or Minnesota Statutes 2004, section 609.109, subdivision 3, after the inmate has served the minimum term of imprisonment specified in subdivision 4.

(b) The commissioner shall require the preparation of a community investigation report and shall consider the findings of the report when making a supervised release decision under this subdivision. The report shall reflect the sentiment of the various elements of the community toward the inmate, both at the time of the offense and at the present time. The report shall include the views of the sentencing judge, the prosecutor, any law enforcement personnel who may have been involved in the case, and any successors to these individuals who may have information relevant to the supervised release decision. The report shall also include the views of the victim and the victim's family unless the victim or the victim's family chooses not to participate.

(c) The commissioner shall make reasonable efforts to notify the victim, in advance, of the time and place of the inmate's supervised release review hearing. The victim has a right to submit an oral or written statement at the review hearing. The statement may summarize the harm suffered by the victim as a result of the crime and give the victim's recommendation on whether the inmate should be given supervised release at this time. The commissioner must consider the victim's statement when making the supervised release decision.

(d) When considering whether to give supervised release to an inmate serving a life sentence under section 609.3455, subdivision 3 or 4, the commissioner shall consider, at a minimum, the following: the risk the inmate poses to the community if released, the inmate's progress in treatment, the inmate's behavior while incarcerated, psychological or other diagnostic evaluations of the inmate, the inmate's criminal history, and any other relevant conduct of the inmate while incarcerated or before incarceration. The commissioner may not give supervised release to the inmate unless:

(1) while in prison:

- (i) the inmate has successfully completed appropriate sex offender treatment;
 - (ii) the inmate has been assessed for chemical dependency needs and, if appropriate, has successfully completed chemical dependency treatment; and
 - (iii) the inmate has been assessed for mental health needs and, if appropriate, has successfully completed mental health treatment; and
- (2) a comprehensive individual release plan is in place for the inmate that ensures that, after release, the inmate will have suitable housing and receive appropriate aftercare and community-based treatment. The comprehensive plan also must include a postprison employment or education plan for the inmate.
- (e) As used in this subdivision, “victim” means the individual who suffered harm as a result of the inmate's crime or, if the individual is deceased, the deceased's surviving spouse, domestic partner, or next of kin. The definition of "domestic partner" set forth in section 243.05 subdivision 1b shall apply.

611A.01 DEFINITIONS

For the purposes of sections 611A.01 to 611A.06:

- (a) “Crime” means conduct that is prohibited by local ordinance and results in bodily harm to an individual; or conduct that is included within the definition of “crime” in section 609.02, subdivision 1, or would be included within that definition but for the fact that (1) the person engaging in the conduct lacked capacity to commit the crime under the laws of this state, or (2) the act was alleged or found to have been committed by a juvenile.
- (b) “Victim” means a natural person who incurs loss or harm as a result of a crime, including a good faith effort to prevent a crime, and for purposes of sections 611A.04 and 611A.045 also includes (1) a corporation that incurs loss or harm as a result of a crime, (2) a government entity that incurs loss or harm as a result of a crime, and (3) any other entity authorized to receive restitution under section 609.10 or section 609.125. The term “victim” includes the family members, domestic partner, guardian, or custodian of a minor, incompetent, incapacitated, or deceased person. The definition of “domestic partner” set forth in section 243.05 subdivision 1b shall apply. In a case where the prosecutor finds that the number of family members makes it impracticable to accord all of the family members the rights described in sections 611A.02 to 611A.0395, the prosecutor shall establish a reasonable procedure to give effect to those rights. The procedure may not limit the number of victim impact statements submitted to the court under section 611A.038. The term “victim” does not include the person charged with or alleged to have committed the crime.
- (c) “Juvenile” has the same meaning as given to the term “child” in section 260B.007, subdivision 3.

Alternative Revision to Minn. Stat. § 611A.01

The Additional Significant Issues Subcommittee also examined the definition of “victim” in Minn. Stat. § 611A.01, and proposed an alternative to that included above. That proposal, and explanatory text, is as follows:

(b) "Victim" means a natural person who incurs loss or harm as a result of a crime, including a good faith effort to prevent a crime, and for purposes of sections 611A.04 and 611A.045, also includes (1) a corporation that incurs loss or harm as a result of a crime, (2) a government entity that incurs loss or harm as a result of a crime, and (3) any other entity authorized to receive restitution under section 609.10 or 609.125. The term "victim" includes the family members, household members, guardian, or custodian of a minor, incompetent, incapacitated, or deceased person. In a case where the prosecutor finds that the number of ~~family members~~ victims makes it impracticable to accord all of the ~~family members~~ victims the rights described in sections 611A.02 to 611A.0395, the prosecutor shall establish a reasonable procedure to give effect to those rights. The procedure may not limit the number of victim impact statements submitted to the court under section 611A.038. The term "victim" does not include the person charged with or alleged to have committed the crime.

“There should be no debate that those who are the victims of crime, and those who suffer along with them, should be compensated for the damage they experience. The initial sentence in this subdivision, referring to “natural person[s],” is extremely broad and should be read to include a victim’s unmarried partner. However, the second sentence in this definition implies that the first relates to direct victims of crime, whereas indirect or secondary victims are addressed in this second sentence – which uses terms that in their typical usage would not include unmarried partners. The third sentence creates further confusion, by appearing to reserve some victims’ rights to those victims who are family members and denying these rights to other victims.

“This proposal affirms that if a victim’s household member experiences loss as a result of the crime the victim suffered, the household member should also be able to seek compensation upon demonstration of that loss. There is no reason why a criminal should be able to inflict harm on these “secondary” victims and leave these harms uncompensated simply because the secondary victim is an unmarried partner (or for that matter, a roommate). Additionally, these secondary victims should also be able to access all rights of victims, including the ability to offer victim-impact statements. The focus of the law should be on those who have experienced loss or harm, not on the legal relationship between those people and the direct victims of crime.”

The Task Force agrees either revision would improve the statute to meet the legitimate needs of unmarried partners in such circumstances.

611A.036 PROHIBITION AGAINST EMPLOYER RETALIATION⁸

Subd. 2. Victim's spouse or immediate family members. An employer must allow a victim of a violent crime, as well as the victim's spouse, domestic partner, or immediate family members,

⁸ This statute is also addressed above by the Labor and Employment Subcommittee report in further detail.

reasonable time off from work to attend criminal proceedings related to the victim's case.

611A.52 DEFINITIONS [*proposal and explanatory text provided by the Additional Significant Issues Subcommittee*]

Subd. 8. Economic loss.

[...]

(c) In the case of death the term is limited to:

(1) reasonable expenses actually incurred for funeral, burial, or cremation, not to exceed an amount to be determined by the board on the first day of each fiscal year;

(2) reasonable expenses for medical, chiropractic, hospital, rehabilitative, psychological and psychiatric services, products or accommodations which were incurred prior to the victim's death and for which the victim's survivors or estate are liable;

(3) loss of support, including contributions of money, products or goods, but excluding services which the victim would have supplied to dependents if the victim had lived; and

(4) reasonable expenses incurred for substitute child care and household services to replace those which the victim or claimant would have performed for the benefit of dependents if the victim or the claimant's child had lived.

Claims for loss of support for minor children made under clause (3) must be paid for three years or until the child reaches 18 years old, whichever is the shorter period. After three years, if the child is younger than 18 years old a claim for loss of support may be resubmitted to the board, and the board staff shall evaluate the claim giving consideration to the child's financial need and to the availability of funds to the board. Other claims ~~Claims~~ for loss of support ~~for a spouse~~ made under clause (3) shall also be reviewed at least once every three years. The board staff shall evaluate the claim giving consideration to the ~~spouse's~~ claimant's financial need and to the availability of funds to the board.

Claims for substitute child care services made under clause (4) must be limited to the actual care that the deceased victim would have provided to enable surviving family members to pursue economic, educational, and other activities other than recreational activities.

“This statute provides a mechanism for compensating persons who have experienced loss as the result of a murder of another person. Clause (3) of the statute as written provides for compensation for loss of support (excluding services), but without explicit limitation as to who may seek this compensation. However, in the paragraph following clause (4), the statute deals specifically with claims brought by surviving spouses and children. The overall import of the crime victims’ compensation statute, however, is to define victims more broadly than that, and to compensate individuals who have been harmed by crime.

“This proposal reflects the previous proposal, recognizing that unmarried partners may be harmed by the murder of their partners in precisely the same way that married spouses are, and

that it honors the direct victim and respects the indirect victim by recognizing this and providing for the possibility of compensation. The proposal maintains the distinction between claims by minors and claims by others, while removing the specific reference to “spouses” and replacing it with “other claims.” The requirement that such claims be regularly reviewed and assessed based on the claimant’s actual financial needs is retained in its entirety.”

611A.73 DEFINITIONS

Subd. 4. Victim. “Victim” refers to anyone or the next of kin of anyone who has been or purports to have been subjected to a criminal act, whether a felony, a gross misdemeanor, or misdemeanor. Domestic partners, as defined by section 243.05 subdivision 1b, shall be considered next of kin for purposes of this section.

II. Marriage Privileges

Minnesota law encompasses the marital and spousal privilege in just one sentence. Minnesota Statute § 595.02 states, “Subdivision 1. Competency of witnesses. Every person of sufficient understanding, including a party, may testify in any action or proceeding . . . except as provided in this subdivision: (a) *A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, without consent of the other, be examined as to any communication made by one to the other during the marriage.*” Minn. Stat. § 595.02 (2008).

The Marital and Spousal Privilege

The **marital privilege** is a form of privileged communication protecting the contents of confidential communications between husband and wife. When applied, a court may not compel one spouse to testify against the other concerning confidential communications made during marriage.

The privilege is usually restricted to confidential communications made during marriage and does not include communications made before the marriage or after divorce. The privilege does, however, generally survive the divorce; that is, a person can be prevented from testifying about confidential communications with an ex-spouse made during the marriage.

Courts and statutes recognize this privilege because our society honors communications that are made between spouses. Our judicial system has decided to forgo potential important information in a court proceeding to lessen strains on relationships. Thus far, Minnesota’s unmarried couples are not afforded the opportunity to keep their confidential communication privileged as married couples do.

Similarly, the **spousal privilege** can be used to prevent any party in a criminal case from calling the defendant's spouse to testify against the defendant about any topic. Under the Minnesota Rules of Evidence, this privilege attaches to the witness spouse; that is, the defendant's spouse can refuse to testify against the defendant, but the defendant may not prevent

his spouse from testifying against him or her. This privilege does not survive the marriage; that is, after divorce, there is no right to refuse to testify against a defendant ex-spouse.

Non-Application of the Privilege

This statute explicitly does not protect unmarried couples. The state will not recognize the marital privilege if invoked by an unmarried couple; in other words, the state does not hold confidences as between partners worthy of a privilege that married couples enjoy.

Likewise, the spousal privilege does not protect unmarried couples in a criminal proceeding. An unmarried partner could be forced to testify against their partner.

Proposed Statutory Changes:

The marital and spousal privileges are important privileges in the Minnesota judicial system, as well as an important way for our society to honor relationships. These privileges should be opened up to include committed, unmarried couples that are by all intents and purposes the same as their married counterparts.

Minn. Stat. § 595 should be changed to read:

595.02 TESTIMONY OF WITNESSES.

Subdivision 1. Competency of witnesses.

Every person of sufficient understanding, including a party, may testify in any action or proceeding, civil or criminal, in court or before any person who has authority to receive evidence, except as provided in this subdivision:

(a) A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during the marriage. A domestic partner cannot be examined for or against his or her domestic partner without the later domestic partner's consent, nor can either, during the domestic partnership or afterwards, without the consent of the other, be examined as to any communication made by one to the other during the domestic partnership. This exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other or against a child of either or against a child under the care of either spouse or domestic partner, nor to a criminal action or proceeding in which one is charged with homicide or an attempt to commit homicide and the date of the marriage or domestic partnership of the defendant is subsequent to the date of the offense, nor to an action or proceeding for nonsupport, neglect, dependency, or termination of parental rights.

For purposes of this section, "domestic partners" means persons who:

(1) are the same sex;

(2) are adults and mentally competent to enter into legally binding contracts;

- (3) have assumed responsibility for each other's basic common welfare, financial obligations, and well being;
(4) share a common domicile and primary residence with each other on a permanent basis;
(5) have a committed interdependent relationship with each other, intend to continue that relationship indefinitely, and do not have this type of relationship with any other person;
(6) are not married to another person and have not entered into a domestic partnership arrangement that is currently in effect; and
(7) are not related by blood or adoption so that a marriage between them would be prohibited under section 517.03, subdivision 1, paragraph (a), clause (2) or (3).

Alternative Revision to Minn. Stat. § 595.02

The “Additional Significant Issues” Subcommittee also examined the spousal privilege in Minn. Stat. § 595.02, and proposed an alternative to that included above. That proposal, and explanatory text, is as follows:

Subdivision 1. Competency of witnesses. Every person of sufficient understanding, including a party, may testify in any action or proceeding, civil or criminal, in court or before any person who has authority to receive evidence, except as provided in this subdivision:

(a) A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during the marriage. This exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other or against a child of either or against a child under the care of either spouse, nor to a criminal action or proceeding in which one is charged with homicide or an attempt to commit homicide and the date of the marriage of the defendant is subsequent to the date of the offense, nor to an action or proceeding for nonsupport, neglect, dependency, or termination of parental rights. For purposes of this section, a court may in its discretion consider as a spouse an adult individual with whom a party resides or resided where the preponderance of the evidence demonstrates that the party and the individual regarded themselves as the equivalent of spouses, irrespective of the existence of a legal marriage.

“The ‘marital privilege’ exception to the fundamental rules governing witness testimony is of long standing, designed to respect the privacy of intimate conversation between spouses from being exposed in court against their wishes. Unmarried couples, however, under Minnesota law may not invoke this privacy protection, which is unusual in that an unmarried couple has not presented themselves to the government to obtain a marriage license, and thus, from the government’s standpoint, remains far more ‘private’ than the married couple who have submitted themselves to government examination to get such a license. That said, the existence of a marriage provides a clear, definitive standard for

when this exception may be invoked – though this does nothing for those couples, namely gay and lesbian couples, who *cannot* marry yet who may well function in everyday ways that are indistinguishable from the lives of married couples.

“This proposal confers authority on courts to apply the privilege in circumstances where the substantial majority of the evidence shows that the parties have such a relationship, and implicitly recognizes that these relationships, too, are entitled to basic respect, even if the State withholds legal recognition from them.”

CHAPTER 9: Additional Significant Issues Subcommittee

Methodology

The “Additional Significant Issues” Subcommittee was one of several Subcommittees of the overall task force. Early in the process, the Task Force made efforts to delineate the separate scope of each Subcommittee, in order to avoid overlap and needless duplication of efforts. In this context, the “Additional Significant Issues” Subcommittee’s focus was understood to generally exclude provisions related to disability, health care, incapacity, and Medical Assistance. The scope was understood to include those provisions related to “military, crime victims, public employees, retirement benefits, benefits for students at public educational institutions, public assistance [other than Medical Assistance], workers compensation, wrongful death actions, evidentiary privileges, elections, transportation, [and] recreation” matters.

Within this broad scope, the Subcommittee recognized that the Task Force’s mission was not to “right every wrong” identified in the Project 515 report which catalogued 515 statutes and subdivisions providing rights or responsibilities to married couples. Instead, the Task Force was charged with identifying “priority areas” for reform. Needless to say, reviewing 515 provisions with an eye toward identifying those which are “priorities” naturally involves weighing these provisions and making subjective value-judgments about which are “priorities” and which are not. Undoubtedly, reasonable minds can differ about the conclusions reached regarding which areas are “priorities” and which are not; the recommendations contained herein are the product of good-faith effort submitted to the legal community for discussion, and are not by any means offered as indisputable gospel.

In approaching the task of reviewing these “miscellaneous” areas of Minnesota law, the Subcommittee reached certain conclusions:

- because there are numerous ways in which public-assistance laws can provide both advantages and disadvantages based on marriage, and because therefore it is unclear what the ultimate impact on same-sex couples is in this area due to their inability to marry, the subcommittee takes the position that piecemeal reforms in this area are not realistically feasible;
- because marrying, or attempting to marry, a person of the same sex, let alone acknowledging one’s identity as gay or lesbian, or even identifying as a beneficiary or emergency contact an unrelated person of the same sex, may trigger an investigation by the U.S. military resulting in one’s discharge, seeking reforms to Minnesota law touching on these issues before the hoped-for repeal of the federal “Don’t Ask/Don’t Tell” policy are premature; and
- although there are numerous provisions related to employment issues within State government itself, ranging from dependent health-care benefits to pension distributions, which disadvantage those State workers who cannot marry their partners, the subcommittee perceived this to be a fairly specialized context related to the internal workings of the State government and not a general area of State

law applying to the Minnesota population as a whole, which it understood as the overall focus of the Task Force's work, and therefore makes no recommendations in this area at this time.

Subcommittee recommendations regarding crime victims' rights and the spousal privilege in evidentiary matters are included within the Criminal Law section of this report.

Minn. Stat. 52.05

Subdivision 1. Requirements. Credit union membership consists of the incorporators and other persons as may be elected to membership and subscribe to at least one share as designated by the board of directors, pay the initial installment thereon and the entrance fee if any. In addition to a regularly qualified member, the member's spouse ~~of a~~ or, in the absence of a spouse, a designated adult household member, the blood or adoptive relatives of either of them and their spouses or designated adult household members may be members. When an individual member of a credit union leaves the field of membership, the member, and all persons who became members by virtue of that individual's membership may continue as members. The surviving spouse or, in the absence of a spouse, a surviving designated adult household member of a regularly qualified member, and the blood or adoptive relatives of either of them and their spouses or designated adult household members may become members. Organizations, incorporated or otherwise, composed for the most part of the same general group as the credit union membership may be members. Credit unions chartered by this or any other state, or any federal credit union may be members. Credit union organizations shall be limited to persons within one or more groups or any combination of groups having a common bond of occupation, association, or community. A person may be "designated" for purposes of this subdivision in any reasonable manner specified by the credit union.

There is no apparent reason why Minnesota should stand in the way of the state's credit unions who wish to do business with unmarried couples. Moreover, and perhaps more tellingly, federal law already provides credit unions organized under its auspices the authority to offer accounts to members and others in the member's household.

This proposal would simply bring Minnesota law into accord with its federal counterpart and allow all of Minnesota's credit unions to do business with unmarried couples.

Minn. Stat. 573.02

Subdivision 1. Death action. When death is caused by the wrongful act or omission of any person or corporation, the trustee appointed as provided in subdivision 3 may maintain an action therefor if the decedent might have maintained an action, had the decedent lived, for an injury caused by the wrongful act or omission. An action to recover damages for a death caused by the alleged professional negligence of a physician, surgeon, dentist, hospital or sanitarium, or an employee of a physician, surgeon, dentist, hospital or sanitarium shall be commenced within three years of the date of death, but in no event shall be commenced beyond the time set forth in section 541.076. An action to

recover damages for a death caused by an intentional act constituting murder may be commenced at any time after the death of the decedent. Any other action under this section may be commenced within three years after the date of death provided that the action must be commenced within six years after the act or omission. The recovery in the action is the amount the jury deems fair and just in reference to the pecuniary loss resulting from the death, and shall be for the exclusive benefit of the surviving spouse, ~~and next of kin,~~ or other person injured in person, property, or means of support, proportionate to the pecuniary loss severally suffered by the death. The court then determines the proportionate pecuniary loss of the persons entitled to the recovery and orders distribution accordingly. Funeral expenses and any demand for the support of the decedent allowed by the court having jurisdiction of the action, are first deducted and paid. Punitive damages may be awarded as provided in section 549.20.

If an action for the injury was commenced by the decedent and not finally determined while living, it may be continued by the trustee for recovery of damages for the exclusive benefit of the surviving spouse, ~~and next of kin,~~ or other person injured in person, property, or means of support, proportionate to the pecuniary loss severally suffered by the death. The court on motion shall make an order allowing the continuance and directing pleadings to be made and issues framed as in actions begun under this section.

The ability of a survivor of an individual who dies as the result of another's negligence to seek compensation for their pecuniary losses is an important legal protection. It compensates the survivor for their loss, and holds the negligent party accountable for the damage they have caused. Under Minnesota law, wrongful-death actions may only be brought by, and for the benefit of, surviving spouses and next of kin. Unmarried partners are not included within either term, despite the fact that such partners may, to the victim, be precisely the person *they* would consider their next of kin, and precisely the person who needs compensation the most. The negligent party should not be excused from responsibility for their fatal negligence simply because the consequences fall on someone to whom the victim was not legally related; approached from the opposite direction, if a victim considers an individual their next of kin, it would in effect further victimize the decedent to ignore this relationship.

This proposal imports the specific language found in Minnesota's Dram Shop Act (Minn. Stat. 340A.801) to provide "other person[s]" who can demonstrate pecuniary loss as a result of the wrongful death caused by a party's negligence the opportunity to seek compensation for their pecuniary loss.

PROPOSED STATUTE

RECORDING OF STATEMENT OF ADVERSE CLAIM OR INTEREST

Subdivision 1. **Procedure; costs.** (a) Any person claiming any interest in real property, which interest does not appear in the chain of title, may, record with the county recorder against the affected real property a verified statement of adverse claim or interest, made by or at the instance of the claimant, stating:

- (1) the alleged claim or interest, whether equitable or pursuant to contract, including the date and nature of such contract;
- (2) how or from whom it was acquired;
- (3) the reason the interest has not or cannot be recorded;
- (4) a description of the affected real property;
- (5) a place at which all notices may be served upon the claimant; and
- (6) that the claim is not made for the purpose of avoiding the payment of mortgage registry tax under section 287.01 or deed tax under section 287.21, or avoiding obtaining the auditor's statement on an instrument under section 272.12.

(b) If the claimant claims an interest in an unregistered mortgage that is subject to the imposition of mortgage registry tax upon recording, the notice must contain evidence satisfactory to the county recorder that the mortgage registry tax has been paid. A copy of the claim must be served upon the persons whose interests are affected by the claim. An affidavit stating the names and addresses of the persons to whom copies of the claim were served must be attached to the claim. The claim with attached affidavit regarding service shall be entitled to be recorded, and the court, upon the petition of any party in interest, shall grant a speedy hearing upon the validity of such claim and enter such order as justice and equity may require. If the court determines that the claim is invalid or without merit, it shall order the claim invalid and of no effect and such order may be recorded against the affected real property. The court shall, in any case, award such costs and damages, including a reasonable attorneys' fees to the prevailing party.

Subd. 2. **Ten-year limit unless new filing.** No statement of adverse claim or interest shall be notice, either actual or constructive, of any matters referred to in the statement after it has been of record for ten years unless a new statement or claim realleging the facts is filed within the ten-year period against the affected real property or unless a certified copy of a notice of lis pendens to adjudicate the matters alleged in the statement or claim is filed within the ten-year period.

Subd. 3. **Exception to the ten-year limit; adverse claim statement by government agency.** The provisions of subdivision 2 do not apply to a statement of adverse claim or interest made by the United States of America, this state, or any political subdivision, agency, or instrumentality of the United States of America or this state, unless otherwise provided by law.

Subd. 4. **Demand for discharge.** A person whose interest is affected by a statement of adverse claim or interest, or the person's agent, may record a demand for discharge of the statement of adverse claim or interest. A copy of the demand must be mailed to the claimant at the address stated on the claim. An affidavit stating the name and address of the person to whom a copy of the demand was mailed must be attached to the demand. The demand must be substantially in the following form:

"DEMAND FOR DISCHARGE OF STATEMENT OF ADVERSE CLAIM OR INTEREST

Date:

, (name of person having an interest) having an interest in (legal description of affected real property), hereby demands that

(name of claimant)

either (1) discharge the claimant's statement of adverse claim or interest regarding the real property described above, or (2) petition the court for a determination of the validity of the claim or interest. If the claimant fails to do so the claim will terminate and be of no effect 90 days after this demand for discharge is recorded with the county recorder of _____ county, Minnesota.

(signature of person having an interest or agent)"

Unless the claimant has petitioned the court and recorded with the county recorder a certified copy of the notice of lis pendens, the claim shall terminate and be of no effect 90 days after the recording of a demand for discharge with attached affidavit regarding mailing.

Subd. 5. **Priority of claim.** The recording of a statement of adverse claim or interest has the same effect as to priority as the recording of any instrument. If an instrument, under which the claim is made, is recorded before the claim has been terminated or discharged, the instrument shall have the same priority as the claim.

Subd. 6. **Application to Torrens.** This section shall not apply to Torrens property registered pursuant to Minnesota Statutes Chapter 508.

Subd. 7. **Inapplicable to Certain Contracts.** No statement of adverse claim or interest shall be notice, either actual or constructive, of any matters referred to in the statement where the claim or interest claimed in the statement of adverse claim or interest arises out of a contract which is governed by and has been cancelled pursuant to Minnesota Statutes Sections 559.21 or 559.217 and an affidavit of cancellation, notice of cancellation and affidavit of service have been recorded against the subject real property, whether or not such statement of adverse claim or interest was recorded prior to the recording of the affidavit of cancellation, notice of cancellation and affidavit of service. This provision shall authorize the recording of affidavit of cancellation, notice of cancellation and affidavit of service of any contract cancelled pursuant to Minnesota Statutes Section 559.217, where a statement of adverse claim or interest has been recorded against the subject real property.

Subd. 8. **Prima Facie Evidence of Adverse Claim or Interest.** The recording of the statement of adverse claim or interest, shall be prima facie evidence of the facts contained therein, unless and until a court of law adjudicates the matter or claimant fails to petition the court 90 days after the recording of a demand for discharge with attached affidavit regarding mailing.

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Attachment No. 2

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COUNSEL

KP/CS

SC6639

1.1 A bill for an act
1.2 relating to human services; modifying provisions governing medical assistance
1.3 claims and liens; amending Minnesota Statutes 2008, sections 256B.15,
1.4 subdivisions 1, 1a, 2; 514.983, subdivision 2.

1.5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

1.6 Section 1. Minnesota Statutes 2008, section 256B.15, subdivision 1, is amended to read:

1.7 Subdivision 1. **Policy and applicability.** (a) It is the policy of this state that
1.8 individuals or couples, either or both of whom participate in the medical assistance
1.9 program, use their own assets to pay their share of the total cost of their care during or
1.10 after their enrollment in the program according to applicable federal law and the laws of
1.11 this state. The following provisions apply:

1.12 (1) subdivisions 1c to 1k shall not apply to claims arising under this section which
1.13 are presented under section 525.313;

1.14 (2) the provisions of subdivisions 1c to 1k expanding the interests included in an
1.15 estate for purposes of recovery under this section give effect to the provisions of United
1.16 States Code, title 42, section 1396p, governing recoveries, but do not give rise to any
1.17 express or implied liens in favor of any other parties not named in these provisions;

1.18 (3) the continuation of a recipient's life estate or joint tenancy interest in real
1.19 property after the recipient's death for the purpose of recovering medical assistance under
1.20 this section modifies common law principles holding that these interests terminate on
1.21 the death of the holder;

1.22 (4) all laws, rules, and regulations governing or involved with a recovery of medical
1.23 assistance shall be liberally construed to accomplish their intended purposes;

Section 1.

1

2.1 (5) a deceased recipient's life estate and joint tenancy interests continued under this
2.2 section shall be owned by the remaindermen or surviving joint tenants as their interests
2.3 may appear on the date of the recipient's death. They shall not be merged into the
2.4 remainder interest or the interests of the surviving joint tenants by reason of ownership.
2.5 They shall be subject to the provisions of this section. Any conveyance, transfer, sale,
2.6 assignment, or encumbrance by a remainderman, a surviving joint tenant, or their heirs,
2.7 successors, and assigns shall be deemed to include all of their interest in the deceased
2.8 recipient's life estate or joint tenancy interest continued under this section; and

2.9 (6) the provisions of subdivisions 1c to 1k continuing a recipient's joint tenancy
2.10 or life estate interests in real property after the recipient's death do not apply to ~~a~~ the
2.11 recipient's homestead owned of record, on the date the recipient dies, by the recipient and
2.12 the recipient's spouse as joint tenants with a right of survivorship except as provided in
2.13 this clause. If the recipient and another person are occupants of the recipient's homestead
2.14 on the date of the recipient's death and if the property would qualify as the surviving
2.15 occupant's homestead following the recipient's death on account of the surviving
2.16 occupant's continued occupancy of the premises and ownership of the property by
2.17 reason of devise, descent, or operation of the surviving occupant's other ownership of
2.18 the property at the time of the recipient's death, none of the provisions of subdivisions
2.19 1c to 1k continuing a life estate or joint tenancy interest owned by the recipient at the
2.20 time of death apply if the surviving occupant is the recipient's spouse. If the surviving
2.21 occupant is someone other than the recipient's spouse, the joint tenancy or life estate is
2.22 continued as provided in subdivisions 1c to 1k, but no recovery against the interest on
2.23 account of any medical assistance claim or lien may be made while the surviving occupant
2.24 remains in actual and continuous physical occupancy of the property. Homestead of
2.25 the recipient means the real property occupied by the surviving joint tenant spouse as
2.26 their sole residence recipient on the date the recipient dies and classified and taxed at
2.27 least in part to the recipient and surviving joint tenant spouse as homestead property for
2.28 property tax purposes in the calendar year in which the recipient dies. "Homestead of a
2.29 surviving occupant" means the same real property as the recipient's homestead if the
2.30 surviving occupant continues to actually physically occupy the property and the property
2.31 would qualify as the surviving occupant's homestead if proper application for homestead
2.32 property tax treatment is made. For purposes of this exemption, real property the recipient
2.33 and their a surviving joint tenant spouse occupant purchase solely with the proceeds from
2.34 the sale of their a prior homestead, own are owners of record as joint tenants co-owners,
2.35 and qualify qualifies as homestead property under section 273.124 in the calendar year
2.36 in which the recipient dies and prior to the recipient's death shall be deemed to be real

3.1 property classified and taxed to the recipient and their surviving joint tenant spouse the
3.2 co-owner as fully homestead property in the calendar year in which the recipient dies.
3.3 The surviving spouse occupant, or any person with personal knowledge of the facts, may
3.4 provide an affidavit describing the homestead property affected by this clause and stating
3.5 facts showing compliance with this clause. The affidavit shall be prima facie evidence
3.6 of the facts it states and a registrar of titles may rely on the facts stated in the affidavit
3.7 to determine whether a life estate or joint tenancy is continued under the provisions of
3.8 this section. Continuous physical occupancy of the homestead is not lost by reason of
3.9 temporary absences from the property, provided the occupant intends to return and the
3.10 occupant claims no other homestead or domicile in other real property.

3.11 (b) For purposes of this section, "medical assistance" includes the medical assistance
3.12 program under this chapter and the general assistance medical care program under chapter
3.13 256D and alternative care for nonmedical assistance recipients under section 256B.0913.

3.14 (c) All provisions in this subdivision, and subdivisions 1d, 1f, 1g, 1h, 1i, and 1j,
3.15 related to the continuation of a recipient's life estate or joint tenancy interests in real
3.16 property after the recipient's death for the purpose of recovering medical assistance, are
3.17 effective only for life estates and joint tenancy interests established on or after August 1,
3.18 2003. For purposes of this paragraph, medical assistance does not include alternative care.

3.19 Sec. 2. Minnesota Statutes 2008, section 256B.15, subdivision 1a, is amended to read:

3.20 Subd. 1a. **Estates subject to claims.** If a person receives any medical assistance
3.21 hereunder, on the person's death, if single, or on the death of the survivor of a married
3.22 couple or a surviving occupant of the recipient's homestead as permitted under subdivision
3.23 1, clause (6), either or both of whom received medical assistance, or as otherwise provided
3.24 for in this section, the total amount paid for medical assistance rendered for the person and
3.25 spouse or the surviving occupant shall be filed as a claim against the estate of the person
3.26 or the estate of the surviving spouse or occupant in the court having jurisdiction to probate
3.27 the estate or to issue a decree of descent according to sections 525.31 to 525.313.

3.28 A claim shall be filed if medical assistance was rendered for either or both persons
3.29 under one of the following circumstances:

3.30 (a) the person was over 55 years of age, and received services under this chapter;

3.31 (b) the person resided in a medical institution for six months or longer, received
3.32 services under this chapter, and, at the time of institutionalization or application for
3.33 medical assistance, whichever is later, the person could not have reasonably been expected
3.34 to be discharged and returned home, as certified in writing by the person's treating
3.35 physician. For purposes of this section only, a "medical institution" means a skilled

4.1 nursing facility, intermediate care facility, intermediate care facility for persons with
4.2 developmental disabilities, nursing facility, or inpatient hospital; or
4.3 (c) the person received general assistance medical care services under chapter 256D.

4.4 The claim shall be considered an expense of the last illness of the decedent for the
4.5 purpose of section 524.3-805. Any statute of limitations that purports to limit any county
4.6 agency or the state agency, or both, to recover for medical assistance granted hereunder
4.7 shall not apply to any claim made hereunder for reimbursement for any medical assistance
4.8 granted hereunder. Notice of the claim shall be given to all heirs and devisees of the
4.9 decedent, and to those persons with other ownership interests in the real property owned
4.10 by the decedent at the time of the decedent's death, whose identity can be ascertained with
4.11 reasonable diligence. The notice must include procedures and instructions for making an
4.12 application for a hardship waiver under subdivision 5; time frames for submitting an
4.13 application and determination; and information regarding appeal rights and procedures.
4.14 Counties are entitled to one-half of the nonfederal share of medical assistance collections
4.15 from estates that are directly attributable to county effort. Counties are entitled to ten
4.16 percent of the collections for alternative care directly attributable to county effort.

4.17 Sec. 3. Minnesota Statutes 2008, section 256B.15, subdivision 2, is amended to read:

4.18 Subd. 2. **Limitations on claims.** The claim shall include only the total amount
4.19 of medical assistance rendered after age 55 or during a period of institutionalization
4.20 described in subdivision 1a, clause (b), and the total amount of general assistance medical
4.21 care rendered, and shall not include interest. Claims that have been allowed but not paid
4.22 shall bear interest according to section 524.3-806, paragraph (d). A claim against the
4.23 estate of a surviving spouse who did not receive medical assistance, for medical assistance
4.24 rendered for the predeceased spouse, is limited to the value of the assets of the estate that
4.25 were marital property or jointly owned property at any time during the marriage. A claim
4.26 against a surviving occupant of the recipient's homestead or the occupant's estate is limited
4.27 to the value of the decedent's interest in the homestead at the time of the decedent's death.
4.28 Claims for alternative care shall be net of all premiums paid under section 256B.0913,
4.29 subdivision 12, on or after July 1, 2003, and shall be limited to services provided on or
4.30 after July 1, 2003.

4.31 Sec. 4. Minnesota Statutes 2008, section 514.983, subdivision 2, is amended to read:

4.32 Subd. 2. **Homestead property.** (a) A medical assistance lien may not be enforced
4.33 against homestead property of the medical assistance recipient or the spouse or of a joint

- 5.1 tenant, tenant in common, or life estate tenant while it remains the lawful residence of the
- 5.2 medical assistance recipient's spouse, joint tenant, tenant in common, or life estate tenant.
- 5.3 (b) A medical assistance lien remains enforceable as provided in sections 514.980 to
- 5.4 514.985, notwithstanding any law limiting the enforceability of a judgment.