Adapting Intestacy Laws to Changing Families

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Introduction

Intestacy statutes provide for the disposition of a decedent's probate property when the decedent dies without a valid will.[1] Intestacy statutes create, in effect, a statutory will—a will in which the government, rather than the individual, determines the dispositive terms.[2]

An analysis of intestacy law must begin with the recognition that an intestacy statute cannot work equally well for every potential decedent. Indeed, developing an intestacy statute that will meet the needs or wishes of all persons is both unnecessary and impossible. There are too many variations on what decedents want, too many family situations to consider and too many special circumstances surrounding individual decedents. An intestacy statute can serve as a default rule, but a person whose wishes do not fit the default rule must execute a will.[3] Any adult with

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1. Intestacy statutes only govern the disposition of property held in the decedent's name alone. *See* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 36-39 (5th ed. 1995). The probate process administers and distributes a decedent's property either pursuant to the decedent's will or by intestacy. *See id.* Property held in a way that avoids probate—in trust, in joint tenancy or subject to a beneficiary designation—will pass pursuant to the trust document, operation of law or contract. *See id.*

2. *Cf.* Gerry W. Beyer, *Statutory Fill-in Will Forms—The First Decade: Theoretical Constructs and Empirical Findings*, 72 OR. L. REV. 769, 774 (1993) (stating that statutory wills have many benefits, but that improvements could be made).

3. *See* Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 29 (1994) (Stating:

> No intestacy regime can hope to be 'suitable' for every person who dies intestate. People whose individuated intention differs from common intention must assume the responsibility of making a will; otherwise, their property will be distributed, by default, according to common intention or,

adequate mental capacity[4] can opt out of the intestacy statute either by executing a will or by holding title to property in a manner that provides for the transfer of title at death by means other than the probate system.[5] If a person determines that the applicable intestacy statute will not appropriately carry out his or her testamentary wishes, the person has alternatives to subjecting disposition of his or her property to the statutory formula.[6]

Given that a one-size-fits-all intestacy statute is impossible and that property owners can use a will to personalize their dispositive scheme, what then should intestacy statutes seek to do? Intestacy statutes have, since the first adoption of such statutes in this country, given a decedent's property to those family members closest to the decedent. Early statutes focused on bloodline,[7] whereas revisions in the 1980s in many states increased the share going to a surviving spouse.[8] Current statutes create a hierarchy of intestate takers based on proximity to the decedent. For takers other than the surviving spouse, the statutes determine proximity based on ties of blood or adoption.[9] The

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more accurately, according to intention as attributed to them by the state legislature.).

4. Mental capacity for purposes of executing a will is low. *See* DUKEMINIER & JOHANSON, *supra* note 1, at 149 (explaining that the requirements are minimal and that the decedent need only know the nature and extent of his or her property, the natural objects of his or her bounty, the disposition he or she is making and how these elements relate).

5. Property may be transferred at death outside the probate system. *See* DUKEMINIER & JOHANSON, *supra* note 1, at 36-37. Property held in trusts, in joint tenancy, in tenancy by the entirety and property paid to a designated beneficiary under a life insurance policy or a pension plan, will all be transferred without going through the probate system. *See id.*

6. Of course, many people who should avail themselves of the opportunity to execute a will, fail to do so. *See infra* text accompanying notes 74-81.

7. *See* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 238-40 (1989).

8. A study of testamentary wishes published in 1978 provided empirical evidence that a married person whose children were all children of that marriage would prefer to leave the entire estate to his or her spouse, with the assumption that the spouse would use the property for the benefit of the children, rather than to leave one-half of the property directly to the children. *See* Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 356 n.127. A number of states changed their intestacy statutes to provide that the estate would go to the surviving spouse unless the decedent left children who were not children of the surviving spouse. *See, e.g.*, OR. REV. STAT. § 112.025 (1999). *But see* 755 ILL. COMP. STAT. § 5/2-1(a) (West 1992) (distributing one-half of the estate to the surviving spouse and one-half of the estate to the decedent's children).

9. Proximity varies under the statutes. For example, in most states siblings of the whole-blood share equally with siblings of the half-blood, *see, e.g.*, OR. REV. STAT. § 112.095 (1999), but in a few states relatives of the half-blood take only a half share, *see, e.g.*, VA. CODE ANN. § 64.1-2 (Michie 1999), and in a few states the

statutes do not take into consideration whether the decedent had an ongoing relationship with the heir or even knew the heir.

Broadly speaking, the goal behind intestacy statutes is to give the decedent's property to the decedent's family.[10] Where the decedent's family consists of a spouse and the decedent's legal[11] children, the intestacy statute distributes the decedent's property to those the decedent most probably thought of as his or her closest family members. In other words, the statute works for many decedents, most likely giving the decedent's property to the persons the decedent prefers to benefit. However, this pattern does not fit the needs of all American families. Although individuals can choose a different dispositive plan by executing a will, many will fail to do so and will die intestate.[12]

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half-blood relative receives a share only if there are no whole-blood relatives of the same degree, *see, e.g.*, MISS. CODE ANN. § 91-1-5 (1999). Remote relatives may receive a share of the estate based on the degree of relationship to the decedent as determined by reference to a table of consanguinity. Under such statutes a first cousin twice removed is of the same degree and will receive the same share as a second cousin. *See, e.g.*, ARK. CODE ANN. § 28-9-204 (Michie 1999); CAL. PROB. CODE § 240 (West 1997-98); CONN. GEN. STAT. § 45a-439 (1999). In other states, statutes determine the intestate shares of remote relatives by reference to the decedent's ancestors, one generation at a time. That is, the intestate estate of a decedent with no spouse or descendants goes first to the decedent's parents, then to their descendants, then to grandparents, then to the grandparents' descendants, then to great-grandparents, then to their descendants, and so on until an heir is found. A first cousin twice removed (a descendant of the decedent's grandparents) would take before a second cousin (a descendant of the decedent's great-grandparents). *See, e.g.*, 755 ILL. COMP. STAT. § 5/2-1 (West 1998); MO. REV. STAT. § 474.010 (1999). In all of these statutes, the degree of relationship based on blood or adoption determines the share without regard to whether the decedent actually had a personal relationship with the relative. *See* DUKEMINIER & JOHANSON, *supra* note 4, at 85-87.

10. *See* Fellows et al., *supra* note 8, at 324.

11. In this Article, "legal" child will refer to a child by blood or adoption. Laws vary in their definition of "child," but most laws, including intestacy statutes, define child as having a biological—established pursuant to paternity laws, if necessary—or adoptive connection to the parent. Even in cases in which a statute does not define parent or child, a court may fall back on the idea that the relationship between a parent and child must be biological or adoptive to be legal. *See, e.g.*, Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991); *infra* text accompanying notes 313-325.

12. *See* Gerry W. Beyer, *supra* note 2, at 841 n.154 (indicating that in a small sample of 51 persons, 37% had wills); Fellows et al., *supra* note 8, at 338 (stating that over 45% of the overall sample had a will, ranging from 36.5% in Massachusetts to 60.7% in Ohio); Mary Louise Fellows et al., *An Empirical Study of the Illinois Statutory Estate Plan*, 1976 LAW FORUM 717, 718 n.3; Joel R. Glucksman, *Intestate Succession in New Jersey: Does it Conform to Popular Expectations?*, 12 COLUM. J.L. & SOC. PROBS. 253 (1975-76) (reporting that of 2,556 decedents in 1971, 47% died with a will, 12% had a probate estate administered under the intestacy laws, and 41% used an intestate affidavit or the estate was unprobated); Contemporary Studies Project, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions Of the Iowa and Uniform Probate Codes*, 63

The family structure in the United States has changed dramatically.[13] Stepfamilies, blended families, unmarried heterosexual and gay and lesbian cohabitants with or without children—many persons now live in families that no longer fit the Cleaver family norm.[14]

Some areas of the law address these new families. In many states, laws such as wrongful death statutes, workers compensation laws, custody and visitation statutes and housing statutes now include persons beyond legally married spouses and legal children.[15] The family members covered by the statutes vary from statute to statute, but in each case the statute creates categories that make sense given that statute's purpose in protecting "family."[16]

Legislatures have been reluctant to expand the definition of family for purposes of intestacy. Except for a modification in California's intestacy statute that includes stepchildren under very limited circumstances[17] and a recent change in Hawaii that

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IOWA L. REV. 1041, 1070 (1978) [hereinafter Iowa Study] (reporting that of the 3,122 probate files reviewed, 72% of the decedents died testate; of the 94 survivors interviewed, 66% had a will; and of the 600 random interviews, 49% of the respondents had a will). Studies based on probate records cannot reveal whether other decedents with no probate estates died without assets or died with property transferred after death by nonprobate means.

13. Statistical evidence marks the changes, but the changes are probably even more dramatic than the available statistics suggest. *See infra* text accompanying notes 178-195.

14. *Leave It to Beaver*, a television show depicting the Cleaver family as a "typical" American family consisting of a mother, father and two kids, is a favorite stereotype of the nuclear family. *See, e.g.*, WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 79 (2d ed. 1997) ("The Changing American Family—From 'Leave It To Beaver' to 'The Brady Bunch'"); Martha Minow, *Redefining Families: Who's In and Who's Out*, 62 COLO. L. REV. 269, 273 (1991). *See also* David D. Haddock & Daniel D. Polsby, *Family as a Rational Classification*, 74 WASH U. L.Q. 15, 15 (1996) (suggesting that the negative connotations attached to Beaver's family in other articles are unfair).

15. *See infra* text accompanying notes 289-379.

16. At the same time that some laws have expanded to include more family members, discrimination based on family relationships is still legal in many contexts, including employment, housing, lending, education and public accommodation. *See* Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. J. 1, 5 n.14 (1998) (citing statutes in only eight states—California, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Vermont, Wisconsin and the District of Columbia—that prohibit discrimination based on sexual orientation). Nevada, New Hampshire and Rhode Island have recently enacted statutes prohibiting discrimination based on sexual orientation. *See* NEV. REV. STAT. §§ 281.370, 338.125, 610.010-610.185, 613.310-613.405 (1999); N.H. REV. STAT. ANN. §§ 21:49, 21-I:42, 21-I:52, 21-I:58,151:21, 354-A:1 to 354-A:17, 354-B:1 (1999); R.I. GEN. LAWS §§ 23-17.16-2, 28-5-2 to 28-5.1-9, 34-37-2 to 34-37-5.4 (1999).

17. CAL. PROB. CODE § 6454 (West 1991 & Supp. 1999); *see infra* text

provides an intestate share for a person registered as the decedent's "reciprocal beneficiary,"[18] intestacy laws still reflect the nuclear family norm. As yet there are few ideas about how to effectuate change without putting too much discretion for determining the appropriate beneficiaries into the hands of the probate judges. Lawmakers need an approach that takes seriously the changing composition of American families and that steers a course between the formal and functional approaches to defining family members, while limiting the degree of discretion held by the court.

Laws formally define family when the laws create a definition of family based on status, either a blood relationship or a legally recognized procedure that creates a link between the family members who are parties to the procedure.[19] In general, under current law either marriage or adoption creates this formal, legal link.[20] Thus, intestacy laws define family as persons related by blood, marriage or adoption.

A functional definition of family instead tries to determine what a family does, what functions family members perform for each other and what relationships family members have with each other.[21] The definition attempts to include as family members those who function as family members, those for whom close, loving, caring and nurturing family relationships exist. Some areas of the law have incorporated elements of a functional

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accompanying notes 376-380.

18. HAW. REV. STAT. §§ 572C-1-572C-7 (1998); *see infra* text accompanying notes 213-218.

19. Marriage creates rights and obligations as between the husband and wife, but not with respect to their children. Children of one spouse do not automatically become children of the other spouse through the marriage. *See* Susan F. Koffman, *Stepparent Adoption: A comparative Analysis of Laws and Policies in England and the United States*, 7 B.C. INT'L & COMP. LAW REV. 469, 470 (1984) ("Marrying someone with children–becoming a stepparent–confers neither parental rights nor duties. To many stepparents, adoption of the stepchild seems the only way to establish parental standing.") (footnote omitted).

20. Hawaii has added a new formal link—registration of a "reciprocal beneficiary relationship"—that creates legal rights, including intestacy rights, between the two persons who register their relationship. HAW. REV. STAT. §§ 572C-1 to 572C-7 (1998); *see also infra* text accompanying notes 226-232. Partnership registration statutes in a growing number of cities enable persons to establish a formal link for employee benefits purposes. *See infra* note 225.

21. *See* Minow, *supra* note 14, at 270 (stating that a group of people function as a family when they "share affection and resources, think of one another as family members and present themselves as such to neighbors and others"); Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91, 99 (1990) (defining family as "a community, which: (1) provides financial and emotional support to the members, (2) involves interdependence and commitment, and (3) allows transcendence of self-interest to an unlimited degree").

definition of family, usually combined with a formal definition. For example, in determining visitation rights with respect to children, family law in many states uses the concept of in loco parentis to identify a family relationship worthy of protection.[22] A person acting in loco parentis is someone not related by blood or adoption to the child but who acts as a parent to the child.[23] A child may have a biological or adoptive parent and also a stepparent, grandparent or other adult whom the law will regard, at least for some purposes, as a parent.[24]

Assuming that some change in the way intestacy laws define family is necessary, what is the best approach? In considering this question, this Article first reviews the policy considerations behind intestacy statutes and the changes that are occurring in American families. The Article examines recent legal responses to the demographic changes, first those that take a formal approach and then those that rely on a functional approach. Noting the growing use of a functional definition of family in other areas of the law, the Article asserts that attempts to squeeze new family members into the existing framework of intestacy laws have not worked well. The Article critiques the creation of intestate shares for reciprocal beneficiaries under Hawaii law and for stepchildren under California law, and then analyzes proposed modifications to the California statute and a proposal to create an intestate share for de facto partners. The Article concludes with a proposal for a statute that, for intestacy purposes, expands the definition of parent and child to include a person who can establish that a parent-child relationship existed between that person and the decedent.[25]

I. The Purposes of Intestacy Statutes

Intestacy statutes are necessary because many Americans do not have valid wills when they die.[26] In order to determine whether current intestacy statutes adequately carry out the purposes behind those statutes, this Article examines the extent of the role intestacy statutes play, looking at which groups of people

22. *See* MARGARET M. MAHONEY, STEPFAMILIES & THE LAW 133-37 (1994) (describing the use of the in loco parentis concept and the best interests of the child standard in providing stepparent visitation). *See also infra* text accompanying notes 289-300.

23. *See* MAHONEY, *supra* note 22, at 16-17.

24. *See infra* text accompanying notes 289-300.

25. *See infra* text accompanying notes 482-**Error! Bookmark not defined.**.

26. *See supra* note 12.

are more likely to die intestate and the rationales given for intestacy statutes.

A. The Rationales for Intestacy Statutes

Scholars have identified a number of goals for intestacy laws. These goals fall into two categories. One category focuses on the interests of the individual property owner, whereas the other category focuses on societal interests.[27]

1. Decedent's Intent

The most commonly identified goal of intestacy statutes is to create a dispositive scheme that will carry out the probable intent of most testators.[28] To the extent possible, the statute should

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27. All goals can be considered societal goals since a goal that benefits the individual decedent or the decedent's family indirectly, or even directly, benefits society.

28. The General Comment to the 1990 Uniform Probate Code (UPC), for example, explains that the pre-1990 UPC "was designed to provide suitable rules for the person of modest means who relies on the estate plan provided by law." UNIF. PROBATE CODE art. II, pt. 1, gen. cmt. (1993). The 1990 revisions seek to further that purpose, and also to bring the sections "into line with developing public policy." *Id. See also* WAGGONER ET AL., *supra* note 14, at 33 (explaining that the decedent's intention is one rationale for intestacy laws while identifying several other goals); Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 912 (1992) (discussing two generally accepted policies espoused by the 1990 Uniform Probate Code, namely, that succession law should reflect the desires of the typical person with regard to protecting expressions of desire and anticipating situations where those expressions are inadequately presented); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 247-42 (1962-63) (explaining that the use of quantitative research to determine what persons who do not have wills would most likely want could be useful for legislative reform to effectuate decedent's intent); E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV 1063, 1068 (1999) ("Succession law generally places donative freedom at the apex of its hierarchy of values."). *See also* Mary Louise Fellows, *Concealing Legislative Reform in the Common-Law Tradition: The Advancements Doctrine and the Uniform Probate Code*, 37 VAND. L. REV. 671, 707 (1984) (referring to what intestacy statutes should do); Fellows et al., *supra* note 8, at 327-28 (arguing that if an intestacy statute does not conform to the likely wishes of an intestate decedent, then the statute "creates a trap for the ignorant or misinformed"); Iowa Study, *supra* note 12, at 1043 (stating that "furthering the perceived intent of the intestate, efficiently distributing the property of the intestate, satisfying all creditor claimants of the estate, and assuring that the intestate's spouse and dependent heirs do not become wards of the state" are all goals of intestacy statutes but that furthering the intent of the decedent has become the primary goal.); John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 UNIV. OF MIAMI L. REV. 497, 501 (1977) ("It is generally agreed that it is the purpose of such [succession] laws to give effect, subject to the constraints of other public policies, to the wishes of the decedent while providing for the well-being of his family."). Professor Gaubatz draws on Professor Ely, and lists as the goals of succession laws, "(1)

distribute the property to the persons the decedent would have chosen to receive the property if the decedent were making the decision. Although a dispositive scheme that will work for every testator is impossible, the goal of a statute should be to meet the needs and wishes of as many persons as possible.[29]

This goal of carrying out the presumed intent of most decedents follows from the concept of private property, a concept at the heart of American property law.[30] Connected to the idea that individuals can own and control property, separate and apart from ownership by the family unit or other social unit, is the idea that an individual property owner should be able to control the disposition of the property at his or her death.[31] While freedom of testation is not unlimited,[32] it continues to be substantial. The

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continuation of the regime of private property as dominant in the social order; (2) effectuation of the wishes of the individual; (3) provision for the well-being of the family; and (4) provision for the well-being of society." *Id.* (citing RICHARD T. ELY, PROPERTY AND CONTRACT IN THEIR RELATION TO THE DISTRIBUTION OF WEALTH 425-34 (1914)). The first of these goals reflects the need to provide for a means to transfer private property on death, if a system of private property is to be perpetuated. *See also* Waggoner, *supra* note 3, at 29 ("[Appropriate intestate shares for surviving spouses] or any other consideration of spousal rights in intestacy must begin with the assumption that intestacy laws should reflect 'common' intention.").

29. Beginning an analysis of intestacy with the decedent's intent, assumes, of course, that the property is the decedent's to control. An intestacy statute governs property that the decedent could distribute by will. A preliminary consideration is whether the decedent should, in fact, control the disposition of the property. That is, do family members — a spouse or children — have competing interests in the property? Should the title control ownership of the property or should property law give rights in the property to a spouse or to children? As Lawrence Waggoner has written, "Intestacy laws build upon the rules that allocate original ownership." *See* Waggoner, *supra* note 3, at 27. If future property laws provide for ownership by the marital unit rather than the individual (already the case in community property states) or by the family unit rather than the individual, then the intestacy statutes may change accordingly.

30. For an interesting historical discussion of the goals of inheritance law (both testate and intestate), see Gaubatz, *supra* note 28, at 501-17. Professor Gaubatz comments that freedom of testation is "[i]mplicit in the definition of private property in many minds." *Id.* at 503. *See also* Lawrence M. Friedman, *The Law of the Living, The Law of the Dead: Property, Succession, and Society*, 1966 WISC. L. REV. 340, 340 (explaining that fields of law, including the law of succession which "governs the orderly transfer of economic interests from generation to generation," are "concerned in some way or other with reproducing social values in succeeding generations").

31. *See* Gaubatz, *supra* note 28, at 502.

32. The United States Constitution does not protect freedom of testation absolutely. *See* Babbitt v. Youpee, 519 U.S. 234, 244 (1997) (holding amended section 207 of the Indian Land Consolidation Act invalid because it "severely restricts the right of an individual to direct the descent of his property"); Hodel v. Irving, 481 U.S. 704, 717 (1987) ("In holding that complete abolition of both the descent and devise of a particular class of property may be taking, we reaffirm the continuing vitality of the long line of cases recognizing the States', and where

ability to rely on an intestacy statute for distribution of property may be related to the idea of freedom of testation.[33]

2. Benefits to Society

Although many sources cite the decedent's intent as the primary goal of intestacy laws, commentators have also identified goals that benefit society more broadly.[34] Many societal goals derive from a concern with support, both economic and otherwise, of the decedent's family.[35] Other societal goals include "continuation of the regime of private property as dominant in the social order,"[36] avoiding complicated property titles and excessive subdivision of property,[37] encouraging the accumulation of wealth,[38] providing for ease of administration[39] and maintaining respect for the legal system.[40]

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appropriate, the United States', broad authority to adjust the rules governing the descent and devise of property . . . ."); Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942) ("Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance."). Restrictions on freedom of testation include spousal elective share rights, transfer taxes and pretermitted child statutes. *See, e.g.*, WAGGONER ET AL., *supra* note 14.

33. *See* Fellows et al., *supra* note 8, at 323 (internal citation omitted) ("Testamentary freedom should include the right not to have to execute a will in order to have accumulated wealth pass to natural objects of the decedent's bounty."); *see also* Friedman, *supra* note 30, at 355 ("Intestacy laws can even be analyzed as an extension of the principle of free disposition of property at death."). Friedman continues, however, that "[i]ntestacy is in fact mostly 'chosen' only by default. It is a statutory plan adopted by government and imposed for social rather than individualistic reasons . . . ." *Id.*

34. Many commentators discuss the policies behind succession laws generally, including laws that apply to testamentary transfers as well as to intestate distribution. While the discussion will cite from some of these works for their general principles, the analysis will focus on the goals of intestacy laws. *See infra* text accompanying notes 35-55.

35. *See, e.g.*, Fellows et al., *supra* note 8, at 324 (listing protection of dependent family members and promotion of the nuclear family as goals of intestacy statutes); *see also infra* text accompanying notes 47-55.

36. *See* Gaubautz, *supra* note 28, at 501 (listing several goals of succession laws).

37. *See id.*

38. *See* Fellows et al., *supra* note 8, at 324.

39. *See* UNIF. PROBATE CODE art. II, pt. 2, gen. cmt. (1993) ("[E]ase of administration and predictability of result are prized features of the probate system . . . ."); Gaubatz, *supra* note 28, at 514 (explaining that simplicity in the administration of estates benefits both society and the heirs of the decedent); Iowa Study, *supra* note 12, at 1046 (listing cost-effectiveness and administrative manageability of the statute as one of several factors in considering intestacy reform); Albert H. Oosterhoff, *Succession Law in the Antipodes: Proposals for Reform in New Zealand*, 16 EST. & TR. J. 230, 232 (1997).

40. *See* Gaubatz, *supra* note 28, at 516 (explaining that, to maintain respect, any law must be responsive to the demands of the society it serves and must serve

Of all of these goals, concerns for the family are paramount. For centuries succession laws in Anglo-American law have provided for family members. John Gaubatz describes this concern for the interests of family members in early Roman law, old Germanic law and early English law, and concludes that "[t]his favoring of family in succession law has been nearly constant throughout history."[41]

Although family interests often take priority, Lawrence Friedman has pointed to the long-standing tension in succession laws between an economic principle (testamentary freedom) and a social principle (succession within the family).[42] Indeed, other than taxation, the legal restrictions on testamentary freedom reflect the social principle Professor Friedman identified. The restrictions benefit a decedent's spouse or children by restricting the decedent's ability to disinherit his or her spouse[43] and by making assumptions about testamentary intent in favor of the spouse or children.[44]

The tension between testamentary freedom and succession within the family does not exist when a decedent dies intestate because the decedent has not exercised the available testamentary freedom.[45] Therefore, the presumed intent of the decedent may parallel the social principle of providing for family members. Intestacy statutes can support families by facilitating the transfer of wealth among family members. The statutes also can reduce the possibility of disputes among surviving family members. Constructing a statute that will be considered fair by all those who knew the decedent may lessen family disharmony and minimize disputes among surviving family members and others who have an

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as a moderator of societal reactions). *See also infra* text accompanying note 46 (discussing the goal of limiting disputes).

41. *See* Gaubatz, *supra* note 28, at 507.

42. *See* Friedman, *supra* note 30, at 378.

43. Elective share statutes, community property, homestead rights and family allowances protect a surviving spouse from disinheritance. *See generally* GLENDON, *supra* note 7, at 244-46.

44. For example, pretermitted heir statutes provide a share for a child born to the testator after the testator executed his or her will under the assumption that the testator would have provided a share for the child if the child had been alive. *See* DUKEMINIER & JOHANSON, *supra* note 4, at 551 ("[A] number of doctrines have been flexibly used to protect children.").

45. *See* RICHARD R. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROPERTY § 90.02[3] (1997) ("[C]ertain societal goals can be accomplished through an intestacy scheme. These goals may include support for family members; encouragement of the nuclear family by giving property to those persons who comprise the nuclear family; and the encouragement of wealth accumulation.").

interest in the decedent's estate.[46]

Intestacy statutes also provide support for dependent family members.[47] Jeremy Bentham describes care for dependents as the first of three goals for laws of succession.[48] Bentham suggests that since the facts necessary to establish dependence are difficult (or awkward) to prove, "[t]he share which each survivor was accustomed to enjoy in the property of the deceased may be presumed from the degree of affection which ought to have subsisted between them; and this degree of affection may be presumed from nearness of relationship . . . ."[49] Thus, the relationship of spouse or child serves as shorthand for a statute seeking to provide "for the subsistence of the rising generation,"[50] and a goal of providing support for a decedent's dependents is inextricably intertwined with provisions for the family.[51] This goal of providing for dependents is a driving concern behind the system of testator's family maintenance in force in Australia, Canada, England and New Zealand.[52]

In addition to providing for family members, limiting disputes and supporting dependents, a goal of supporting the family as a positive societal institution exists. Although not as

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46. *See* WAGGONER ET AL., *supra* note 14, at 32-34; Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 415-21 (1997).

47. Issues of support surface in probate codes in connection with homestead provisions and family allowances. *See, e.g.*, UNIF. PROBATE CODE §§ 2-401 (Homestead Allowance), 2-402 (Exempt Property), and 2-403 (Family Allowance) (1998). Society's concern that its members have adequate resources may also be appropriately considered in thinking about intestacy statutes.

48. *See* WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 38 (1991) (citing J. BENTHAM, THE THEORY OF LEGISLATION 177-86 (C.K. Ogden ed. 1931), which lists the objects a legislator should consider in framing a law of succession as "1st, Provision for the subsistence of the rising generation; 2nd, Prevention of disappointment; 3rd, The equalization of fortunes.") *Id.*.

49. *See id.*

50. *See id.*

51. *See* Gaubatz, *supra* note 28, at 506-10 (listing "providing for the family" as one of several primary goals of inheritance law, and "providing for the needy," defined to include family members, charity and the government, as a subgoal of the goal of "providing for society"); *see also* Friedman, *supra* note 30, at 358 ("The basic family unit in the United States is the nuclear family (husband, wife, and children). The head of the family has an obligation to support, educate, and care for his dependents; he has a moral obligation to make provision for them in the event of his death."). Friedman explained that "family succession is considered normal and natural." *Id.* Although a definition of family based on the decedent, the decedent's spouse and children of the two spouses may have served adequately as an approximate definition of a decedent's dependents in the immediate post World War II era, increasingly that definition is underinclusive.

52. *See infra* text accompanying notes 452-466.

easily articulated as some of the other purposes, societal interests in supporting the family are implicit in intestacy statutes.

Indeed, succession laws have been described as "an attempt to express the family in terms of property,"[53] and succession laws serve to strengthen family ties, reinforce emotional bonds, and provide incentive for caring and continued connection among adult family members.[54] Recognition of family through distribution of property following the death of a family member carries with it not only economic benefits, but also, and perhaps as important, psychological benefits.[55]

As society's view of "family" changes,[56] the intestacy statutes have changed, not only because the decedent's probable intent is based on a societal view of whom the decedent considers "family," but also, perhaps, to reflect the type of family society wants to support. For example, as adoption became more accepted as a way to add a family member, intestacy statutes were changed to include adopted relatives.[57] Also, as the spousal tie within the nuclear family gained in importance over bloodlines,[58] the statutes increased the amount passing to the surviving spouse.[59]

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53. Gaubatz, *supra* note 28, at 501 n.10, 507 (citing T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 711 (5th ed. 1956)).

54. *See, e.g.*, Law Commission, *Preliminary Paper 24, Succession Law: Testamentary Claims; A Discussion Paper* 5 (1996) ("An important aim of good laws of succession is to promote family cohesion. By 'cohesion' we mean strong social relationships which lend themselves to voluntary co-operation and mutual support amongst family members.").

55. *See* Gary, *supra* note 46 at 416-17 (explaining that "beyond the simple desire for greater economic benefit, survivors may want or feel entitled to a 'fair' and equitable distribution, regardless of the amount involved"). If the family members perceive the distribution as fair, conflict among family members is less likely to develop. *See id.* (pointing out that different views of fairness can lead to conflict).

56. Mary Ann Glendon points to the importance of distinguishing "between the family as a social group that includes more persons than the marriage partners (if any), and marriage, which may or may not coincide with the existence of a family." GLENDON, *supra* note 7, at 5. She explains that some form of the family exists in all human societies but marriage is not always part of "the simplest human societies." *Id.* Glendon adds, "[t]o say that 'the family' is the primary institution, however, can be misleading unless we specify that families exist in a variety of forms." *Id.* at 6.

57. *See* Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 718 (1984).

58. *See* GLENDON, *supra* note 7, at 239.

59. *See, e.g.*, OR. REV. STAT. § 112.025 (1999) (distributing the decedent's entire estate to his or her surviving spouse, unless the decedent left children who were not children of the surviving spouse). The statute was enacted in 1987 and replaced a statute that gave only one-half of the decedent's estate to his or her surviving spouse. *Compare* 1987 Or. Laws c.591 § 20 *with* OR. REV. STAT. § 112.025 (1999). The prior version had been enacted in 1969. *Compare* 1969 Or. Laws c.329 § 1 *with*

With respect to the type of family the intestacy statute supports, the definition of family may reflect society's view both of what a family is and what a family should be. At issue in thinking about intestacy statutes is not only what a decedent wants, but what society wants. Should family be supported, and if so, should a statute attempt to determine the decedent's view of who his or her family is, or should the statute create a definition of family based on a societal view of family? Since American society is made up of many different types of family, how can the fixed rules of an intestacy statute reflect those differences and reach a fair outcome for the greatest number of decedents? Whose view of family should influence the statute? If intestacy statutes reinforce family bonds, should the statutes be sufficiently broad to encompass our modern families?[60] Before addressing these questions, it is helpful to examine who actually uses the intestacy statutes — who dies intestate and why?

B. To Whom Do Intestacy Statutes Apply?

Empirical studies show that many Americans die intestate.[61] Although the bulk of wealth passes without resort to intestacy statutes, either by will or pursuant to nonprobate transfers,[62] persons with small or modest estates overwhelmingly die without a will.[63] Since the heirs of persons with little property can arrange for the transfer of the decedent's property by using a small estate affidavit[64] or through means not supervised by a probate court,[65]

OR. REV. STAT. § 112.085 (1999).

60. *See* Fellows et al., *supra* note 16, at 14-15 (examining some of these questions with respect to the specific issue of recognizing inheritance rights for surviving committed partners and suggesting that a proposal to change intestacy statutes to provide an intestate share for committed partners could be viewed three different ways: (1) as devaluing marriage (and therefore the nuclear family), (2) as furthering state interests in supporting family functions, and (3) as reinforcing the dominance of the marriage tradition by encouraging committed partners to conform to traditional family norms in order to obtain inheritance rights).

61. *See, e.g.*, Fellows et al., *supra* note 8. *See also infra* text accompanying notes 74-81.

62. *See* WAGGONER ET AL., *supra* note 14, at 29-32.

63. *See* Dunham, *supra* note 28, at 250 (Analyzing probate estates and finding that frequency of testacy increased in relation to the size of the decedent's estate. Decedents with probate estates valued below $5,000 had wills only 25% of the time, while 96% of decedents with probate estates valued in excess of $100,000 had wills.).

64. *See, e.g.*, OR. REV. STAT. §§ 114.505-114.560 (1999) (providing for use of a small estate affidavit by estates with less than $50,000 of personal property and $90,000 of real property). A surviving heir or devisee can use a small estate affidavit to transfer title to a decedent's property without a formal probate proceeding if the value of the estate does not exceed an amount specified in the

intestacy statutes will apply most often to persons with modest estates. The financial amounts transferred under intestacy laws may be small, but to the people involved they matter. And, of course, even persons of more substantial wealth may die intestate.

Empirical data with respect to testamentary wishes and frequency of testacy exist, but such data are limited. Nonetheless, a number of studies over the past forty years shed light on the ways in which Americans transfer property at death and on their preferences for the disposition of their property.[66] Studies have attempted to address four issues: (1) what percentage of people die intestate; (2) who dies intestate, that is, what factors make it more or less likely that someone will die intestate; (3) why people choose not to execute a will; and (4) what preferences people have for the disposition of their property.[67]

Researchers have used two approaches in their studies. In one approach, studies are based on information gathered from death certificates and probate records.[68] The researcher draws a sample of decedents from death certificates and then cross-checks that sample with probate records. The probate records indicate

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statute. *See id.*

65. *See* Dunham, *supra* note 28, at 247-48.

66. *See* MARVIN B. SUSSMAN ET AL., THE FAMILY AND INHERITANCE (1970); Beyer, *supra* note 2 (interviews with 51 persons); Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303 (1969) (reviewing probate records in Washtenaw County, Michigan); Dunham, *supra* note 28 (focusing on probate records); Fellows et al., *supra* note 12, at 718 n.3 (analyzing data obtained in 182 telephone interviews based on a randomly drawn sample); Fellows et al., *supra* note 16, at 1 (phone interviews); Fellows et al., *supra* note 8, at 319 (studying probated wills); Glucksman, *supra* note 12, at 253 (collecting and analyzing three sets of data: (1) a review of death certificates and probate records of 100 residents of Morris County, New Jersey who died in 1971; (2) a telephone survey of 50 Morris County residents conducted in 1975 regarding knowledge of intestacy law and procedure; and (3) a telephone survey regarding dispositive preferences of 50 different Morris County residents); Iowa Study, *supra* note 12, at 1041 (1978) (comparing estate survivors to randomly selected cross-section of population); Richard R. Powell & Charles Looker, *Decedents' Estates*, 30 COLUM. L. REV. 919 (1930) (analyzing judicial statistical reports and inheritance tax records from several New York counties); Frederick R. Schneider, *A Kentucky Study of Will Provisions: Implications for Intestate Succession Law*, 13 NO. KENTUCKY L. REV. 409 (1987); Edward H. Ward & J.H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393 (1950) (reviewing death certificates from Dane County, Wisconsin, for 1929, 1934, 1939, 1941 and 1944, and analyzing a sample of 415 probate files from those years). Society has changed dramatically since the earliest studies. Changes such as increased size of estates and more frequent use of property transfers that avoid probate affect the meaning of findings with respect to testacy.

67. *See infra* note 82.

68. *See, e.g.*, Dunham, *supra* note 28, at 241-42 (cross-checking a sample from death certificates with probate records).

whether the decedent for whom a probate was opened died testate or intestate. These studies can provide demographic information about persons who die testate and intestate and can also provide data about how those who die with wills dispose of their property. However, studies based on these public records cannot reveal whether decedents with no probate estates died without assets or died with property transferred after death by nonprobate means. Further, the studies report the dispositive wishes of testate decedents but not those of intestate decedents — the very group of concern for intestacy statutes.[69]

A second research method uses interviews to gather information from living persons.[70] Some surveys have been based on information gathered from the heirs of decedents[71] and some have been based on random samples.[72] By gathering information from living persons, researchers can ask about dispositive wishes broadly, using a variety of hypothetical situations. Studies based on interviews can obtain information both from those with wills and from those without wills, but the answers may reflect aspirational ideals rather than actual plans.[73]

1. Frequency of Testacy

Surveys consistently show that many Americans die without wills. A study published in 1963 by Allison Dunham reported that

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69. *See* Fellows et al., *supra* note 8, at 324-26 (describing the limitations of studies that seek to determine dispositive intent by reviewing probated wills, stating that persons dying with wills are more likely to be older, wealthier and employed in white-collar occupations than those who die intestate and that persons in different socio-economic groups may have different dispositive preferences, and pointing out that even a probated will may reflect the recommendations of the decedent's lawyer for tax or other reasons and may not accurately reflect the testator's personal preferences).

70. *See, e.g.*, Beyer, *supra* note 2, at 797 (interviews with 51 persons); Fellows et al., *supra* note 12, at 720 (181 telephone interviews); Fellows et al., *supra* note 16 (256 telephone surveys, 87 with persons from the general public, 33 with persons with opposite-sex committed partners, and 51 with men with same-sex committed partners and 85 women with same-sex committed partners); Fellows et al., *supra* note 8 (750 telephone interviews in five states); Glucksman, *supra* note 12, at 267 (50 telephone interviews in Morris County, New Jersey); Iowa Study, *supra* note 12, 1045, 1070 (a survey of 94 intestate estate survivors and interviews with 600 randomly selected citizens).

71. *See, e.g.*, SUSSMAN ET AL., *supra* note 66.

72. *See, e.g.*, Fellows et al., *supra* note 12; Fellows et al., *supra* note 8.

73. Stepparents may feel pressure to treat their stepchildren as they would their biological or adoptive children. Persons answering questionnaires may believe that stepparents should treat their stepchildren equally with their legal children. A study that gathered information from actual wills would be helpful, but the death records would not indicate stepchildren, so it would be difficult to get good data without interviews.

85% of a 1957 sample group of Chicago decedents died without leaving an estate that required probate.[74] Of the 15% of decedents for whom the probate court had records, 55% were testate.[75] Thus, of total deaths, testate proceedings occurred for only 8.3% of the decedents.[76] Professor Dunham surmised that failure to accumulate enough assets to warrant probate accounted for a substantial portion of the nonprobate deaths,[77] although he noted that lifetime transfers, nonprobate transfers and consensual non-judicial administration of estates by family members probably contributed to the number.[78] Of the estates that were probated, 45% were distributed pursuant to the intestacy statute.[79]

More recent studies still indicate that many Americans die intestate.[80] Greater use of revocable trusts and other forms of probate avoidance probably means that some of those who die without wills do so in reliance on those other means of transferring property at death and do not leave property subject to intestate distribution.[81] Nonetheless, the intestacy system still serves those who have not prepared formal estate plans and those who intend to rely on the intestacy statute.

2. Who Dies Intestate?

Three studies in particular have identified characteristics of those more likely to die without a will.[82] That information, combined with information concerning who is more likely to die without leaving a probate estate,[83] can prove useful in thinking about intestacy reform. The demographic characteristics of those whom the intestacy statutes will serve most often can guide thinking about appropriate intestate distributions.

Studies have examined age, wealth, occupation, education, marital status and gender as factors that correlate to the

74. *See* Dunham, *supra* note 28, at 244.

75. *See id.* at 242-45.

76. *See id.* at 244.

77. *See id.*

78. *See id.*

79. *See id.*

80. *See infra* note 82.

81. *See, e.g.*, Iowa Study, *supra* note 12, at 1064 (Table 3—Percentage of Estates Composed Substantially of Joint Property, by Gross Estate Size, stating that interview respondents with estates from $10,000-49,999 reported holding at least 78% of their assets in joint tenancy, and respondents with estates between $50,000 and $99,999 reported that 89% of their assets were held in joint tenancy).

82. *See* Fellows et al., *supra* note 8; Glucksman, *supra* note 12; Iowa Study, *supra* note 12.

83. *See* Glucksman, *supra* note 12.

likelihood that a person will die testate or intestate.[84] Not surprisingly, age shows a strong correlation with testacy in all three studies.[85] Younger decedents are more likely to die intestate than older decedents.[86] As individuals age they are more likely to think about their own death and about how they want their property distributed after death. Younger persons procrastinate preparing a will, older persons are more likely to have documents executed.[87]

Wealth is also a significant factor identifying those who die testate.[88] As an individual's estate increases in size the person is more likely to be concerned with its disposition. Wealth is also tied to age, since many people accumulate wealth as they get older. The studies show a direct correlation between greater wealth and greater likelihood of testacy.[89]

The factors of occupation and education also affect likelihood of testacy.[90] Greater education correlates with greater testacy and white collar workers are more likely to die testate than blue collar workers.[91] Since education will affect occupation and both are likely to affect accumulation of wealth, the results of the studies confirm the findings with respect to wealth as a factor.

One study also found correlations between gender and testacy, reporting data that showed that women are more likely than men to die testate even though men are more likely to have greater wealth.[92] Another study found comparable testacy rates between the men and women surveyed.[93]

Two of the studies obtained data on marital status and found that widows and widowers are the most likely of any group (single, married, divorced) to have wills.[94] Widows and widowers have had

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84. *See supra* note 82.

85. *See* Fellows et al., *supra* note 8, at 338 (reporting that 84.6% of respondents older than 65 had wills); Iowa Study, *supra* note 12, at 1071-72 (reporting that 77% of the respondents without a will were under age forty and that of respondents older than 65, 75% had wills).

86. *See id.*

87. *See id.*

88. *See* Iowa Study, *supra* note 12, at 1072 (finding, in its sample of probated estates, only 26% testacy of estates of less than $5,000, but 80% testacy for estates of $500,000 to $1,000,000, and 100% testacy for estates valued at more than $1,000,000).

89. *See id.*

90. *See* Fellows et al., *supra* note 8, at 338; Glucksman, *supra* note 12, at 286.

91. *See* Fellows et al., *supra* note 8, at 338; Glucksman, *supra* note 12, at 286.

92. *See* Glucksman, *supra* note 12, at 258-59.

93. *See* Iowa Study, *supra* note 12, at 1076.

94. *See* Glucksman, *supra* note 12, at 259-60; Iowa Study, *supra* note 12, at 1075.

the experience of dealing with the transfer of a spouse's assets and are aware of the need for a will. Also, with their spouse no longer alive, the transfer of property by joint tenancy is less likely to be an effective mechanism for disposition of their property then when their spouse was alive.

Although age and wealth are the key factors in determining who is most likely to die testate or intestate, it is also important to consider when thinking about intestacy statutes whether those dying intestate will have probatable estates that will be subject to intestate distribution.[95] Young persons are the most likely to die intestate, but they may not have probatable estates.[96] Those most likely to be affected by intestacy statutes are those with some, but not too much, accumulated wealth who are still relatively young — middle-aged persons with modest estates.

3. Why Do People Choose Not to Execute a Will?

If the majority of those who decide not to execute a will do so because they know that the intestacy statute will distribute their property in accordance with their dispositive preferences, then a reconsideration of intestacy law may not be necessary or advisable. Studies have shown, however, that actual knowledge of the intestate distributive scheme is limited and failure to execute a will results more often from procrastination than from planning.[97]

Two studies asked specifically about the respondent's reason for not having a will. In the American Bar Foundation study, conducted in five different states, 63.6% of respondents who did not have a will cited "laziness" as the primary reason for not having a will.[98] Other reasons included not having thought about it, being young and childless and having little property.[99] No one indicated that they were relying on the intestacy statute of their state.[100]

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95. *See generally* Glucksman, *supra* note 12, at 257-59 (explaining the proportional relationship between age and the accumulation of property to constitute an estate and the correlation between higher wages and a greater tendency to leave a probatable estate).

96. Unless they have inherited wealth, most young persons probably have not accumulated many assets. If married, they likely will hold title to their house and bank account as joint tenants or tenants by the entirety. Only assets held in the decedent's name alone are subject to probate. *See supra* note 1.

97. *See* Fellows et al., *supra* note 8, at 339.

98. *See id.*

99. *See id.*

100. *See id.*

Similarly, a study conducted in Iowa reported that 56% of one group of respondents and 57% of a second sample cited "[h]ave not gotten around to making a will" as the primary reason for not having a will.[101] In that survey, 25% of the first group and 13% of the second group stated as their reason for not having a will either that the state would distribute their assets or that their "family" would get their assets automatically.[102] The authors of the study suggest that these numbers do not reflect satisfaction with the Iowa statute, but may, in fact, reflect a lack of knowledge about what happens to the property when someone dies or a reliance on prior arrangements other than wills that distribute assets to chosen survivors.[103] The authors concluded that the overall responses did not indicate informed reliance on the intestacy statute.[104] Thus, in the results reported by these two studies, there is no evidence that any significant number of people are relying on intestacy statutes to distribute their property or that changes in the intestacy statutes would adversely affect expectations.[105]

Finally, stepfamily members may be reluctant to discuss estate planning or to execute wills because of family dynamics. If relationships between a stepparent and stepchildren are strained, neither the legal parent nor the stepparent may want to address issues of property distribution on death.[106] Unfortunately, the temptation to assume that family members will "do the right thing" after one parent dies, can lead to conflict.[107] Inaction can result in greater difficulties, particularly for stepfamilies.[108]

4. What Are Common Dispositive Wishes?

Increasingly, researchers have focused on the question of how persons prefer to distribute their property. Although decedent's intent is not the only goal of intestacy statutes, it is the primary

101. Iowa Study, *supra* note 12, at 1077.

102. *See id.*

103. *See id.* at 1077-78.

104. *See id. See also* Glucksman, *supra* note 12, at 262-66.

105. *See* Fellows et al., *supra* note 8, at 339; Iowa Study, *supra* note 12, at 1077-78.

106. *See* Marjorie Engel, *Pockets of Poverty: The Second Wives Club—Examining the Financial [In]security of Women in Remarriages*, 5 WM. & MARY J. OF WOMEN & L. 309, 343-44 (1999) (describing the phenomenon of passive neglect).

107. *See id.*

108. *See id.* at 343 (explaining that failure to plan can be problematic for stepfamilies because "inheritance and tax statutes are patterned after the traditional family").

goal.[109]

Until recently, researchers have looked at the distribution of property primarily within the nuclear family. Several researchers have compared the preferred share of the surviving spouse with the shares given surviving children.[110] Empirical data showed that persons preferred to give the surviving spouse all or most of the estate, with variations depending upon whether the decedent left children who were not biological or adopted children of the surviving spouse.[111] Studies also found that people preferred the nuclear family (spouse and children) to the extended family (parents, siblings and more distant relatives).[112]

In a study conducted in 1996 and published in 1998, researchers looked for the first time at dispositive wishes for families in which family ties were not defined by blood, adoption or marriage.[113] The study focused on preferred dispositions for couples in unmarried committed relationships. Researchers collected data through telephone interviews with 256 Minnesota residents in four groups: (1) the general public, (2) persons with opposite-sex committed partners, (3) women with same-sex committed partners, and (4) men with same-sex committed partners.[114] The researchers asked survey participants to state their distributive preferences in response to eight hypotheticals.[115] The first four hypotheticals posed questions about allocating property between a surviving partner and parents, siblings or children.[116] The second four hypotheticals raised questions of distributions when children of the decedent's partner were added to the family group.[117] With respect to each hypothetical, the

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109. *See supra* text accompanying notes 28-59.

110. *See* Fellows et al., *supra* note 8, at 355-84; Glucksman, *supra* note 12, at 267-75; Iowa Study *supra* note 12, at 1081-1100.

111. *See* Fellows et al., *supra* note 8.

112. *See id.*

113. *See* Fellows et al., *supra* note 16. A prior study had looked at the question of whether stepchildren affected dispositive wishes, but only from the perspective of a parent whose child is not the child of a surviving spouse. The survey questionnaire asked participants whether the share of the surviving spouse should change if the decedent left children (1) all of whom were children of the decedent and the surviving spouse, and (2) some of whom were children of the decedent and someone other than the surviving spouse. *See* Fellows et al., *supra* note 8, at 358, 369.

114. *See* Fellows et al., *supra* note 16, at 31. The study used a self-definition of committed partner for eligibility. *See id.* at 34. The study also included questions related to defining a committed relationship. *See id.* at 53-65.

115. *See id.* at 37-79.

116. *See id.* at 37-52.

117. *See id.* at 72-81.

question was posed with the decedent in an opposite-sex relationship, and the researchers then asked the respondents whether their response would change if the decedent had been in a same-sex relationship.[118] The researchers recorded little change in the dispositive choices based on whether the decedent was involved in an opposite-sex or same-sex relationship.[119]

Although the focus of the research was public attitudes about the provision of an intestate share for committed partners currently unprotected by intestacy statutes,[120] the study is of significance when considering whether intestacy laws should include children of gay and lesbian families and stepfamilies. First, the study reflects the fact that the family pattern in the United States has changed in ways that the intestacy statutes have yet to address.[121] Second, the study provides the first empirical data of views concerning intestacy distributions when the decedent left surviving children who are members of the decedent's family but are not related to the decedent by blood or adoption.[122]

In the first four scenarios (Scenarios A through D), the researchers asked the respondents to make decisions concerning dispositive shares when the decedent was survived by a committed partner and by other family members who were related by blood or adoption.[123] The four scenarios created the following groups of survivors: (A) partner and decedent's parents, (B) partner and decedent's siblings, (C) partner (who has no children) and decedent's minor child from a prior relationship, and (D) partner, partner's children from a prior relationship and decedent's

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118. *See id.* at 37-84.

119. *See id.* at 89. The exact numbers are reported in the article. Generally speaking, the opposite-sex and same-sex couples reported very little change (between 95% and 100% reported no change, depending on the scenario), and the general public sample reported slightly more, but still limited changes in disposition (between 81% and 89% reported no change). *See id.*

120. *See id.* at 3. Hawaii provides a share for a committed partner or other person who registered with the decedent as a reciprocal beneficiary. *See infra* text accompanying notes 226-232.

121. *See id.* Professor Fellows' prior empirical work demonstrated the disjunction between intestacy statutes that gave a surviving spouse one-half or one-third of a decedent's estate and the majority view that if a decedent left a surviving spouse and either no children or children all of whom were children of the surviving spouse, then the surviving spouse should receive the entire estate. *See* Fellows et al., *supra* note 12, at 730, 744; Fellows et al., *supra* note 8, at 356-57. Intestate reform followed. *See supra* note 59.

122. *See* Fellows et al., *supra* note 16, at 72-84.

123. *See id.* at 37-52.

children from a prior relationship.[124] In the last scenario, respondents were asked what percentage they would give the surviving partner, but not whether they would give a share to the partner's children.[125]

Responses to these scenarios indicate that the majority of respondents favor giving the committed partner a share of the estate.[126] This contrasts with the result under current intestacy laws, which would exclude the committed partner.[127] The responses vary in the percentage given to the committed partner. In general, a larger share is preferred if the other survivors are parents or siblings,[128] whereas a smaller share is preferred if the other survivors are children of the decedent who are not children of the committed partner.[129]

The responses to these questions demonstrate that the majority of persons in the survey would leave a share of an intestate estate to a committed partner, even if the decedent left a surviving legal child.[130] Those respondents considered a relationship by affinity, currently outside the intestate statutes,

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124. *See id.*

125. *See id.* at 49.

126. *See id.* at 51.

127. *See id.* at 15.

128. *See id.* at 37-45.

129. *See id.* at 45-52. The first scenario involving children is as follows:

> [T]he person has a child under 18 from a prior relationship and the opposite-sex partner has no children. When the person dies, how would you divide the estate between the person's child and their [sic] partner? What percentage of the estate would you give to the child of the person who dies? What percentage of the estate would you give to the partner of the person who dies?

Id. at 47. In response, 38.4% of the general public sample, 42.4% of the respondents with opposite-sex partners, and 57.3% of respondents with same-sex partners, would give 50% to the partner and 50% to the child; in comparison, 37.2% of the general public, 30.3% of opposite-sex partners and 6.1% of same-sex partners would give the entire estate to the child. *See id.* The second scenario involving children is as follows:

> In [this] situation, a retired widow and retired widower enter into a committed relationship and live together without getting married. They both have children from their prior marriages. If the widower dies first, what percentage of the estate, if any, would you give to his partner? If the widow dies first, what percentage of the estate, if any would you give to her partner?

Id. at 49. In response, 41% (widower died first) and 39% (widow died first) of the general public sample, 39.4% (widower or widow died first) of the respondents with opposite-sex partners, and 41.9% (widower died first) and 40.3% (widow died first) of respondents with same-sex partners, would give 50% to the partner and 50% to the child. In comparison, 28.9% (widower died first) and 30.5% (widow died first) of the general public and 24.2% (widower or widow died first) of opposite-sex partners would give the entire estate to the child. *See id.* at 51.

130. *See id.* at 49-51.

worthy of an intestate share.[131]

The other four scenarios (Scenarios E through H) reflect more directly on the issue of children who are part of the decedent's family but who are not legal children of the decedent.[132] In these scenarios, the decedent is survived by a child who is a child of the committed partner but not a biological or adopted child of the decedent.[133]

In Scenario E, the decedent died survived by two children: (1) a legal child from a prior relationship and (2) a child who was conceived or adopted by the decedent's committed partner during their relationship, raised by the decedent, but never adopted by the decedent.[134] A substantial majority of respondents would divide the decedent's estate equally between the two children.[135] In this scenario, the nonlegal child joined the family created by the partners during their relationship and was raised by both partners.[136] The data suggest that most respondents viewed the child as a child of the decedent despite the lack of a formal (biological or adoptive) tie. The facts imply that the decedent viewed the child as his or her own and that the decedent was a functional parent although not a legal parent.

The situation in Scenario E is likely to be more common when the parents are a same-sex couple rather than an opposite-sex couple. Laws in some states prohibit adoptions by gay men or lesbian couples, while laws in other states prevent second-parent adoptions.[137] Therefore, even if committed partners decide to have a child together, the laws may prevent both parents from becoming legal parents. Although in some ways similar to the legal barrier to adoption that exists for some stepparents when a legal parent refuses to consent to the adoption, Scenario E poses a more straightforward family unit since the child starts with two parents and continues to live with the same two parents. The

131. *See id.*

132. *See id.* at 72-84.

133. *See id.*

134. *See id.* at 72-75.

135. *See id.* at 74 (stating that 80.2% of the general public sample, 87.9% of opposite-sex partners, and 90.2% of same-sex partners would divide the estate equally between the two children).

136. *See id.* at 73.

137. Second-parent adoption refers to an adoption by the committed partner of a child's biological or adoptive parent. The adoption does not terminate the legal parent's parental rights. *See id.* at 70 n.289 (citing statutes in Florida and New Hampshire that bar adoptions by lesbians and gay men); *id.* at 70 n.285 (citing cases in Colorado and Wisconsin that refused to permit an adoption by the same-sex partner of the child's parent).

parents view the child as a legal child of both parents.

In Scenarios F through H, the facts include a committed partner's child from a prior relationship.[138] In Scenarios F and G, the partner predeceased the decedent.[139] In Scenario F, the decedent is survived by his or her own child from a prior relationship and by the partner's child from a prior relationship.[140] Both children had lived in the couple's household.[141] Interestingly, given the law's preference for legal children, the number of respondents who would divide the estate equally between the two children is still substantial.[142] The scenario does not indicate how long the child from a prior relationship had lived in the decedent's household or whether a parent-child relationship existed between the two. It seems likely that respondents assumed the existence of a parent-child relationship between the decedent and the partner's child.[143]

In Scenario G, the decedent's parents and the partner's child from a prior relationship survive the decedent.[144] The results here show that a substantial majority would give half or more of the estate to the partner's child,[145] and a significant number would give the entire estate to the partner's child.[146] The contrast with intestacy law, which would give all of the estate to the decedent's parents,[147] is striking.

In Scenario H, a child raised by both partners (the legal child of both partners), the partner's child from a prior relationship and the partner all survive the decedent.[148] The responses are more varied than in the prior scenarios, but a majority of respondents would divide the estate among the three takers and treat the two children equally.[149]

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138. *See id.* at 74-79.

139. *See id.* at 74-76.

140. *See id.* at 74.

141. *See id.*

142. *See id.* at 74-76 (stating that 72.1% for the general public sample, 81.8% for opposite-sex partners, and 90.2% for same-sex partners would divide the estate equally between the two children).

143. *See infra* text accompanying note 155.

144. *See* Fellows et al., *supra* note 16, at 76.

145. *See id.* at 77 (stating that 68.6% for the general public sample, 75.8% for opposite-sex partners, and 90.2% for same-sex partners would give half or more of the estate to the partner's child).

146. *See id.* (stating that 20.9% for the general public sample, 21.2% for opposite-sex partners, and 33.1% for same-sex partners would give the entire estate to the partner's child).

147. *See id.* at 76.

148. *See id.* at 79.

149. *See id.* at 82.

In the report analyzing the data in this study, two preferences stand out—a preference for creating a share for the surviving partner and a preference for treating children of the decedent and the committed partner equally, even when one child is a legal child of the partner but not of the decedent.[150] The preference for creating a share for the committed partner strongly supports revising intestacy statutes to provide for such a share. The data collected will be useful in thinking about two possible ways to accomplish this—Lawrence Waggoner's proposal to create an intestate share based on a functional definition of committed partner[151] and Hawaii's recent legislation creating an intestate share based on registration by the committed partners as reciprocal beneficiaries.[152]

With respect to children in stepfamilies and children of gay and lesbian families, the report provides intriguing data and raises a number of questions. The data suggest that for families headed by committed partners, support exists for treating children of the partnership equally with children from a prior relationship.[153] The difficulty in reading the data is that the scenarios do not attempt to make distinctions based on the type of relationship that exists between the decedent and the partner's child.[154] Factors such as the duration of the relationship and whether the relationship began when the child was a minor may have been assumed by the respondents in answering the questions posed in connection with the scenarios.[155]

The researchers did obtain limited additional information about how the quality of the parent-child relationship might affect the dispositive preferences of the survey respondents. Scenario H states that the committed partner's child lived in the household of the decedent.[156] The researchers asked a follow-up question using a scenario that was the same as Scenario H, except that the modified scenario posits that the partner's child had not lived in the decedent's household.[157] Response to that version of Scenario H indicated that the respondents would provide a smaller share

150. *See id.* at 83.

151. *See infra* text accompanying notes 442-450.

152. *See infra* text accompanying notes 226-232.

153. *See* Fellows et al., *supra* note 16, at 83.

154. *See id.* at 47-79.

155. The researchers discuss this problem in their report. *See id.* at 85.

156. *See id.* at 79.

157. *See id.* ("We reasoned that respondents might use the distinction between living inside and outside the household as an indirect way of evaluating the nature of the relationship between the decedent and the partner's child.").

for the partner's child under those circumstances.[158] Further, the number of respondents who would provide no share for the partner's child increased.[159] These responses indicate that the quality of the parent-child relationship does affect dispositive preferences with respect to the partner's child. The difficulty, of course, lies in creating questions that address that issue. As the researchers explain, respondents brought their own subjective interpretations of what it means for the child to have lived in the household of the couple.[160] The researchers recommend further research that focuses "on the actual nature of the relationship between a decedent and a partner's child from a prior relationship."[161]

Public attitudes concerning inheritance by stepchildren may be different from attitudes about inheritance within families headed by committed partners. The report itself suggests a number of questions that must be asked and recommends further research.[162] Nevertheless, the importance of the report for stepfamilies, as well as for committed partner families, should not be minimized. The data provides overwhelming support for the proposition that the public believes that disposition through intestacy should reflect families as functional units and not be based merely on legal ties of marriage, blood and adoption.[163] How

158. *See id.* at 86. ("Over 47% of the respondents in the general public sample, over 56% of the respondents with opposite-sex partners and nearly 36% of the respondents with same-sex partners gave less to the partner's child when the child never lived in the couple's household than when the child did live in the couple's household.").

159. *See id.* at 85-86. Under Scenario H, 23.0% of the general public sample, 18.7% of the opposite-sex partners and 30.8% of the same-sex partners gave the partner's child nothing; while under the modified version of Scenario H (in which the child did not live in the decedent's household), 51.6% of the general public sample, 59.4% of the opposite-sex partners and 53.8% of the same-sex partners gave the partner's child nothing. *See id.*

160. *See id.* at 86.

161. *Id.* at 87.

162. The researchers recommend empirical study of stepfamily issues and suggest that the question of a "fair" distribution of a decedent's property should be examined from the viewpoint of the children as well as from that of the decedent. *See id.* at 83 n.324. The report identifies the following issues as appropriate for further research:

> If a partner's child fails to survive the decedent, should that child's lineal descendants share in the decedent's estate? Should a partner be able to inherit as a parent from the other partner's child? Should a partner's child be able to inherit from or through the other partner's family, such as the other partner's children, siblings or ancestors?

See id. at 84 n.325. These issues are posed as questions that affect disposition of assets in a family headed by committed partners, but they apply as well to stepfamilies.

163. *See id.* at 31-89.

that can be done is debatable, but this research demonstrates public support for the proposition that it should be done.

II. Changing Definitions of Family

Intestacy statutes attempt to distribute a decedent's property to the decedent's family, either because the intestacy statute strives to approximate the decedent's wishes[164] or because society has decided that intestacy statutes should benefit and strengthen families if a decedent does not express a contrary wish in a will.[165] If family is the focus of several goals behind intestacy statutes, then understanding what "family" means is important. The empirical data discussed above reflect significant recent shifts in perceptions of family. If the family is changing, what does the new family look like? Scholars have written extensively on this topic in recent years, trying to make sense of laws that work well for nuclear families but may not work at all for many of today's more diverse families.[166]

Intestacy statutes almost uniformly use a formal definition of family: persons related by blood, marriage or adoption.[167] Other areas of the law have begun to turn to a functional definition of family, although not in a consistent manner.[168] In recent years, general discussions about families and the law have proposed either changing the formal definition of family to include more

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164. *See supra* text accompanying notes 28-33.

165. *See supra* text accompanying notes 47-55.

166. *See, e.g.*, Lauren Anderson, *Property Rights of Same-Sex Couples: Toward a New Definition of Family*, 26 J. FAM. L. 357 (1987-88); Joseph G. Arsenault, *"Family" But Not "Parent": The Same-Sex Coupling Jurisprudence of the New York Court of Appeals*, 58 ALB. L. REV. 813 (1995); Paris R. Baldacci, *Pushing the Law to Encompass the Reality of Our Families: Protecting Lesbian and Gay Families from Eviction from Their Homes—Braschi's Functional Definition of "Family" and Beyond*, 21 FORDHAM URB. L.J. 973 (1994); Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879 (1984); Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387 (1993); Haddock & Polsby, *supra* note 14; Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461; Rebecca L. Melton, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family,"* 29 J. FAM. L. 497 (1990-91); Minow, *supra* note 14; Treuthart, *supra* note 21; *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640 (1991) [hereinafter *"Looking for a Family Resemblance"*].

167. *See supra* text accompanying notes 17-20; *cf.* CAL. PROB. CODE § 6454 (West 1991 & Supp. 1999) (providing a share for stepchildren under limited circumstances).

168. *See infra* text accompanying notes 261-379.

family relationships[169] or relying more frequently on a functional definition of family in determining the rights and responsibilities of family members.[170]

A look at the family generally begins with the nuclear family or "conventional" family: defined as a legally married husband and wife, and the children of that marriage.[171] Of course, even historically, Americans developed laws that dealt with family structures that did not fit this definition. For example, common law marriage grew out of necessity in an expanding country in outposts where legal marriage was not immediately available.[172] A man and woman who functioned as a married couple were considered married under the common law even if they had not been formally married.[173] With respect to children, a requirement that children be related by blood to be entitled to an inheritance gave way to laws treating adopted children as full members of the family.[174]

Although some scholars and politicians still regard the nuclear family as normative,[175] the available data demonstrate

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169. *See, e.g., Looking for a Family Resemblance*, *supra* note 166, at 1640-41 (advocating registration systems that would permit non-traditional couples to register and obtain the legal benefits and responsibilities that married couples have); Anne-Marie E. Rhodes, *Abandoning Parents Under Intestacy: Where We Are, Where We Need to Go*, 27 IND. L. REV. 517 (1994) (arguing for the integration of a functional definition of parenting that focuses on positive acts of responsibility, favoring a caring parent over an abandoning parent, into the intestate system).

170. *See, e.g.*, Harris, *supra* note 166, at 480-85 (considering the benefits to the child of functional fatherhood as the basis for legal fatherhood); Minow, *supra* note 14 (exploring the functional definition of family in the child custody context).

171. Martha Fineman describes the nuclear family as an ideal venerated in law and society: "[H]istorically only the nuclear family has been protected and promoted by legal and cultural institutions." Fineman, *supra* note 166, at 388. Despite changes in the laws defining family, Fineman posits that the sacred status accorded the nuclear family by non-legal institutions continues to privilege the nuclear family. *See id.* at 393. Further, she argues that even attempts to challenge the supremacy of the nuclear family do so by analogy—expanding the definition of family by being more inclusive but not by challenging the underlying assumptions of what makes the nuclear family the "natural" family. *See id.* at 393-94.

172. *See* Minow, *supra* note 14, at 270-71 (explaining that finding a minister qualified to perform marriages and recording the marriage was not always possible in the frontier of early America).

173. *See id.*

174. *See* Rein, *supra* note 57, at 718-23.

175. *See* Haddock and Polsby, *supra* note 14, at 15 (describing the conventional family as "married persons sharing living quarters with children"). The authors refer to "the a priori belief, which is still widespread in the socially underdeveloped inland provinces of the country, that there might be some systematic differences in the production of socially prejudicial behavior as between conventional married households on the one hand and contractual quasi-marital households on the other . . . ." *Id.* at 15-16.

that fewer and fewer American families fit this definition of family. The Census Bureau defines a "family" as made up of "two or more people living together who are related by blood, marriage, or adoption, one of whom is the householder."[176] This definition does not recognize other kinds of families such as same-sex or opposite-sex couples with children. The Census Bureau defines "own children" as children under eighteen that are "never-married sons and daughters of the householder," including stepchildren and adopted children.[177] Thus, the Census Bureau counts as "family" only those persons living in a household. The definition excludes adult children living on their own, whether legal children or stepchildren. Further, the definition excludes minor children who reside with another parent.

Given the definitions used by the Census Bureau, reliable statistics on stepfamilies are difficult to find. Paul Glick, one of the first to compile data on stepfamilies,[178] cautions that statistics regarding stepfamilies have different meanings depending upon the terms used.[179] Despite these limitations, the available data do indicate the growing number of stepfamilies among American families.[180]

Glick estimates that in 1987 there were 4.3 million stepfamilies with children under the age of eighteen.[181] He reports that stepfamilies had 8.78 million children under the age of eighteen, 5.85 million of whom were stepchildren and the remaining 2.93 of whom were children born after the remarriage.[182] These statistics, derived from Census reports, are based on a definition of stepfamily as a "remarried family with a child under eighteen years of age who is the biological child of one of the parents and was born before the remarriage occurred."[183] The number of stepfamilies defined as remarried parents with a child of any age who is the legal child of one parent but not of the

176. KEN BRYSON & LYNNE M. CASPER, CENSUS BUREAU, HOUSEHOLD AND FAMILY CHARACTERISTICS: MARCH 1997, CURRENT POPULATION REPORTS P20-509 (Apr. 1998).

177. *See id.*

178. *See* Paul C. Glick, *Living Arrangement of Children and Young Adults*, 7 J. OF COMP. FAM. STUD. 321, 321-33 (1976).

179. *See* Paul C. Glick, *Remarried Families, Stepfamilies, and Stepchildren: A Brief Demographic Profile*, 38 FAM. REL. 24, 24 (1989) ("For example, American stepchildren at a given time are a very small proportion of *all children* but a substantial majority of *children in remarried families* . . . .").

180. *See id.*

181. *See id.*

182. *See id.* at 25.

183. *See id.* at 24.

other is likely to be much higher. Perhaps for that reason, Jan Larson estimates that one out of every three Americans is a member of a stepfamily.[184] Larson quotes Paul Glick as stating "[m]ore than half of Americans today have been, are now, or will eventually be in one or more step situations during their lives . . . ."[185]

Statistics on same-sex and opposite-sex couples with children are even more limited.[186] A Census Bureau report published in 1998 shows the increase in the number of unmarried-couple households from 1960 to 1998.[187] The report lists the total number of unmarried-couple households, households with children under 15 years and households without children under 15 years.[188] The total number of households increased from 439,000 in the 1960 census, to 523,000 in 1970, to 1,589,000 in 1980, to 2,856,000 in 1990, to 4,236,000 in 1998.[189] Unmarried households without children exceed the number of households with children throughout this time period, but the percentage of households with children increased from 1980 to 1997. In 1980, the number of households with children constituted 27.1% of the total, while in 1998, the number constituted 35.9% of the total.[190]

Although the census does not distinguish between same-sex and opposite-sex cohabitants, several surveys have obtained information from unmarried-couple households.[191] The data indicate that approximately 30% of the unmarried-couple households are likely to be same-sex couples and the remainder were opposite-sex couples.[192] Opposite-sex unmarried couples

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184. *See* Jan Larson, *Understanding Stepfamilies (Creating Niche Markets from the Special Needs of Stepfamilies)*, AM. DEMOGRAPHICS July 1992, at 36, 36; *see also* Engel, *supra* note 107, at 313 (stating that one out of every three Americans is a member of a stepfamily).

185. *See* Larson, *supra* note 184, at 36.

186. *See* Dominick Vetri, *Almost Everything You Always Wanted to Know About Lesbians and Gay Men, Their Families, and the Law*, 26 S.U.L. REV. 1, 23 (pointing to the inadequate documentation of unmarried couple families by the Census Bureau and finding the Census Bureau categorization of same-sex and opposite-sex couples as "non-family" households offensive).

187. U.S. Bureau of the Census, *Unmarried-Couple Households, by Presence of Children: 1960 to Present*, Jan. 7, 1999 (visited Sept. 28, 1999) <http://www.census.gov/population/socdemo/ms-la/tabad-2.txt>.

188. *See id.*

189. *See id.*

190. *See id.*; *see also* Glick, *supra* note 179, at 25 (estimating that in 1987 there were 7.25 million families of unmarried adults with children under the age of 18 and 5.7 million families of unmarried adults with young adult children or other relatives sharing the household).

191. *See* Fellows et al., *supra* note 16, at 3 nn.5-7.

192. *See id.* at 3 (citing American Demographics Inc., *One-third of Unmarried*

were more likely to have children under fifteen living in the house than same-sex couples (35% of opposite-sex couples and 8-9% of same-sex couples).[193] The survey data indicate that the number of opposite-sex households is growing at a rate faster than that of same-sex households.[194]

Detailed information on the number of stepfamilies or gay and lesbian families is beyond the scope of this Article. However, the limited data available for stepfamilies and for gay and lesbian families support the general perception that the structure of American families has changed from the nuclear norm and will continue to change in the future.[195]

III. Legal Responses to Changes in Family Structure

How has the law begun to address the changes in family structure? Martha Minow worries "about preserving a set of legal rules that have little relationship to how people actually live."[196] Nevertheless, in some areas of the law legislatures and courts are attempting to create legal rules that do make sense for today's diverse families.[197] In so doing, courts, legislatures and scholars advocating change make use of two approaches—a formal approach and a functional approach.

A. Formal Approach

One approach is to bring "new" families into the fold. If the law uses a formal definition of family—a definition based on blood

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Partners Are Gay, THE NUMBER NEWS, May 1996, at 1).

193. *See id.* (citing ARLENE F. SALUTER, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P20-484, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1994, xiii (1996)).

194. *See id.*; *see also* Vetri, *supra* note 186, at 25-27.

195. *See* Carolyn R. Glick, *The Spousal Share in Intestate Succession: Stepparents are Getting Shortchanged*, 74 MINN. L. REV. 631, 631 (1990) ("American families have changed dramatically in the last twenty-five years."); Sol Lovas, *When is a Family not a Family? Inheritance and the Taxation of Inheritance Within the Non-Traditional Family*, 24 IDAHO L. REV. 353, 353 (1987-88) ("The American family is changing. Fewer American households consist of a 'traditional' family, that is, a husband and wife and their children."); Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917, 917 (1989) ("Many modern families do not take the form of the traditional nuclear family.").

196. *See* Minow, *supra* note 14, at 271. Minnow's comment relates to the failure of a New York court to treat a lesbian mother as a "parent" for purposes of considering child visitation. *See infra* text accompanying notes 327-340.

197. Changes have occurred with respect to child custody and visitation issues in family law, interpretation of housing statutes, wrongful death statutes, worker's compensation and employee benefits. *See infra* text accompanying notes 289-379.

or formal legal registration processes like marriage and adoption, then by permitting families to create formal legal relationships as well as personal relationships, more persons can declare themselves a family for purposes of legal rules. The most extensive changes have occurred in connection with adoption. Other changes in recent years mark the beginning of attempts to include committed partners as family members for some purposes.[198]

1. Changes to the formal definition of family

a. Adoption

Although family relationships on a personal, non-legal level probably have always included children who are not the biological children of the male and female heads of the family, legally recognized adoption is a relatively recent addition to the formal—and legal—definition of family.[199] In the United States, state legislatures began to adopt formal rules on adoption in the mid-nineteenth century.[200] Adoption of a minor child now creates a parent-child relationship, which will be treated legally in the same manner as the relationship between a parent and a biological child.[201]

Although adoptive children are treated under the law like biological children, the formal adoption of children with whom an adult has a parent-child relationship may not always be possible. In a stepfamily situation, adoption may not be an option to create a legal tie. For example, a stepparent may wish to adopt his or her stepchild, but if the child's legal parent does not consent, the law will not permit an adoption.

For same-sex committed partners, if one partner seeks to adopt his or her partner's child, the couple may find that the adoptive mother's (or father's) legal tie to the child will cut off the

198. For a discussion of Hawaii statute, see *infra* text accompanying notes 226-232.

199. For examination of the history of adoption, see MORTON I. LEAVY & ROY D. WEINBERG, LAW OF ADOPTION (4th ed. 1979); Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443 (1971); Rein *supra* note 57, at 711.

200. Texas and Vermont passed general adoption statutes in 1850. *See* LEAVY & WEINBERG, *supra* note 199, at 2. Massachusetts adopted a comprehensive adoption law in 1851. *See* Mass. Acts ch. 324, *cited in* Rein, *supra* note 57, at 716 n.21. England did not legalize adoption until 1926. *See* Adoption of Children Act, 1926, 16 & 17 Geo. 5, ch. 29, *cited in* Rein, *supra* note 57, at 714 n.10.

201. *See* 2 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, PRACTITIONER'S EDITION 565 (2d ed. 1988).

biological mother's (or father's) legal connection.[202] In addition, laws in some states prohibit adoptions by gay men and lesbian couples.[203] Therefore, even if committed partners decide to have a child together, the laws may prevent both parents from becoming legal parents.

Adult adoption provides another legal relationship, allowing the persons involved to fit within the formal definition of family for purposes of many different laws. Same-sex committed partners, who cannot legally marry, may choose adoption as a means of creating a legal relationship to give legal recognition to the family they have created together.[204] Most, but not all, states permit adult adoption.[205]

New York courts have permitted adult adoptions in two cases involving same-sex committed partners who turned to adoption to create a legal relationship.[206] In the second of these cases, *In re Adult Anonymous II*,[207] the parties sought the adoption to secure the right to remain together in an apartment leased to one of them.[208] The lease allowed "any immediate family members" to occupy the apartment.[209] The court allowed the adoption and stated that a court should not deny a petition for adoption on the basis of a narrow definition of family.[210] Rather, the court described a family as "a continuing relationship of love and care, and an assumption of responsibility for some other person,"[211] and noted that a family relationship existed between the two men.[212] The court permitted the adoption, allowing the men to create a

202. *See* Fellows et al., *supra* note 16, at 69-70 n.285 (citing cases in Colorado and Wisconsin that refused to permit an adoption by the same-sex partner of the child's parent). Other states permit second parent adoptions—an adoption by the committed partner of a child's biological or adoptive parent that does not terminate the legal parent's parental rights. *See id.*; Maxwell S. Peltz, *Second-Parent Adoption: Overcoming Barriers to Lesbian Family Rights*, 3 MICH. J. GENDER & L. 175 (1995).

203. *See* Fellows et al., *supra* note 16, at 70 n.289 (citing statutes in Florida and New Hampshire that bar adoptions by lesbians and gay men).

204. *Cf.* S.D. CODIFIED LAWS § 25-6-2 (Michie 1998) ("Any minor child may be adopted by any adult person. However, the person adopting the child must be at least ten years older than the person adopted.").

205. For an extensive discussion of adult adoption, see Rein, *supra* note 57, at 749-65. *See also* CLARK, *supra* note 201, at 674-76.

206. *See In re* Adoption of Adult Anonymous, 435 N.Y.S.2d 527 (1981); *In re* Adult Anonymous II, 452 N.Y.S.2d 198 (1982).

207. *In re* Adult Anonymous II, 452 N.Y.S.2d 198, 200 (1982).

208. *See id.*

209. *Id.*

210. *See id.* at 201.

211. *Id.*

212. *See id.*

legal relationship while implicitly recognizing that the relationship was not a parent-child relationship.[213] Judge Sullivan argued in dissent that the purpose of adoption is to create a parent-child relationship and that legal recognition of other family relationships should be left to the legislature.[214]

Subsequently, in *In re Adoption of Robert Paul P.*,[215] the New York Court of Appeals refused to allow the adoption of a fifty-year-old man by his fifty-seven-year-old committed partner.[216] The two men sought the adoption to give legal formality to their twenty-five year relationship.[217] The court held that adoption should not be used as a "quasi-marital vehicle."[218] Since the two men admittedly did not have a parent-child relationship, the court rejected the petition for adoption.[219]

b. Marriage

Like adoption, marriage creates a legal family relationship between persons who are not related by blood. In general, legal marriage carries with it rights and responsibilities, regardless of whether the spouses function as a family. However, in some circumstances the fact that spouses are not functioning as a family will affect the spouses' legal rights. For example, in most common law states a surviving spouse has the right to an elective share of the estate of the decedent spouse, regardless of whether the spouses conducted their lives as married persons. However, in New Jersey the elective share is barred unless the spouses were living together when the first spouse died,[220] and in Oregon the elective share can be denied or reduced if the spouses were living apart when one of the spouses died.[221]

Under current law no state in the United States permits two persons of the same sex to marry.[222] Thus, the law prohibits many

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213. *See id.* at 200.

214. *See id.* at 203.

215. 471 N.E.2d 424 (N.Y. 1984).

216. *See id.* at 426-27.

217. *See id.* at 425.

218. *Id.*

219. *See* Anderson, *supra* note 166, at 363 (discussing these two adoption cases and stating, "[f]or the present, as the statutory language of both the marriage and adoption laws have been construed as precluding gay couples from their scopes, sympathetic courts are forced to continue to fashion imaginative means by which gay partners can obtain some recognition as family members").

220. *See* N.J. STAT. ANN. § 3B:8-1 (West 1999).

221. *See* OR. REV. STAT. § 114.135 (1999).

222. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (denying a same-sex couple the right to marry); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971) (same);

couples who would like to fit within a formal legal definition of family from doing so. Making marriage available to same-sex couples would expand the formal definition of family to include more persons who think of themselves as a family, but the current political climate makes this approach infeasible, at least in the short term.[223] Further, some couples, both opposite-sex and same-sex committed partners, prefer not to marry.

c. Domestic Partner Ordinances

Although same-sex couples cannot currently marry, in some places and for some purposes same-sex couples and unmarried opposite-sex couples can register as a domestic partnership, legally declaring themselves a couple—and a family.[224] Some cities and companies provide employment benefits that are equivalent to the benefits a married person would receive if an unmarried partner registers.[225] Like adoption, registration creates a legal relationship that then signifies, for at least some purposes, that the parties come within a formal definition of family.

Storrs v. Holcomb, 645 N.Y.S.2d 286 (Sup. Ct. 1996) (same); Baker v. State of Vermont (visited Sept. 29, 1999) <http://www.qrd.org/usa/legal/ lgln/1998/12.98> (rejecting a challenge to Vermont's refusal to grant marriage licenses to same-sex couples). *See generally* William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993) (recounting the history of same-sex marriage to provide support for arguments that states should end their prohibition of same-sex marriage); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 187 (listing the fact that "no state allows people of the same sex to marry" as one of the many legal restrictions and legal sanctions imposed on gay men and lesbians).

223. In response to attempts to legalize same-sex marriages, Congress in 1996 enacted the Defense of Marriage Act. This Act provides that the Federal government will not recognize same-sex marriage for purposes or benefits under the tax or social security systems even if a state legalizes such marriages. Defense of Marriage Act of 1996, Pub. L. No. 104-199 § 2(a), 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

224. *See* Vetri, *supra* note 186, at 62-63 (listing 32 cities and counties that permit the registration of domestic partnerships).

225. *See* Sue Nussbaum Averill, *Desperately Seeking Status: Same-Sex Couples Battle for Employment-Linked Benefits*, 27 AKRON L. REV. 253 (1993); Robert L. Eblin, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)*, 51 OHIO ST. L.J. 1067 (1990); Steven N. Hargrove, *Domestic Partnerships Benefits: Redefining Family in the Workplace*, 6 LOY. CONSUMER L. REP. 49 (1994); Kate Latimer, *Domestic Partners and Discrimination: The Need for Fair Employment Compensation*, 12 HAMLINE J. PUB. L. & POL'Y 329 (1991); Vetri, *supra* note 186, at 64-75 (providing detailed information on companies, municipalities, universities and three states—Vermont, Oregon and New York—that provide employee benefits to domestic partners and discussing federal legislation that would make benefits available to domestic partners of federal employees).

d. Hawaii Statute—Registration as Reciprocal Beneficiaries

In 1997, Hawaii created a legal relationship called a "reciprocal beneficiary relationship."[226] The Hawaii statute now provides that two people at least 18 years of age who cannot legally marry can register as reciprocal beneficiaries and obtain certain of the rights and benefits available to married couples.[227] The statute states that the new legal relationship is available for any two people who cannot legally marry and who are not a party to another reciprocal beneficiary relationship, including a widowed mother and her son.[228] The legislation permits same-sex couples to create a legal relationship, but states that opposite-sex couples cannot register as reciprocal beneficiaries.[229] The reciprocal beneficiary relationship is created when the parties sign a declaration of reciprocal beneficiary relationship, have their signatures notarized and file the declaration with the director of finance who maintains a record of each declaration.[230]

Although the statute does not give reciprocal beneficiaries all of the rights and obligations a married couple has under Hawaii law, the act does grant marriage-like benefits under a variety of Hawaii statutes.[231] For purposes of intestacy, a surviving reciprocal beneficiary is given the same share a surviving spouse would receive under intestate succession.[232]

The Act, however, does not affect the status of children in a family headed by a same-sex couple registered as reciprocal beneficiaries. For example, assume that a same-sex couple decides to raise a child together, and a child is born to one of the partners through artificial insemination. Both partners consider themselves the child's parents, but one parent is a biological parent and one parent is not related to the child by blood or adoption. The registration of the child's parents (the same-sex

226. *See* 1997 HAW. HOUSE BILL 118 (1997).

227. *See* HAW. REV. STAT. §§ 572C-3, 572C-4 (1998).

228. *See* §§ 572C-2, 572C-4.

229. *See* § 572C-4.

230. *See* § 572C-5.

231. For example, the Act extends to reciprocal beneficiaries the same rights spouses have in connection with a variety of employer-provided benefits, including, among others, health benefits for state and county employees, employer provided family insurance coverage, vacation allowances and funeral leave. *See* 1997 HAW. HOUSE BILL 118 (1997). The Act gives reciprocal beneficiaries the same powers as spouses over health care decision making and the right to an elective share of the estate of a deceased reciprocal beneficiary. *See id.* The registration of the reciprocal beneficiaries operates like a marriage in revoking the wills of both beneficiaries. *See id.*

232. *See* HAW. REV. STAT. § 560:2-102 (1998).

couple) does not confer parental rights on the non-biological parent. Thus, if the non-biological parent dies, the child will receive no share under the intestacy statute.

2. Effect of Changes in the Formal Definition of Family on Intestacy Statutes

a. Adoption

For centuries laws tied inheritance to bloodline and legitimacy. Illegitimate children and family members not related by blood fell outside the scope of the inheritance laws.[233] Although adoption created legal rights for many purposes beginning in the mid-nineteenth century,[234] much more recently intestacy and inheritance statutes have addressed questions of inheritance for and through adopted children.

In general, adopted children now inherit under intestacy through their adoptive families, but states vary with respect to whether children inherit only through their adoptive family or also through their biological family. Some states treat the adoption as cutting off ties with the biological family. Other states permit inheritance through both the adoptive and biological relatives. A few states permit inheritance from biological relatives of a deceased parent if the adoption took place after the death of the deceased biological parent.[235]

A different issue arises with respect to inheritance under a will or trust executed by a relative other than an adopted child's adoptive parents—a stranger to the adoption. For example, if a grandmother's will makes a gift to "grandchildren," should that gift include adopted grandchildren? In keeping with "modern" thinking about adoption—that adoption makes the adopted child a member of the new family for all purposes—statutes and courts increasingly permit adopted children to take under documents executed by members of their adoptive family.[236]

An exception to permitting adopted persons to inherit through, as well as from, their adoptive parents, exists in some

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233. *See* Lovas, *supra* note 195, at 367 ("A legitimate natural child is a 'child' for inheritance purposes. Beyond that, it gets complicated.").

234. *See supra* note 200.

235. *See* DUKEMINIER & JOHANSON, *supra* note 4, at 92-100; Rein, *supra* note 57, at 720-28.

236. The issue often becomes one of interpreting the document—in using the term "grandchildren" did the grandparent intend to include adopted children? Should the answer turn on the definition of "child" in the intestacy statutes in force at the time the grandparent's will or trust was executed?

states for persons adopted as adults for the purpose of inheritance. In some cases, an adult adoption occurs because the adopting adult (parent) and adopted adult (child) have no other means to create a legal relationship to give legal support to their family relationship. For example, same-sex committed partners may turn to adoption to create intestacy rights as protection against a will contest,[237] or for other reasons. In other situations, however, one adult adopts another solely for the purpose of fitting within a specific dispositive term in an existing document.

The latter situation does not always achieve the goal of the adopter. In a Kentucky case,[238] a man adopted his wife so that she could receive a distribution from a trust created by the man's mother.[239] The trust provided that on the death of the last surviving child of the mother the trust assets were to be distributed to the mother's heirs.[240] Although the adoption was legal and the wife was, therefore, technically an heir of the man's mother, the Kentucky Court of Appeals decided that "[a]doption of an adult for the purpose of bringing that person under the provisions of a preexisting testamentary instrument when he clearly was not intended to be so covered should not be permitted."[241] The adopted wife did not share in the distribution from her mother-in-law's (grandmother's) trust.[242]

With respect to intestacy, the question of intent is perhaps less difficult. The property owner is, necessarily, alive when the adoption occurs and can execute a will to dispose of his or her property. With an adult adoption, however, the property owner may not realize that the adoption has occurred and may not be on notice that executing a will is necessary to carry out the property owner's intent.[243] In general, however, the hurdle to inheritance

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237. If one committed partner adopts the other partner, the "child" becomes the intestate heir of the "parent," and the parent becomes the heir of the child. When one partner dies, that partner's blood relatives will not have standing to contest his or her will because the blood relatives are no longer the intestate heirs of the deceased partner. For committed partners, adult adoptions have many purposes other than attempted inheritance through a family member's will or trust.

238. *See* Minary v. Citizens Fidelity Bank & Trust Co., 419 S.W.2d 340 (Ky. 1967).

239. *See id.* at 341.

240. *See id.*

241. *Id.* at 344.

242. *See id.*. *See also In re* Belgard's Trust, 829 P.2d 457, 460 (Colo. Ct. App. 1991) (deciding adopted wife excluded from those entitled to take); *In re* Jones, 411 A.2d 910, 911 (R.I. 1980) (rejecting adoption of heterosexual lover as petitioner was married to another woman).

243. *See* Edward C. Halbach, Jr., *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971, 988 (1965) (arguing that adult adoptions pose minimal

through intestacy is likely to be whether state law will permit the adult adoption.

Note that in all of these adoption situations, the question for inheritance purposes is the formal legal definition of family rather than whether the person functioned as a family. The adopted person is treated as part of a family by statute, regardless of the actual family circumstances. For example, in some states ties with biological grandparents are assumed to continue after an adoption by a stepparent, while in other states the adoption cuts off legal ties with the deceased parent's family. The statutes and the courts focus on the legislatively provided definition of family, rather than whether or not the adopted person maintained connections with his or her biological family.

b. Equitable Adoption

In limited circumstances a child may be able to take an intestate share of a "parent's" estate under the doctrine of equitable adoption. The doctrine is occasionally used in a situation in which a child has lived with adults whom the child considers parents but who are not the child's biological parents and who have not formally adopted the child. Courts have applied the equitable adoption doctrine in situations where an attempt to adopt the child failed for minor mechanical reasons[244] or where the child can prove that the "parents" with whom the child lived entered into a contract to adopt the child.[245] If the biological parents and the child have performed under the contract, then the court may enforce the contract using a theory of specific performance, an estoppel theory or some combination of the two theories.[246] In no event can the doctrine be used to create an intestate share in favor of the adoptive parents, since they did not perform under the contract.[247]

Although courts have permitted inheritance under the

problems for intestacy). *But see* Rein *supra* note 57, at 755 (arguing that problems persist).

244. *See* Rein, *supra* note 57, at 766-67; *Equitable Adoption: They Took Him Into Their Home and Called Him Fred*, 58 VA. L. REV. 727, 737 (1972).

245. *See* Rein, *supra* note 57, at 770-87.

246. *See id.* (providing a detailed examination of the law of equitable adoption); *see also* CLARK, *supra* note 201, at 676-82; DUKEMINIER & JOHANSON, *supra* note 4, at 105-06.

247. *See* Heien v. Crabtree, 369 S.W.2d 28 (Tex. 1963), *discussed in* CLARK, *supra* note 201, at 680. Further, the child cannot inherit through the adoptive parents. *See* Board of Educ. v. Browning, 635 A.2d 373, 380 (Md. 1994) (explaining an equitably adopted child could not inherit from her adoptive aunt, even though the aunt's estate escheated to the state).

doctrine of equitable adoption, relief is available under very limited circumstances. The child must be able to prove either substantial compliance with the adoption requirements[248] or the existence of a contract,[249] either of which will be difficult if not impossible to establish in many situations in which the arrangement is informal.[250] For stepchildren, the doctrine of equitable adoption is of even less utility. Courts have held that a stepparent relationship is inconsistent with a claim of equitable adoption.[251] The stepparent would have provided love, affection and care for a stepchild, and vice versa, as part of a stepfamily relationship. No consideration beyond that could exist for an adoption contract. Further, the legal impossibility of adoption, common in many stepparent situations, makes a contract to adopt impossible.[252]

c. *Effectiveness of the Formal Approach in the IntestacyContext*

The formal definition of family has expanded to take in more family members, yet many families still do not fit within any existing legal definition of family for inheritance purposes. Any attempt to rely solely on a formal definition of family for inheritance purposes faces several problems.

The existing legal mechanisms to create family ties do not address all family circumstances. Adoption can be used by some families to give legal recognition to a parent-child relationship, but adoption is not a viable option for all families.[253] No state permits same-sex marriage, and registration as committed partners is of limited utility in creating a legal status as a family.

Even if laws permit family members to create a legal relationship through registration or adoption, many people may simply not take advantage of those laws. If the sole reason for creating a legal tie is inheritance, many people will likely not take the necessary legal step due to procrastination, psychological resistance, or the expense involved. After all, any person can avoid the application of the intestacy rules altogether by executing

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248. *See* Rein, *supra* note 57, at 770-87.

249. *See* CLARK, *supra* note 201, at 678.

250. *See id.* at 677-78 ("[A] close reading of the cases leaves the impression that there is little appreciation of the basis for the doctrine and correspondingly little enthusiasm about applying it beyond a very limited range of cases.").

251. *See* MAHONEY, *supra* note 22, at 61.

252. *See id.*; ENGEL, *supra* note 106, at 357-58.

253. *See supra* text accompanying notes 202-203.

a will. Persons may fail to take steps to declare themselves a legal family for the same reasons that many people die intestate.[254]

For all these reasons, a formal definition of family may be both underinclusive and overinclusive. The definition may be underinclusive because it excludes many currently existing family groups: same-sex couples, children of a same-sex couple who have not been adopted by their nonbiological mother or father, stepchildren who have not been adopted by their stepparents, and biological relatives who maintain family ties with children who have been adopted by their stepparents. The definition may be overinclusive because legal ties do not necessarily create familial ties. A biological parent who abandons his or her child will still have a legal tie to the child unless steps are taken to terminate the parental rights. For example, in a Vancouver, Washington case reported in the press, a father who had never met his son inherited $500,000 as the son's only heir after the son's death at age forty-three.[255]

Because of these problems, Anne-Marie Rhodes has argued that in applying intestacy statutes courts should interpret the definition of "parent" functionally so that an abandoning parent would not take an intestate share of a deceased child's estate.[256] That is, if a person dies intestate and the decedent's heirs under the intestacy statute are the decedent's "parents," then a biological parent who had abandoned his or her child would not meet the definition of parent.[257] Rhodes points to the use of a fact-specific standard in many wrongful death statutes, in which recovery of damages is based on dependency and on the subjective relationship between the decedent and the survivors.[258] Damages are distributed proportionate to the loss suffered and the "loss" can include loss of society or companionship as well as pecuniary loss.[259] To distribute damages, the court must determine actual family ties—rather than make a distribution based simply on

254. *See supra* text accompanying notes 97-105.

255. *See Fortune Links Father To Son He Never Met*, REGISTER GUARD (Eugene, Oregon), Feb. 27, 1993, at 1A. (Margaret Peterson raised a son fathered by Daniel Peterson. Daniel Peterson had no contact with the mother or the son after the son was born. Margaret Peterson died in 1986, and when the son died in 1991 in an automobile accident he left no known heirs. Heir locators found Daniel Peterson and DNA testing established with near certainty that he was the decedent's father.).

256. *See supra* note 169 at 526.

257. *See id.* at 526-27.

258. *See id.* at 521.

259. *See id.* at 521-22.

blood or other legal ties.[260]

B. Functional Approach

Consistent with Rhodes' logic, a number of courts, scholars and others concerned with the application of laws to families advocate a functional approach to defining what a family is and who should be included as family members.[261] Initially, a functional approach raises the question of what a family is rather than who is in the family. In order to determine whether identified persons are acting like family members, it is necessary first to determine what a family does—what makes a family a family? Indeed, some critics of the functionalist approach express concern that functionalism will be detrimental to non-traditional families.[262] If the functional definition of family is based on the way a nuclear family functions, then many non-traditional families may still be left out of the definition. The difficulty in defining a family in functional terms is reflected in the different legal approaches that have been taken in developing a definition of family.

1. Public Policy in California

In a 1921 case involving a claim for a death benefit under the California Workmen's Compensation Act,[263] the California

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260. *See id.* at 521-24.

261. *See, e.g.*, Braschi v. Stahl Assoc., 543 N.E.2d 49 (N.Y. 1989) (holding that the term family in a New York statute included gay life partners who had lived together for 10 years, shared financial obligations and attended family functions as a couple); Bartlett *supra* note 166, at 882-83, 944-63; Minow, *supra* note 14, at 270 ("[W]hat is important is whether the group of people function as a family: do they share affection and resources, think of one another as family members, and present themselves as such to neighbors and others?"); Treuthart, *supra* note 21, at 99 ("[A] family consists of a community, which: (1) provides financial and emotional support to the members, (2) involves interdependence and commitment, and (3) allows transcendence of self-interest to an unlimited degree").

262. *See Looking for a Family Resemblance*, *supra* note 166, at 1653 (noting that "functionalism requires that all alternative families resemble traditionally recognized relationships in function, if not in precise form"). The Article identifies three problems: (1) the lack of precise standards resulting in loss of stability of the relationships, (2) the intrusive judicial examination into the intimate details of the lives of family members in order to determine whether a family relationship exists and (3) the marginalization of non-traditional families by treating them differently from traditional families (i.e., by requiring non-traditional families, but not traditional families, to prove their status as a family). *See id.* at 1653-55. The Article also points out that these criticisms are more troubling in the context of a committed partner relationship than in a parent-child relationship. *See id.* at 1655.

263. Moore Shipbuilding Corp. v. Industrial Accident Comm'n, 196 P. 257 (Cal. 1921).

Supreme Court stated: "[Family] means different things under different circumstances. The family, for instance, may be . . . a particular group of people related by blood or marriage, or not related at all, who are living together in the intimate and mutual interdependence of a single home or household."[264] In the case, an undivorced woman and her child Ida had been abandoned by the woman's husband (the child's father).[265] Ida and her mother lived with the decedent before his death.[266] The man and woman held themselves out as husband and wife, and the man treated Ida as his daughter.[267] The statute at issue provided a death benefit for dependent members of the decedent's "family" or "household"[268] and the court held that Ida qualified as a member of the decedent's family or household.[269]

Two reports from California reflect more recent attempts to create an understanding of families in order to plan policies and laws that support and strengthen California families.[270] Both reports reflect attempts to define the family in terms of the functions the family performs or the functions society relies upon families to perform.[271]

The Joint Select Task Force on the Changing Family issued a report in April 1989 in an attempt to assist public and private policymakers in creating a coherent family policy that would support families.[272] To do so, the task force looked at "the functions that society relies upon families to perform" as a way of creating a definition of the family.[273] The report explained the importance of families and the functions a family serves: "Families play an essential and unique role in society. They care for dependents economically and emotionally, offer a foundation for

264. *Id.* at 259.

265. *See id.* at 257.

266. *See id.*

267. A concurring opinion described the man's relationship as in loco parentis with Ida. *See id.* at 260 (Olney, J., concurring).

268. The statute provided a death benefit for a "stepchild" who was dependent on the decedent, but Ida was not a stepchild because her mother had not married the decedent. *See id.* at 259.

269. *See id.* at 260.

270. *See* SHERRY NOVICK ET AL., PLANNING A FAMILY POLICY FOR CALIFORNIA: FIRST YEAR REPORT OF THE JOINT SELECT TASK FORCE ON THE CHANGING FAMILY (April 1989) [hereinafter CHANGING FAMILY]; LOS ANGELES (CALIF.) TASK FORCE ON FAMILY DIVERSITY, FINAL REPORT: STRENGTHENING FAMILIES, A MODEL FOR COMMUNITY ACTION (1988) [hereinafter FAMILY DIVERSITY].

271. *See* CHANGING FAMILY, *supra* note 270, at 7-8; FAMILY DIVERSITY, *supra* note 270, at xvi.

272. *See* CHANGING FAMILY, *supra* note 270, at 9.

273. *See id.* at 7.

the values and ethics of each new generation, motivate children to achieve educationally, and provide a sense of belonging that is essential to human growth and dignity."[274] The task force created a set of principles that label the family as society's "primary social and economic unit," describe what a family is by stating the functions families perform and direct policymakers to respect the diversity of today's families.[275]

A task force created by the City of Los Angeles, the Task Force on Family Diversity, also studied families and public policy.[276] This task force determined that "the central characteristic underlying family is mutual interdependency. Thus, family may refer to a group of unmarried persons not related by blood, but who are living together and who have some obligation, either legal or moral, for the care and welfare of one another."[277]

The task force began its work by looking for an existing legal definition of family and found, not surprisingly, that California law does not have one uniform definition of family.[278] The task force identified two examples of the legislature's using the formal definition (related by blood, marriage or adoption) to define family: the provision of allowances for family members during estate administration and the veterans-home-purchase program.[279]

The task force also found examples of the use of a functional definition of family.[280] In 1980, the California Supreme Court held unconstitutional a City of Santa Barbara zoning ordinance that defined a single family unit as a group related by blood, marriage or adoption.[281] The court found that a group of 12 adults who lived together in a single house constituted a family.[282] The group had social, economic and psychological commitments to each other and regarded their group as a family.[283] In a second example, the task force pointed to domestic violence legislation that defined "family members" to include a variety of adult household members.[284]

As evidence of the use of a functional definition on an

274. *Id.* at 4.
275. *See id.* at 10-11.
276. *See* FAMILY DIVERSITY, *supra* note 270.
277. *Id.* at 18-19.
278. *See id.* at 21.
279. *See id.* at 20.
280. *See id.* at 19.
281. *See* City of Santa Barbara v. Adamson, 610 P.2d 436 (Cal. 1980).
282. *See id.* at 442.
283. *See id.* at 438.
284. *See* FAMILY DIVERSITY, *supra* note 270, at 20 (citing CAL. WELF. & INST. CODE § 18921 (1986)).

administrative basis, the task force cited a 1982 survey of federal, state and municipal agencies in California that used the terms "family" or "household" in operating their programs.[285] Seventy-five percent of the responding agencies indicated that they were not bound by a definition based solely on blood, marriage or adoption, and respondents reported using administrative discretion to define family in an expanded way.[286] The task force noted that multiple definitions of family were already in use and recommended continuing use of flexible family definitions.[287]

2. Family Law

In connection with issues involving parental rights and responsibilities, family law has struggled with the question of who should be considered a parent. Although parental rights and responsibilities follow from a legal relationship with the child determined by blood or adoption, many issues involve persons who have developed a significant relationship with a child but are not related by blood or adoption.[288]

To deal with the question of when parental rights and responsibilities should be imposed, courts developed the in loco parentis doctrine.[289] In addition to its use in the common law in a variety of ways,[290] the doctrine has now been codified in some states for some specific purposes.[291] In Latin, in loco parentis

285. *See id.* at 21.

286. *"Family" and "Household" Use Survey: How Government Agencies Use These Terms in Operating Their Programs*, REPORT OF THE CALIFORNIA COMMISSION ON PERSONAL PRIVACY—SUPPLEMENT ONE (1982).

287. *See* FAMILY DIVERSITY, *supra* note 270, at 22.

288. *See, e.g.*, Harris v. Lyon, 140 P. 825 (Ariz. 1914) (concerning a former stepfather of a child who wanted to disavow any parental responsibilities); Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991) (involving dispute over custody and visitation rights of a nonbiological mother to her children).

289. A 1940 treatise reported that a United States court first used the in loco parentis doctrine in 1849. *See* ADELE STUART MERIAM, THE STEPFATHER IN THE FAMILY 23-26 (1940) (citing Williams v. Hutchinson, 5 Barb. 122 (N.Y. App. Div. 1849), *aff'd*, 3 N.Y. 312 (1850)), *cited in* MAHONEY, *supra* note 22, at 17 n.9.

290. The doctrine is of particular importance in resolving issues of child support and visitation, but has also affected the laws in many states involving issues of child custody, medical decision making, worker's compensation claims and wrongful death claims. *See* MAHONEY, *supra* note 22, at 105 (wrongful death), 117 (workers' compensation laws), 125-27 (medical decision making), 139-40 (custody); Bernard J. Berkowitz, *Legal Incidents of Today's "Step" Relationship: Cinderella Revisited*, 4 FAM. L.Q. 209, 212-22 (1970) (describing the legal incidents that may follow from an in loco parentis relationship).

291. Montana uses the in loco parentis approach in its stepchild support statute:

> A married person is not bound to support his spouse's children by a former marriage; but if he receives them into his family and supports them, it is presumed that he does so as a parent and, where such is the case, they are

means "in the place of a parent." To stand in loco parentis the stepparent or other adult must have intended to take the place of a parent.[292] To reach such a finding a court will look, on a case-by-case basis, for evidence that the adult accepted the child into his or her household, that the adult supported the child both financially and emotionally, and that the adult participated in the day-to-day care of the child.[293] The doctrine thus allows a court to give legal weight to a parent—child relationship that is based on neither blood nor adoption.[294]

A key element of the in loco parentis doctrine is that the adult voluntarily accepted the status as parent.[295] Courts will not find that an in loco relationship exists if the adult has assumed some parental duties but does not intend to be treated as a parent for all purposes.[296] Due to the voluntary nature of the relationship, either the adult or child can voluntarily terminate an in loco parentis relationship. The effect is that the adult, who controls the element of intent, controls the existence of the in loco parentis relationship at all times. Even if the relationship existed for a period of time, the adult can choose to terminate the relationship.[297]

The in loco parentis doctrine carries with it both rights and responsibilities, but does not confer all the rights and responsibilities of a legal parent on the in loco parentis adult.[298]

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not liable to him for their support nor he to them for their services.

MONT. CODE ANN. § 40-6-217 (1997), *cited in* MAHONEY, *supra* note 22, at 38.

292. *See* MAHONEY, *supra* note 22, at 16-27.

293. *See id.*; *See also* Berkowitz, *supra* note 290; Bryce Levine, *Divorce and the Modern Family: Providing In Loco Parentis Stepparents Standing to Sue for Custody of Their Stepchildren in a Dissolution Proceeding*, 25 HOFSTRA L. REV. 315, 329-32 (1996).

294. *See* MAHONEY, *supra* note 22, at 16-17.

295. *See* Margaret M. Mahoney, *Reformulating the Legal Definition of the Stepparent-Child Relationship, in* STEPFAMILIES: WHO BENEFITS? WHO DOES NOT? 191, 191-96 (Alan Booth & Judith Dunn eds., 1994).

296. *See* MAHONEY, *supra* note 22, at 1-18.

297. *See* Harris v. Lyon, 140 P. 825 (Ariz. 1914) (noting that the in loco parentis doctrine has no effect on inheritance rights). In *Harris*, a stepfather cared for his stepdaughter for five years following the death of his wife, her mother. *See id.* at 826. When the stepdaughter became the owner of valuable property, the stepfather sued for reimbursement of his expenses in supporting her. *See id.* The Arizona Supreme Court held that he could not be reimbursed for the amounts already expended because he had been acting in loco parentis. *See id.* at 829. The fact that he sued for reimbursement, however, indicated that he no longer intended to act in loco parentis, and therefore he could receive payment for any future expenditures. *See id. See also* MAHONEY, *supra* note 22, at 17-19 (discussing *Harris* and the in loco parentis doctrine).

298. *See* MAHONEY, *supra* note 22, at 7-8; David R. Fine & Mark A. Fine, *Learning From Social Sciences: A Model For Reformation of the Laws Affecting*

Courts have used the doctrine to impose support obligations on a stepparent during the stepparent's marriage to the stepchild's legal parent.[299] Courts have also used the doctrine to grant visitation rights to stepparents following the divorce of the stepparent from the legal parent of the children.[300]

In general, the mere fact of marriage will not make a stepparent responsible for support of minor stepchildren. A number of states have, by statute, imposed support obligations on stepparents under specified circumstances, but the financial rights of stepchildren are limited.[301] Some statutes rely on a form of equitable estoppel, requiring financial support for a child if the stepparent had voluntarily contributed to the child's support and the child had relied on that support to the child's detriment.[302] Other statutes create a support obligation only for those parents who have assumed the parental role based on an in loco parentis standard.[303]

In states that do not address stepchild support statutorily, courts have used the in loco parentis doctrine to preclude a stepparent from seeking reimbursement from a stepchild for funds provided to the stepchild for support.[304] If the stepparent intended to take the place of a parent, then any support provided for the stepchild followed from the stepparent's status as a parent.[305]

If divorce terminates the marriage between the stepparent and the legal parent, the stepparent's support obligations also terminate. The North Dakota support statute creates a limited exception, providing that the stepparent must continue to provide support to the stepchild, as long as the stepchild remains in the stepparent's "family."[306] Of course, if the stepparent's role changes following the divorce, as is usually the case, the statute will not

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Stepfamilies, 97 DICK. L. REV. 49, 52 (1992).

299. *See, e.g.*, Schwieter v. Heathman's Estate, 264 S.W.2d 932, 933 (Mo. Ct. App. 1954), *discussed in* MAHONEY, *supra* note 22, at 18.

300. *See, e.g.*, Carter v. Brodrick, 644 P.2d 850 (Alaska 1982), *discussed in* MAHONEY, *supra* note 22, at 133.

301. *See* MAHONEY, *supra* note 22, at 38-41.

302. *See, e.g.*, MONT. CODE ANN. § 40-6-217 (1997).

303. *See, e.g.*, N.D. CENT. CODE § 14-09-09 (Supp. 1997); *see also* Richard S. Victor et al., *Statutory Review of Third-Party Rights Regarding Custody, Visitation, and Support*, 25 FAM. L.Q. 19, 43 (1991) (citing a North Dakota statute that deems any person standing in loco parentis secondarily liable for the support of a child as long as the person has voluntarliy assumed the obligation of support).

304. *See, e.g.*, Harris v. Lyon, 140 P. 825 (Ariz. 1914).

305. *See* MAHONEY, *supra* note 22, at 16-22.

306. *See* N.D. CENT. CODE § 14-09-09 (Supp. 1997).

apply.[307] Although the stepparent and stepchild may have had a parent-child relationship, the law does not impose the same continuing obligations of support on a stepparent that the law imposes on legal parents. To the extent a stepchild has rights to support from a stepparent acting in loco parentis, the stepchild's rights are viewed as derivative of the marriage.

The doctrine of in loco parentis has been used with increasing frequency in resolving issues of visitation following divorce, and to a significantly lesser degree in connection with child custody cases.[308] With respect to child custody cases, a strong preference for the legal parent persists.[309] In some states, the court in a divorce proceeding lacks jurisdiction over custody and visitation issues involving stepchildren.[310] In those states, the most convenient forum for seeking custody is unavailable to a stepparent, regardless of whether a stepparent had been acting in loco parentis.[311] Increasingly, however, states are including stepchild issues in divorce proceedings, either by construing statutes broadly to include stepchildren or by enacting statutes that specifically include stepchildren.[312]

If the stepparent can proceed with the custody issue, the stepparent must then compete directly with the legal parent. In some states, the parental preference applies, permitting third party custody only if the legal parent is an unfit parent.[313] In other states, the stepparent must establish extraordinary reasons for interfering with the parent-child relationship,[314] and in still other states the best interests of the child standard[315] focuses on

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307. *See* MAHONEY, *supra* note 22, at 40.

308. *See id.* at 137-38; Levine, *supra* note 293, at 327-29.

309. *See* Fine & Fine, *supra* note 298, at 56 ("Almost universally, statutes give a clear preference to biological parents.").

310. *See* MAHONEY, *supra* note 22, at 138-40.

311. *See id.* at 138.

312. *See id.* at 137-47; Levine, *supra* note 293, at 320-23. *Cf.* Fine & Fine, *supra* note 298, at 56-57.

313. *See* Levine, *supra* note 293, at 321.

314. *See, e.g.*, Bennett v. Jeffreys, 356 N.E.2d 277 (N.Y. 1976) (requiring a judicial finding of extraordinary circumstances that would drastically affect the welfare of the child in order to intervene in the legal parent's right to custody).

315. The best interests of the child standard requires the court to focus on the child, rather than on the rights of the parents. Developed in response to work done in the 1970s by psychologists, the best interests of the child standard relies on the concept of psychological parent. *See* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 17-20 (1973); J. Hammond Muench & Martin R. Levy, *Psychological Parentage: A Natural Right*, 13 FAM. L.Q. 129 (1979). The term psychological parent describes a person who, although not necessarily a child's legal parent, assumes a parental role in which the psychological parent cares for the child emotionally as well as physically through day-to-day interaction. *See*

the child's interests and places the stepparent and the legal parent on a level playing field.[316] The first two approaches start with a formal definition of parent—blood or adoption—while the third approach relies on a functional definition, examining the functioning of both parents with respect to the child. Even the third approach, however, falls back on the formal definition in some cases, because courts may believe that maintaining the relationship with the legal parent is in the best interests of the child simply because that parent is the child's legal parent.[317] Courts are reluctant to interfere with a legal parent's custody when the contending party is a "third party," so cases granting custody to a stepparent instead of a legal parent are infrequent.[318] Under most of these statutes, the stepparent is lumped together with all other third parties, regardless of the nature of the parent-child relationship.[319]

Stepparents are likely to have more success obtaining visitation rights.[320] Courts in states that do not authorize stepparent visitation by statute have used the best interest of the child standard[321] to grant visitation rights.[322] Using either statutory authority or the best interests of the child standard, courts have authorized visitation for stepparents,[323]

GOLDSTEIN, *supra*, at 19. Many psychologists believe that breaking up the relationship between a child and his or her psychological parent can be harmful to the child's emotional development. *Id.* at 17-20.

316. *See e.g.*, HAW. REV. STAT. § 571-46 (1985 & Supp. 1990). Fine & Fine describe the Hawaii statute as the "most liberal" of the child custody statutes in that it allows the best interests standard to take precedence over the parental preference. *See* Fine & Fine *supra* note 298, at 56.

317. *See, e.g.*, Henrikson v. Gable, 412 N.W.2d 702, 703 (Mich. Ct. App. 1987) (stating "the best interests of the child are served by awarding custody to the parent . . . unless the contrary is established by clear and convincing evidence."), *cited in* MAHONEY, *supra* note 22, at 146-47. Note that the court uses "parent" to mean legal parent — the formal definition goes unchallenged.

318. *See* Fine & Fine, *supra* note 298, at 57. *But see* Janet Leach Richards, *The Natural Parent Preference Versus Third Parties: Expanding the Definition of Parent*, 16 NOVA L. REV. 733, 739-56 (1992) (describing standards used in some states to set aside the parental preference).

319. *See, e.g.*, CAL. CIV. CODE § 4600.6 (West 1998) (creating preferences for (1) both biological parents or either biological parent, (2) the person or persons in whose home the child has been living in a wholesome and stable environment, and (3) any other person deemed fit).

320. *See* MAHONEY, *supra* note 22, at 130-31; Levine, *supra* note 293, at 327-29.

321. *See supra* note 315.

322. For an explanation of state rules on stepparent visitation, see Levine, *supra* note 293, at 319-20 nn.22-32.

323. *See, e.g.*, Simmons v. Simmons, 486 N.W.2d 788 (Minn. Ct. App. 1992) (the statute did not preclude granting visitation to a stepfather); Hickenbottom v. Hickenbottom, 477 N.W.2d 8 (Neb. 1991) (visitation rights for stepfather were in the best interests of the child); Spells v. Spells, 378 A.2d 879 (Pa. Super. Ct. 1977)

grandparents,[324] and occasionally others.[325] These courts determined that the child's interests will be best protected by an ongoing relationship with the stepparent or other adult who has cared for the child as a psychological parent.[326]

Although stepparents and grandparents have made progress in obtaining legal recognition of their parent-child relationships, other family groups have had less success. Martha Minow, for example, writes eloquently of her involvement in a New York case that sought visitation rights for a lesbian mother.[327]

In the case, two women, Alison and Virginia, decided, after living together for several years, to have a child together.[328] According to Alison's petition to the court, the two women "planned for the conception and birth of the child and agreed to share jointly all rights and responsibilities of childrearing."[329] One of the women, Virginia, became pregnant through artificial insemination.[330] After the child was born, Virginia and Alison lived together and cared for the child together.[331] Two years later Virginia and Alison separated, and Alison paid child support and continued to have frequent contact with the child.[332] Two years after the separation, Virginia began to limit Alison's contacts with the child and eventually tried to cut off all contact between Alison and the child, and Alison brought a habeas corpus petition to obtain visitation rights under a New York statute that allows a "parent" to petition the court for visitation.[333]

Alison's lawyers, including Minow, who joined in an amicus

(remanding the case to the trial court with directions to use the best interest of the child standard in determining whether to permit stepparent visitation); Honaker v. Burnside, 388 S.E.2d 322 (W. Va. 1989) (best interests standard used to grant visitation to stepparent).

324. Every state has adopted legislation providing for visitation by grandparents. *See* MAHONEY, *supra* note 22, at 130 (citing Elaine D. Ingulli, *Grandparent Visitation Rights: Social Policies and Legal Rights*, 87 W. VA. L. REV. 295 (1984-85)).

325. *See generally* Minow, *supra* note 14, at 271-72 (describing visitation cases involving a boyfriend of the mother of the children and a foster parent).

326. *See* MAHONEY, *supra* note 22, at 134; Levine, *supra* note 293, at 327-28.

327. *See* Minow, *supra* note 14, at 269.

328. *See* Alison D. v. Virginia M., 572 N.E.2d 27, 28 (N.Y. 1991). The court recited the facts as alleged by the petitioner in her petition, because the facts were not at issue given the procedural posture of the case. *See id.*

329. *See id.*

330. *See id.*

331. *See id.*

332. *See id.*

333. *See* Minow, *supra* note 14, at 269-70; Alison D. v. Virginia M., 572 N.E.2d at 28.

brief,[334] urged the court to adopt a functional definition of "parent" and to hear Alison's petition for visitation rights because she met that definition of parent.[335] The court refused to extend the definition of parent beyond the formal definition of someone "related by blood or adoption," and stated that the definition proposed by Alison's lawyers could be adopted only by the legislature.[336] Since Alison was not related to the child by blood or adoption, she was not a parent and therefore did not have standing to bring a petition for visitation.[337] Dissenting Judge Judith Kaye argued that the legislature had given the responsibility for defining "parent" to the courts and did not require the courts to use a restrictive definition.[338]

From a child's perspective, if an adult assumes the role of parent, the child may develop a parent-child relationship with that adult. The child's definition of parent may be similar to the one Minow derived by looking at psychological theories of children's needs: "someone who has taken care of the child on a daily basis, is known to the child as a parent, and has provided love and financial support."[339] Although Minow raised concerns about using a functional, rather than formal, definition of parent, she also stressed the importance of making "family law connect with

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334. Brief for the Amicus Curiae, Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. App. Div. 1991) (No. 692-88), *cited in* Minow, *supra* note 14, at 284 n.51.

335. The brief in which Minow joined proposed that for purposes of section 70(a) of the New York Domestic Relations Law, the term "parent" should mean:

> 1) the term "parent" includes a child's biologic or adoptive parent, unless parental rights have been terminated or otherwise unrecognized by applicable law.
>
> 2) The term "parent" also includes a person who meets the following three criteria:
>
> > a) the person has lived with the child for a substantial portion of the child's life; and
> >
> > b) the person has been regularly involved in the day-to-day care, nurturance, and guidance of the child appropriate to the child's stage of development; and
> >
> > c) if the child has also been living with a biologic parent, the biologic parent has consented to the assumption of a parental role by the person, and the child has in fact looked to this person as a parent.

Id. at 284 n.52.

336. *See* Alison D. v. Virginia M., 572 N.E.2d at 29. *See also* Kogon v. Ulerick, 405 S.E.2d 441 (Va. Ct. App. 1991) (reaching the same result on a request for visitation by a stepparent). *Kogon* stated that only the legislature could expand the right to visitation to "non-parents." *See id.* at 442.

337. *See* Alison D. v. Virginia M., 572 N.E.2d at 29.

338. *Id.* at 31. As Judge Kaye points out, the statute at issue uses the term "parent" without any definitional limitation. "Indeed, [the statute] does not define the term 'parent' at all. That remains for the courts to do, as often happens when statutory terms are undefined." *See id.*

339. Minow, *supra* note 14, at 274.

how people really live . . . ."[340]

In a case similar to *Alison D. v. Virginia M.*, a Florida court held that a lesbian co-parent lacked standing to bring an action for custody and temporary visitation of her child.[341] In the Florida case, Penny Kazmierazak argued that her status as a psychological parent put her on "equal footing" with the child's biological mother for the purposes of determining custody and child-rearing.[342] The court discussed three cases that granted visitation or custody to nonbiological parents based on a "best interest of the child" standard, but determined that these cases did not create common law rights for psychological parents.[343] The court discussed Florida's constitutional right of "parental privacy"[344] and concluded that Kazmierazak did not have "rights equivalent to a biological parent."[345] A concurring opinion noted that a Florida law prohibiting adoption by a homosexual prevents someone like Kazmierazak from creating a legal relationship with her child.[346] Thus, the concurrence acknowledged that under Florida law a gay man or lesbian cannot create a family that gives family members legal rights and responsibilities to each other. Nonetheless, the court refused to grant standing based on status as a psychological parent, the only status available to Kazmierazak.

In California, a lesbian co-parent tried a different tactic, but also lost her bid for visitation.[347] After the couple separated in

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340. *Id.* at 271. *See also* FAMILY DIVERSITY, *supra* note 270.

341. *See* Kazmierazak v. Query, 736 So. 2d 106 (Fla. Dist. Ct. App. 1999) (holding that an alleged psychological parent—a woman with no biological ties to the child but claiming to have status equivalent to a biological parent—lacked parental status equivalent to a biological parent and lacked standing to seek custody or visitation).

342. *See id.* at 106.

343. *Id.* at 108-09 (citing Wills v. Wills, 399 So. 2d 1130 (Fla. Dist. Ct. App. 1981) (granting visitation to a stepmother); Simmons v. Pinkey, 587 So. 2d 522 (Fla. Dist. Ct. App. 1991) (granting custody to a foster mother); Heffernan v. Goldman, 256 So. 2d 522 (Fla. Dist. Ct. App. 1971) (custody awarded to stepmother despite mother's petition)).

344. *See id.* at 109 (discussing Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998), and stating "*Von Eiff* stands for the proposition that the state cannot intervene into a parent's fundamental or constitutionally protected right of privacy, either via the judicial system or legislation, absent a showing of demonstrable harm to the child").

345. *Id.*

346. *See id.* at 111 (Gross, J., concurring specially). *See also* Music v. Rachford, 654 So. 2d 1234 (Fla. Dist. Ct. App. 1995) (rejecting a lesbian mother's claim that she was a de facto parent entitled to custody of her non-biological child).

347. *See* Kathleen C. v. Lisa W., 84 Cal. Rptr. 2d 48 (Cal. Ct. App. 1999) (denying a former partner of the biological mother custody and visitation).

1990, Lisa, the biological mother, agreed to allow Kathleen, Lisa's former partner, regular visitation with the two children they had raised together before their separation.[348] Lisa terminated the agreement in 1994, but Kathleen surreptitiously visited with the children on several occasions in early 1996.[349] When Lisa learned of these visits, she sought a court order to prevent Kathleen from visiting the children.[350] Kathleen responded by seeking appointment as a guardian of the children with visitation rights.[351] The California appellate court affirmed the lower court's finding that Kathleen could not be appointed a guardian unless the court found that Lisa's continued custody of the children was detrimental to them.[352] The court noted that California appellate courts have denied several attempts by lesbian co-parents to obtain legally enforceable visitation with their children,[353] and concluded that "[t]he issue is one that must be addressed to the Legislature."[354]

Although nonbiological co-parents in many states have been unable to obtain legal recognition of their family relationship with their children, the Supreme Judicial Court of Massachusetts recently permitted a lesbian co-parent to seek custody and visitation.[355] In *E.N.O. v. L.M.M.*, the court reinstated the granting of temporary visitation by the probate court,[356] stating that the equity jurisdiction of the probate court is broad[357] and that the probate court had correctly applied the best interest of the child standard in making its decision.[358] In his opinion for the majority, Justice Abrams stated that the probate judge properly emphasized the plaintiff's role as a parent of the child:

> It is our opinion that he was correct to consider the child's

348. *See id.* at 49.

349. *See id.*

350. *See id.*

351. *See id.*

352. *See id.* at 50.

353. *See id.*

354. *See id.*

355. *See* E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999) (holding that the probate court has equity jurisdiction to grant visitation between a child and the child's de facto parent and that evidence supported the probate court's decision to grant visitation).

356. The probate court ordered temporary visitation, pending trial. *See id.* at 886. A single justice of the appellate court granted the biological mother's petition to vacate the order, and then a single justice of the Supreme Judicial Court of Suffolk County reinstated visitation. *See id.* The Supreme Judicial Court affirmed the decision of the single justice. *See id.*

357. *See id* at 890.

358. *See id.* at 892-93.

> non-traditional family. A child may be a member of a non-traditional family in which he is parented by a legal parent and a de facto parent. A de facto parent is one who has no biological relation to the child, but has participated in the child's life as a member of the child's family.[359]

Justice Abrams noted further, "[t]he recognition of de facto parents is in accord with notions of the modern family."[360]

In *E.N.O. v. L.M.M.*, the Probate Judge and the Supreme Judicial Court of Massachusetts recognized the reality of the family the two women had created with their son. The court noted that a legal parent does have constitutional rights to custody of her child,[361] but that the legal parent's right is not absolute and must be balanced with the child's interest in maintaining a relationship with the child's de facto parent, a best interests of the child approach.[362] Justice Abrams explained, "[t]he family that must be accorded respect in this case is the family formed by the plaintiff, the defendant, and the child."[363] Thus, the case reflects the importance of family relationships for a child, regardless of whether the child's family is "traditional" or "non-traditional." This case, as well as the cases in other states that refuse to create parental rights for de facto or psychological parents, demonstrate the need for laws that respect all families.

3. Housing Issues

In a different setting, construing the term "family" rather than "parent," the New York Court of Appeals did use a functional definition. In *Braschi v. Stahl Associates*,[364] the court was asked to interpret the New York City Rent and Eviction Regulations. That statute provides that a landlord cannot evict "any member of the tenant's family, as defined in paragraph (3) of this subdivision."[365] The statute goes on to define family member

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359. *See id.* at 891.

360. *See id.*

361. *See id.* at 893 (explaining that a fit, legal parent has a fundamental right to custody of her child, founded on a liberty interest in the Fourteenth Amendment of the federal constitution and the due process clause of the state constitution, and citing Stanley v. Illinois, 405 U.S. 645, 651 (1972) (finding a violation of equal protection by an Illinois statute which failed to give an unmarried father a hearing to determine fitness for custody, while granting such hearing to unmarried mothers, married parents and divorced parents); Opinion of the Justices, 691 N.E.2d 911 (Mass. 1998) (finding the state's interest in protecting children from abuse outweighed deprivation of parental due process right)).

362. *See id.*

363. *See id.*

364. 543 N.E.2d 49 (N.Y. 1989).

365. N.Y. City Rent and Eviction Regulations, N.Y. COMP. CODES R. & REGS. tit.

broadly as "any other person . . . who can prove emotional and financial commitment, and interdependence between such person and the tenant."[366] Petitioner, Miguel Braschi, argued that the statute applied to him, as a member of the family of Leslie Blanchard, his deceased committed partner.[367]

In interpreting the term "family" as used in the eviction statute, the court refused to use a narrow, formal definition of family that limits the term to persons related by blood or adoption.[368] Because the statute did not define the term, the court concluded that the legislature had left to the court the task of construing the word "family."[369] In so doing, the court looked to legislative intent, specifically, the legislative purpose in enacting the rent control and eviction statute.[370] The court concluded that since the purpose of the statute was to protect tenants, particularly "[f]amily members, whether or not related by blood, or law who have always treated the apartment as their family home"[371] from the hardship of eviction. The court stated that this protection for tenants "should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life."[372] In the court's view, an appropriate definition of family included "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence."[373] The court cited dictionary definitions of family in support of its conclusion.[374]

4. Wrongful Death and Worker's Compensation

Other areas of the law have taken a functional approach to defining who merits the protection of the statute, fine-tuned to the purpose of the particular statute. Many, but not all, wrongful death statutes now include stepchildren as potential claimants.[375]

9, § 2204.6(d) (1984).

366. *See id.*

367. *See Braschi*, 543 N.E.2d at 51.

368. Respondent argued that the court should construe the term consistent with the New York intestacy laws, limiting family members to those related by blood, consanguinity and adoption. *See id.* at 52-53.

369. *See id.* at 52.

370. *See id.* at 52-53 .

371. *See id.* at 54.

372. *See id.* at 53.

373. *See id.* at 54 ("This view comports both with our society's traditional concept of 'family' and with the expectations of individuals who live in such nuclear units.").

374. *See id.*

375. *See* Engel, *supra* note 106, at 361-62 (arguing that a stepchild's rights

Some of the statutes include stepchildren in the list of those covered by the statute.[376] Other wrongful death statutes use dependency as the determining factor, enabling a stepchild who was dependent on the decedent to bring a claim under those statutes.[377] A few statutes permit a claim by a stepchild only if no primary beneficiaries exist.[378]

Workers compensation laws provide benefits to dependents of an injured worker. The Oregon statute includes "a child toward whom the worker stands in loco parentis . . . and a stepchild, if such stepchild was, at the time of the injury, a member of the worker's family and substantially dependent upon the worker for support."[379] By basing the statute on persons who are actually dependent on the injured worker, the statute takes a functional approach that makes sense in light of the purpose behind the statute—replacing financial support lost due to the injury.

The cases in this Section IV demonstrate that some areas of the law have begun to recognize the reality of American families. Courts and legislatures have taken a functional approach to determine what constitutes a family and what legal rights and responsibilities should follow from a person's role in a family. The in loco parentis doctrine, the best interest of the child standard, a definition of family that includes lifetime partners, and a definition of parents that includes de facto parents are all ways in which laws have begun to address the problem of creating a legal definition of family.

IV. Reform Efforts in Intestacy Laws

Even though the laws in some areas are beginning to address questions of the changing nature of family, albeit slowly, there have been few changes in intestacy law. The Official Comments to the 1990 Uniform Probate Code (UPC) explain that "ease of administration and predictability of result are prized features of

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under wrongful death statutes should depend on the best interests of the child, and not on "some outdated conception of family relations which fails to account for step-relationships").

376. *See* Engel, *supra* note 106, at 361 nn.415-18 (citing CAL. CIV. PROC. CODE § 377.60 (West 1991); IDAHO CODE § 5-311 (1997); WASH. REV. CODE ANN. § 4.20.020 (West 1988)).

377. *See id.* (citing ALASKA STAT. § 09.55.580 (Michie 1998); ARK. CODE ANN. § 16-62-102(d) (Michie 1987); HAW. REV. STAT. § 663-3 (1998)).

378. *See id.* (citing DEL. CODE ANN. tit. 10, § 3724 (1989); MD. CODE ANN., CTS. & JUD. PROC. § 3-904 (1998)).

379. OR. REV. STAT. § 656.005(5) (1989).

the probate system . . . ."[380] Perhaps it is in part this desire for certainty in probate law that makes change in this area so difficult, particularly change which requires some exercise of discretion on the part of the probate judge. The difficulty of creating a scheme of intestate distribution in the face of the multitude of family combinations cannot be underestimated, yet neither can the need to change an intestate system that increasingly fails to make sense in view of the ways families live. Other areas of the law have begun to come to terms with the issues; probate law must face these questions as well.

Intestacy laws have changed in the past to respond to societal changes. Adopted children and illegitimate children are now included as "children" under the statutes.[381] Equitable adoption has been used occasionally to permit distribution of an intestate share to a child not related to the decedent by blood or adoption, although equitable adoption is rarely successful and is unavailable for stepchildren.[382] In a few states, stepchildren can receive an intestate share if the alternative is escheat to the state.[383] That is, the stepchildren will inherit only if no relatives by blood or adoption exist.[384] Now, increasing changes in the structure of families require greater changes.

A. The Hawaii and California Statutes

Two states have in recent years attempted to expand their

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380. UNIF. PROBATE CODE art. II, pt. 2 (1993) (explaining the decision to use a mechanically determined elective share rather than an elective share that would require judicial discretion in determining whether property held by the spouses was marital property or separate property).

381. *See supra* notes 199-201 and accompanying text.

382. *See supra* notes 244-252 and accompanying text.

383. In Connecticut, Maryland, Ohio and South Carolina, if a decedent left no other heirs, then the decedent's stepchildren and their descendants can take. *See* MAHONEY, *supra* note 22, at 57. In Arkansas, California, Florida, Iowa, Kentucky, Missouri, Nevada, Rhode Island, Virginia and West Virginia, if a decedent left no other heirs, the heirs of the decedent's spouse can take. *See id.* The heirs of the decedent's spouse may be the decedent's stepchildren. *See id.* The Washington statute provides that the decedent's property will go to the spouse's descendants, but only to the extent that the decedent had received the property from the spouse. *See id.* at 57-58. Still another version, in Iowa, gives property to the heirs of the decedent's parents—who may include a stepparent of the decedent. *See id.* at 58.

384. Statutes look for relatives at least as far removed as descendants of the decedent's grandparents, so a first cousin or a grandnephew will take before a stepchild can take. *See, e.g.*, OR. REV. STAT. § 112.045 (1999). Many states prefer not to limit intestate takers to descendants of grandparents, so the relative who takes an intestate share may be even farther removed. *See* DUKEMINIER & JOHANSON, *supra* note 4, at 89 ("The UPC limitation on inheritance [descendants of grandparents] has met with considerable resistance in legislatures.").

intestate statutes beyond the "blood, marriage or adoption" rule. These two statutory changes, Hawaii's reciprocal beneficiary Act[385] and California's intestate share for stepchildren,[386] both take a formal approach in defining the new family members. The Hawaii statute creates a new status, reciprocal beneficiary, that can be obtained by following specified registration procedures.[387] The Act creating the new status takes pains to distinguish the status from marriage, but the Act does give reciprocal beneficiaries many of the benefits of marriage, including an intestate share equal to the share a spouse would receive.[388] By creating a formal category, the legislature avoids the issue of judicial discretion. The process is entirely self-selecting. Any two people who meet the statute's requirements can register and become each other's intestate heirs.[389] Of course, for those couples who fail to register, the new statute provides no relief.

In 1983, California became the first state to create an intestate share for stepchildren regardless of whether other heirs exist.[390] The California statute was narrowly drawn, and the California Supreme Court has interpreted the statute restrictively, so its potential application is extremely limited.[391] The California statute treats a stepchild or foster child[392] as a "child" of the decedent for purposes of the intestate distribution if certain criteria are met.[393] The California statute creates three

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385. *See* HAW. REV. STAT. § 572C (1998).

386. *See* CAL. PROB. CODE § 6454 (West 1991 & Supp. 1999).

387. *See supra* text accompanying notes 226-232.

388. *See supra* text accompanying notes 226-232.

389. One requirement is that the two persons be adults who are legally prohibited from marrying each other. *See* HAW. REV. STAT. § 572C-2 (1998). The Statute explains that this includes family members related by blood as well as same-sex couples. *See id.* It is interesting to note that the new status is not available to a stepparent and stepchild unless the two are both male or both female. *See supra* text accompanying notes 227-232 (discussing statutory requirements for reciprocal beneficiaries).

390. California's statute creates a share for qualified stepchildren regardless of whether other heirs exist. *See* CAL. PROB. CODE § 6454 (West 1991 & Supp. 1999).

391. *See* Estate of Joseph, 949 P.2d 472, 475 (Cal. 1998) (citing Tent. Recommendation Relating to Wills and Intestate Succession (Nov. 1982), 16 Cal. Law Revision Com. Rep. 2318, 2319 (1982)).

392. The California statute uses the terms "step-child and foster child." This Article will use stepchild, but the reader should be aware that the statute also applies to foster children.

393. *See* CAL. PROB. CODE § 6454 (West 1991 & Supp. 1999). The statute states the following:

> For the purpose of determining intestate succession by a person or the person's issue from or through a foster parent or stepparent, the relationship of parent and child exists between that person and the person's foster parent or stepparent if both of the following requirements

requirements: (1) that a parent-child relationship begin while the child is a minor, (2) that the parent-child relationship continue throughout the joint lifetimes of the child and parent and (3) the parent would have adopted the child but for a legal barrier.[394] This last requirement, as construed by the California Supreme Court,[395] has created a nearly insurmountable stumbling block for many stepchildren.

The statute does not define "parent-child relationship," presumably leaving that determination to the courts, but the other requirements make determining the quality of the relationship less necessary. The statute requires that the stepchild prove by clear and convincing evidence that the stepparent would have adopted the stepchild but for a legal barrier. That evidence will establish that in the parent's view a parent-child relationship did exist and the parent wanted to formalize that relationship through adoption. Thus, the California statute takes an approach similar to equitable adoption but does not require that the child prove the existence of a contract. The California statute applies more broadly than equitable adoption, because equitable adoption generally will not work in a stepfamily composed of remarried spouses and their children.[396]

The idea to expand the intestate heirs to include stepchildren under limited circumstances grew out of a project conducted by the California Law Revision Commission. In its report to the legislature, the Commission stated its purpose was to create rules in light of the changing American family that would be more likely to implement the intent of an intestate decedent.[397] The initial recommendation from the Commission to the legislature did not include the stepfamily provision.[398] That provision was added later, apparently with input from Professor Edward C. Halbach, Jr., an expert consultant to the Commission.[399] Professor

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are satisfied: (a) The relationship began during the person's minority and continued throughout the joint lifetimes of the person and the person's foster parent or stepparent. (b) It is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier.

Id.

394. *See* CAL. PROB. CODE § 6454 (West 1991 & Supp. 1999).

395. *See Estate of Joseph*, 949 P.2d at 477.

396. *See supra* text accompanying notes 251-252.

397. *See Estate of Joseph*, 949 P.2d at 475.

398. In fact, the initial recommendation specifically excluded a stepchild from the definition of child and stepparent from the definition of parent. *See* Cal. Law Revision Com. on Prob. Code § 6408, *cited in Estate of Joseph*, 949 P.2d at 476.

399. *See Estate of Joseph*, 949 P.2d at 476.

Halbach's notes indicate that the new section would "provide for step- and foster children in very limited situations, with the necessary safeguards incorporated by treating the case like an adoption, for which qualifications, exceptions, etc. are elsewhere worked out."[400]

Thus, although the Commission's charge was to consider the "changes in the American family,"[401] the new statute provides a share for a stepchild only in a situation that was as close as possible to adoption—the child must have evidence that the stepparent wanted to adopt the child but could not legally do so.[402] The legislative history points out that the statute would cover a child who would have been adopted by the stepparent but for the refusal of the biological parent to give consent.[403] The statute reflects the priority given to adoption in establishing a legal parent-child bond, but recognizes that in a stepfamily situation the stepparent may be precluded from adopting the stepchild because the biological parent refuses to consent to the adoption.

The California statute does not attempt to incorporate new family structures, but rather seeks to squeeze the new family structures into existing rules. A stepparent-stepchild relationship may be significant and worthy of recognition regardless of whether the stepparent seeks to adopt the stepchild. Indeed, it may be in the stepchild's best interests to maintain ties to both families. An adoption, either before or after the child attains the age of majority, may be inappropriate or unnecessary even if it becomes legally possible.

The question of what sort of relationship was necessary to show a parent-child relationship has not been discussed by the courts.[404] Rather, the courts have focused on the requirement that

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400. *Id.* (citing the records of the Law Revision Commission, specifically a two page document entitled "March '83 ECH—Notes," apparently the notes of Professor Halbach).

401. *Id.* at 475.

402. *See id.*

403. *See* Sen. Com. on Judiciary, Rep. on Assem. Bills No. 25 & 68 (1983-1984 Reg. Sess.) 3 Sen. J. 4882 (1983-1984 Reg. Sess.), *cited in* Estate of Joseph, 949 P.2d at 475.

404. *See* Estate of Claffey, 257 Cal. Rptr. 197, 198-199 (Cal. Ct. App. 1989) (holding that in a stepparent to stepchild relationship the term "relationship" within the meaning of the intestate inheritance statute contemplates a relationship like that of natural parent and child in the sense of family relationship). The *Claffey* opinion stressed the importance of finding that a family relationship existed between the deceased stepmother and two stepchildren. Jury instructions described the relationship required by the statute as a "parent and child family relationship," but provided no further guidance regarding the nature of the relationship. *See id.* at 198.

a legal barrier to adoption existed and that the stepparent would otherwise have adopted the child. In the first reported case applying the statute, *Estate of Stevenson*,[405] the court interpreted this requirement to mean that the legal barrier existed during the child's minority.[406] Although the legal barrier—the biological parent's refusal to consent to an adoption—would no longer exist after the child became an adult, the court stated that requiring a legal barrier at all times during the joint lives of the parties would exclude nearly all stepchildren from the scope of the statute.[407] This, the court concluded, "would not make sense."[408]

In a subsequent case, *Estate of Cleveland*,[409] the court disagreed with the *Stevenson* court and held that the legal barrier had to exist at all times until the death of the decedent stepparent.[410] This decision created a split between the Second District and the Sixth District.

Finally, in *Estate of Joseph*,[411] the California Supreme Court agreed with the decision in *Cleveland* and interpreted the statute to mean that the legal barrier must persist until the stepparent dies.[412] Associate Justice Chin's dissent that such an interpretation renders the statute "virtually inapplicable to adult foster children or stepchildren, who seldom (if ever) could demonstrate a lifetime legal barrier to adoption" failed to sway the court.[413]

In *Estate of Joseph* the majority argued that section 6454 should not be read to require a barrier to adoption only at the time adoption was considered or attempted, but rather to mean that the barrier must continue throughout the joint lifetimes of the stepparent and the stepchild.[414] The court stated that this determination was "consistent with the words [the section] uses."[415] The court also stated that its interpretation conformed with the purpose of passing an intestate estate in accordance with

405. 14 Cal. Rptr. 2d 250 (Cal. Ct. App. 1992).

406. *See id.* at 257.

407. *See id.* ("[I]t must appear that the legal barrier existed when the parties attempted adoption. It is not necessary that the legal barrier exist until the time the stepparent dies.").

408. *Id.*

409. 22 Cal. Rptr. 2d 590 (Cal. Ct. App. 1993).

410. *See id.*

411. 949 P.2d 472 (Cal. 1998).

412. *See id.*

413. *Iid.* at 482.

414. *See id.* at 477.

415. *Id.*

the likely intent of the intestate decedent "to do so in an 'efficient and expeditious' manner."[416] The dissent argued that the majority opinion is not consistent with the words of the statute and instead that the majority added to the statute the requirement that a "continuous, lifetime legal barrier to adoption (and a continuous, lifetime intent to adopt)" exist.[417]

In addition to the words of the statute, both the majority and the dissent looked to the legislative intent in adopting the statute. The legislature intended that the statute apply to a stepparent-stepchild relationship in which the stepparent would have adopted the stepchild but for the biological parent's refusal to give consent.[418] The dissent reasoned that since the majority's interpretation precludes most stepchildren from meeting the requirements of section 6454, the better interpretation was to require that the barrier exist only during the child's minority.[419] The majority countered by stating that the legislature's intent was to apply the statute "only in exceptional circumstances."[420]

Although the language of the statute may be susceptible of two interpretations, the court's reliance on the decedent's intent is misplaced. The court quoted approvingly from the probate court's opinion:

> *Cleveland* . . . envisioned just such a case as this when it recognized that any number of reasons could exist for not wanting a 'foster child' to succeed to one's property including loss of affection, disappointment, favoring relatives, dissatisfaction with the choice of the 'foster child's' spouse, to name but a few.[421]

The same can, of course, be true for a child related to the parent by

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416. *Id.* at 478-79 (citing Tent. Recommendation Relating to Wills and Intestate Succession, 16 Cal. Law Revision Com. Rep. 2319 (Nov. 1982)).

417. *Id.* at 483.

418. *See id.* at 473.

419. *See id.* at 488.

420. *Id.* at 480. The court does note that in 1997 the California Law Revision Commission proposed that the legislature amend California Probate Code § 6454 to provide that the legal barrier need exist only at the time at which adoption was contemplated or attempted. *See id.* at 479-80. That is, the Commission would continue the requirement that the stepparent would have adopted the stepchild but for a legal barrier, but would not require that a stepparent adopt the stepchild after the stepchild attained the age of majority in order to make the stepchild an heir. *See id.* The court commented that the proposal did not reflect legislative intent with respect to the statute as it exists, but rather was a Commission recommendation for legislative change. *See id.* at 480. One could argue that the Commission's proposal is necessary merely to clarify its — and the legislature's — intent in the face of the decisions that require the legal barrier to continue throughout a stepchild's life.

421. *Id.* at 474.

blood or adoption. The court ignored the complexity of modern families, stating that "the foster child or stepchild might have been a friend to the foster parent or stepparent. But a friend, as such, is not an heir."[422] The majority's opinion found, in the existence of an ongoing legal barrier, evidence of the decedent's likely intent to leave property to a stepchild, while the absence of a legal barrier led the court to assume that, at best, the stepparent and the stepchild maintained a friendly relationship.[423] Given the failure of many people to take the necessary legal step of writing a will to deal with property matters, it seems likely that the same people will not take the legal step of adopting a child once the child is an adult, regardless of the closeness of the parent-child relationship. To infer a closer relationship simply because a legal barrier exists makes no sense. Rather, the court should look to the relationship itself. As the dissent pointed out, the statute already requires that a parent-child relationship exist throughout the joint lifetimes of the stepparent and the stepchild.[424] The court should look for the existence of that relationship, rather than the existence of a continuing legal barrier. The court's opinion in *Joseph*, therefore, leaves the future of the stepfamily statute to the legislature.

B. Responses to the California Statute

Even before the California Supreme Court's decision in *Joseph*, two law review articles criticized the statute for not going far enough. Margaret Mahoney's article proposes modifications to the California statute that take a more functional approach in defining a stepchild for purposes of the intestacy statute.[425] Although expanding the definition of child for intestate purposes to a small degree, the California statute, with its emphasis on the decedent stepparent's intent to adopt coupled with a legal barrier to adoption, continues to take a formal approach to the definition of child for intestacy purposes. Under the statute, a child is one who would have been adopted but for the legal barrier.[426] Although the formal step of adoption had not been taken, the parent must have come as close as possible.[427]

Mahoney, taking a functional approach, proposes an intestate

422. *Id.* at 478.
423. *See id.*
424. *See id.* at 484.
425. *See* Mahoney, *supra* note 195.
426. *See supra* note 375.
427. *See supra* text accompanying notes 402-403.

share for children who meet several requirements.[428] Mahoney states, "the standard for inheritance by stepparents and stepchildren must involve proof of the stepmarriage plus proof of the de facto family relationship between the nonparent spouse and the children of the other spouse."[429] Mahoney would require that the stepfamily be formed during the child's minority, as is required under the California statute.[430] Rather than using the "would have adopted . . . but for a legal barrier" test used by the California statute,[431] Mahoney proposes using the common law in loco parentis doctrine[432] to determine whether a de facto family relationship existed.[433] Mahoney points out that because use of the doctrine is well developed in family law, the doctrine could also be used in the intestacy context.[434] The in loco parentis analysis focuses on a relationship that formed during a child's minority.[435]

Mahoney would require that the relationship continued throughout the joint lifetimes of the parties. The California statute also contains this requirement of an ongoing relationship.[436] Although the statute limits the intestate rights created under the stepfamily statute to inheritance by a stepchild from a stepparent, Mahoney would extend the rights to inheritance by the stepparent from the stepchild and inheritance by descendants of a predeceased stepchild from the stepparent.[437]

A second critique of the California statute agrees with Mahoney that the California statute's mechanism for determining the existence of a relationship that qualifies for an intestate share, the "would have adopted . . . but for a legal barrier" test, is too narrow.[438] In his article, Thomas Hanson concludes that Mahoney's in loco parentis approach is also underinclusive.[439]

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428. *See* Mahoney, *supra* note 195, at 929.

429. *Id.*

430. *See id.*

431. CAL. PROB. CODE § 6454 (West 1991 & Supp. 1999).

432. *See supra* text accompanying notes 289-294 (explaining that the in loco parentis doctrine uses evidence, such as whether the child and parent live in the same household, whether the parent performs household services for the child and whether the parent supports the child, both financially and emotionally, to determine whether a parent-child relationship exists).

433. *See* Mahoney, *supra* note 195, at 931-32.

434. *See id.*

435. *See id.* at 932.

436. *See* CAL. PROB. CODE § 6454.

437. *See* Mahoney, *supra* note 195, at 933-34.

438. *See* Thomas M. Hanson, *Intestate Succession for Stepchildren: California Leads the Way, But Has It Gone Far Enough?*, 47 HASTINGS L.J. 257, 270 (1995).

439. *See id.* at 283-84.

Hanson suggests that a better approach is to make the sole statutory requirement proof "by a preponderance of evidence that a legitimate family relationship existed between the decedent and the stepchild."[440] Hanson suggests using presumptions to aid the court in determining whether a legitimate family relationship exists.[441]

Although Hanson's article raises a number of good points, the author does not address the difficulty of putting a significant amount of discretion in the hands of the probate judge. It is this balancing of discretion and equitable results that makes crafting an appropriate statute so difficult and forms the basis for Mahoney's more limited approach.

C. Proposal for De Facto Partners

Although no state legislature has adopted the idea, a proposal by Lawrence Waggoner takes a functional approach in creating an intestate share for a committed partner.[442] Waggoner's proposed statute provides that if a decedent dies unmarried and without a valid will, the decedent's "de facto partner" will be entitled to an intestate share.[443] To be considered a de facto partner, the survivor must meet four requirements, which are that the decedent and the surviving partner:

> (1) must not have been related by blood in a manner that would have precluded them from marrying each other under state law; (2) must, at the decedent's death, have been unmarried; (3) must then have been regularly living together in the same household; and (4) must then have been in a relationship that was marriage-like.[444]

The first three requirements are bright-line tests, although the requirement that the partners have been regularly living together may require some guidelines concerning partners who maintain two households for work-related reasons.[445] These three tests operate more like a formal approach, although the status considered is a negative status due to the language *not* related by blood and *not* married. The fourth, and most important, test takes a functional approach and requires that the petitioner establish the existence of a de facto partner relationship between the decedent and the surviving partner—that they lived in a

440. *See id.* at 279.
441. *See id.* at 283-84.
442. *See* Waggoner, *supra* note 3, at 79-80.
443. *See id.* at 80.
444. *Id.* at 81.
445. *See id.* at 81 n.145.

marriage-like relationship.

To guide the court in making a determination as to whether the relationship was "marriage-like," the proposed statute does two things. First, the statute provides a nonexclusive list of factors for the court to consider.[446] The court must balance these factors to determine the nature of the relationship between the decedent and the surviving partner. Waggoner explains that he derived the factors from case law.[447] Many of the factors can be established by objective evidence, for example whether the couple went through a marriage ceremony or had children together, which will make proving the existence of the relationship easier.

Second, the statute also creates presumptions that, if specified circumstances exist, will shift the burden of proof from the surviving de facto partner to the heirs who will otherwise take the intestate estate.[448] For example, a presumption that the relationship was marriage-like exists if: (a) the decedent and the partner lived together for periods totalling at least five years during the six-year period preceding the decedent's death, (b) the decedent and the partner registered as domestic partners or (c) if the partner is the parent of a minor child of the decedent who lived with the decedent.[449] Waggoner explains that the use of presumptions like these should reduce litigation.[450]

Waggoner's proposal makes a substantial contribution to the discussion of ways in which intestate laws can adapt to changing family structures. By combining formal and functional approaches, Waggoner minimizes the costs of increased litigation

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446. *See id.* at 79-80.

> Among the factors to be considered in determining whether a relationship is marriage-like are the following: (1) the purpose, duration, constancy, and exclusivity of the relationship; (2) the degree to which the parties pooled their financial resources, such as by maintaining joint checking or other types of account, sharing a mortgage or lease on the household in which they lived or on other property, titling the household in which they lived or other property in joint tenancy, or naming the other as primary beneficiary of life insurance or employee benefit plans; (3) the procreation or adoption of children and the degree of mutual care and support given them; (4) whether the couple went through a marriage ceremony; and (5) the degree to which the couple held themselves out to others as married or the degree to which the couple held themselves out to others as emotionally and financially committed to one another on a permanent basis, as exhibited by their acknowledging mutual rights, duties, and obligations toward one another.

Id.

447. *See id.* at 83.

448. *See id.* at 80.

449. *See id.*

450. *See id.* at 83.

and uncertainty of moving from a status-based statute to a statute dependent on establishing the quality of a relationship. The proposal provides useful ideas for thinking about ways to modify intestacy laws in order to bring non-legal children into the intestate scheme.

D. The Dilemma of Discretion

In the United States, probate law in general and intestacy laws in particular have long relied on fixed rules and limited discretion.[451] By contrast, a system developed in New Zealand[452] and now in use in the states of Australia, in England and in most of the Canadian provinces provides for a substantial degree of judicial discretion.[453] Testator's family maintenance provides that the court can rearrange the decedent's estate plan, either an intestate distribution[454] or a will, pursuant to a petition by any person provided for under the statute.[455]

Initially, and still the case in some jurisdictions,[456] the statutes protected the decedent's spouse and children. In 1975, the English statute was expanded to include not only the decedent's spouse and children, but also a former spouse who had not remarried, a stepchild, if the stepchild was treated as a child by the decedent, and any other person who was being maintained by the decedent at the time of the decedent's death.[457] Thus, the

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451. *See* Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1185 (1986) (referring to succession law as "the traditional stronghold of fixed rules").

452. *See* Testator's Family Maintenance Act of 1900, N.Z. Stat., No. 20 (1900) (enacting the first testator's family maintenance statute in 1900).

453. For a history of testator's family maintenance, see W.D. MACDONALD, FRAUD ON THE WIDOW'S SHARE (1960); Joseph Dainow, *Restricted Testation in New Zealand, Australia and Canada*, 36 MICH. L. REV. 1107, 1111-15 (1938). *See also* Deborah A. Batts, *I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal For Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197, 1213-16 (1990); Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 121-33 (1994); Joseph Laufer, *Flexible Restraints on Testamentary Freedom-A Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277, 288-94 (1955).

454. The statutes are sometimes more accurately referred to as "decedent's family maintenance" because the court can alter intestate distribution, as well as a decedent's testamentary plans. *See* Laufer, *supra* note 453.

455. *See generally* N.Z. Stat., No. 20 (describing New Zealand statute).

456. *See, e.g.*, Wills Variation Act, R.S.B.C., ch. 435, § 2(1) (1979) (Can.) ("[T]he court may, in its discretion, in an action by or on behalf of the wife, husband or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the estate of the testator for the wife, husband or children.").

457. Inheritance (Provision for Family and Dependents) Act, 1975, ch. 63 § 1.-(1). (Eng.), *cited in* Batts, *supra* note 453, at 1215 n.97. The statute provides for the

English statute specifically contemplates stepchildren, regardless of whether the decedent was married to the child's legal parent at the time of the decedent's death.

The English statute permits persons for whom the distributive share was inadequate or nonexistent to apply for a "reasonable financial provision."[458] For applicants other than the surviving spouse, this term includes only amounts reasonable for maintenance.[459] For the surviving spouse, amounts beyond those necessary for maintenance must be "reasonable."[460] The additional flexibility for the surviving spouse was added to the law in 1975 as a way of providing for the marital property rights of the surviving spouse.[461]

The general idea behind testator's family maintenance is to provide support for family members who were dependent on the decedent before the decedent's death.[462] Courts, however, likely will use the statute to rearrange a testator's distributive scheme under a will to fit the court's normative expectations.[463] The Supreme Court of Canada, interpreting the requirement under the British Columbia statute that the court make such distribution as is "adequate, just and equitable,"[464] explicitly directed courts to consider both legal and moral obligations in determining whether to grant a petition for a distribution.[465] Given this gloss on the statute and the general lack of specific guidelines in the statutes, one commentator has described testator's family maintenance as

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following categories of potential applicants:

> (a) the wife or husband of the deceased;
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> (b) a former wife or former husband of the deceased who has not remarried;
>
> (c) a child of the deceased;
>
> (d) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;
>
> (e) any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased . . . .

Id.

458. Batts, *supra* note 453, at 1215-16.

459. *See* Brashier, *supra* note 453, at 123 n.133.

460. *See id.*

461. *See id.*

462. *See id.* at 122.

463. *See* Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996).

464. Wills Variation Act, R.S.B.C, ch. 435, § 2(1) (1979) (Can.); *see also supra* text accompanying note 456.

465. Walker v. McDermott, 1931 S.C.R. 94, 96 (Can.), *discussed in* Leslie, *supra* note 463, at 271 n.194 and accompanying text.

permitting the judge to operate in a "highly discretionary manner."[466]

Periodically, an American scholar recommends the adoption of testator's family maintenance in the United States.[467] The idea has never caught hold here, however, perhaps because of a desire for certainty and perhaps due to the structure of the probate court system.[468] The high level of discretion involved in testator's family maintenance is of particular concern when the decedent's will is altered.[469] Given the great emphasis placed on testamentary intent in the United States,[470] changes to a decedent's will, absent evidence of lack of capacity or undue influence, are suspect.[471] With respect to intestate distribution, however, no direct evidence of the decedent's intent exists. Perhaps with respect to intestacy, then, some degree of judicial discretion is acceptable. Nonetheless, the use of discretion in the probate context should be approached with caution given the experience with the discretionary application of the doctrine of undue influence.

Any aspect of probate law that injects judicial discretion into the distribution of a decedent's property may create problems for persons whose behavior and family structure do not fit the prevailing social norms. Undue influence is notorious as a tool used to undo a will that does not meet society's approved distributive pattern.[472] If a testator makes testamentary

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466. Brashier, *supra* note 453, at 124-25; *see also* Leslie, *supra* note 463, at 272-73 ("[C]ourts in British Columbia are required to rely on their interpretation of societal norms in determining whether to give effect to testamentary intent.").

467. *See* MACDONALD, *supra* note 453; Laufer, *supra* note 453, at 313.

468. *See* Glendon, *supra* note 451, at 1186.

469. *See* Brashier, *supra* note 453, at 124-33 ("The judicial discretion afforded by the testator's family maintenance system is the modern commonwealth remedy to the difficult problem of balancing testamentary freedom with moral obligation to protect and provide for one's spouse and children . . . .").

470. *See supra* note 28; *see also* Brashier, *supra* note 453, at 133-34.

471. *See* Brashier, *supra* note 453, at 133; Glendon, *supra* note 432, at 1191 (advocating against expanded use of judicial discretion in probate because "discretionary provision . . . ignores the intent of the testator, promotes intrafamily litigation, depletes estates, and brings disarray into a relatively smooth functioning area of the law").

472. *See* Joseph W. deFuria, Jr., *Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence?*, 64 NOTRE DAME L. REV. 200, 202-07 (1989); Gary, *supra* note 46, at 418-21; Leslie, *supra* note 463, at 243-58 (reporting the results of a survey of contested wills over a five-year period and concluding that "the presumption in favor of family members generally can be overcome only where the court views the testator's reason for disinheriting relatives as morally acceptable"); Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225 (1981); E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 275 n.1, 282-

dispositions to persons outside the societal definition of the "natural objects of testator's bounty,"[473] disinherited blood relatives may charge that those persons unduly influenced the testator.[474] In some cases, courts appear to find undue influence based on disapproval of the relationship between the testator and the beneficiary.[475]

The undue influence doctrine allows the judge or jury to impose its own norms on the testator's dispositive plans. For example, a court may find that a younger man unduly influenced an older woman, who happened to be his lover, into leaving her property to him because the court had difficulty imagining love between the two.[476] In addition, same-sex couples face attack on their wills by family members who may be unhappy both about being disinherited and about the decedent's homosexuality.[477] In these situations, the decedent executed a will in conformance with his or her own notions of family. If the decedent's sense of family does not conform with a societal notion of family, the court may use a finding of undue influence to disrupt the testator's

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86, 294-95 (1999) (explaining that the trier of fact in a will contest is more likely to disrupt an estate plan that does not follow social norms and recommending that minority testators—persons "whose core religious, political or social values and beliefs differ meaningfully and substantially from majoritarian norms," include arbitration clauses in their wills to help control redistribution under the guise of undue influence); Kurt Wanless, *Rethinking Oregon's Law of Undue Influence in Will Contests*, 76 OR. L. REV. 1027, 1035-38 (1997).

473. *See* BLACK'S LAW DICTIONARY 1027 (6th ed. 1990) (defining "natural object of testator's bounty" as whoever would take under the laws of intestacy). Since intestacy laws depend on a definition of family based on blood, marriage or adoption, bequests to non-relatives (committed partners or stepchildren) may be seen as outside these "natural objects."

474. *See, e.g., In re* Will of Moses, 227 So. 2d 829 (Miss. 1969) (invalidating a bequest from an older woman to her younger male lover); *In re* Kaufmann's Will, 247 N.Y.S.2d 664 (N.Y. App. Div. 1964), *aff'd*, 205 N.E.2d 864 (N.Y. 1965) (invalidating a will leaving decedent's property to his "best friend," apparently his homosexual partner).

475. *See, e.g., In re* Will of Moses, 227 So. 2d at 833 ("There was strong evidence that this aging woman, seriously ill, disfigured by surgery, and hopelessly addicted to alcoholic excesses, was completely bemused by the constant and amorous attentions of Holland, a man 15 years her junior."). It seems unlikely that a court would describe a marital relationship in this way.

476. *See id.*

477. *See* deFuria, *supra* note 472; Rhonda R. Rivera, *Lawyers, Clients, and AIDS: Some Notes from the Trenches*, 49 OHIO ST. L.J. 883, 892 (1989) (reporting anecdotal evidence from lawyers that attacks by a decedent's biological family on the decedent's homosexual partner are not uncommon and usually result in a settlement that substantially reduces the share that the surviving partner receives); Carol Angel, *Legal Challenges to AIDS Patients' Wills Seen on Rise*, L.A. DAILY J., Aug. 16, 1988, at 1; Kirk Johnson, *AIDS Victims' Wills Under Attack*, N.Y. TIMES, Feb. 19, 1987, at B1.

dispositive plan.[478]

The experience with undue influence suggests the need for caution in approaching any uses of discretion in the probate context.[479] Discretion when a person dies intestate does, however, present different issues from the use of discretion in testamentary estates. A significant criticism of discretion in connection with testate decedents—interference with testamentary freedom[480]—does not exist where the decedent has not exercised the testamentary freedom. Further, if courts exercise discretion in a way that favors societal norms,[481] then permitting the exercise of discretion to benefit non-traditional families will not likely move the law far from the status quo. In fact, including non-traditional families in intestacy statutes, even in a discretionary manner, may decrease application of discretion in a manner that adversely affects non-traditional families. Incorporating non-traditional families into intestacy statutes will signal to the court the importance of non-traditional families in American society.

The objective approach that predominates in intestacy statutes carries with it the weight of history, the security of fixed rules and the benefit of efficiency for the probate court. Unfortunately, the objective "blood, marriage or adoption" approach means that increasingly property does not benefit the decedent's "family" nor follow decedent's intent. The difficulty, of course, is that while ties through blood or adoption are relatively easy to establish, ties of affinity are not. Any determination of whether a decedent had a parent-child relationship with a survivor will require some degree of discretion. The uncertainty associated with the use of discretion likely will lead to increased litigation. Discretion carries with it risks, but given the state of today's families, some degree of discretion is necessary.

V. Proposal

American family life is complicated. A statute no longer can create appropriate results for most testators if the statute provides intestate shares only to those related to the decedent by blood or adoption. Nevertheless, giving the probate court complete

478. *See supra* note 472.

479. *See* Harris, *supra* note 166, at 473 (pointing out that in determining paternity bright-line rules may be less susceptible to manipulation and abuse by decision-makers than when compared to indeterminate standards).

480. *See supra* text accompanying notes 468-471.

481. *See* Spitko, *supra* note 472, at 283 (explaining that "will contests enable the fact-finder to rewrite the testator's estate plan in accordance with societal norms").

discretion in determining intestate shares may also yield inequitable results and will almost certainly yield uneven results. The following proposal attempts to create an intestacy regime that will have a reasonably predictable outcome for those who choose to rely on the statute, that also will provide adequate direction to the probate court, but that will be sufficiently flexible to account for many of today's families. This proposal adopts a functional approach in defining the parent-child relationship by adding a functional definition to the existing formal definitions of parent and child. The proposal is guided by two policies: (1) the distribution should approximate the decedent's intent, and (2) the intestacy statute should provide support[482] for families, however formed.

This proposed intestacy statute adds an additional means for a person to meet the definition of parent or child for purposes of intestacy. The proposal, however, does not affect a state's existing rules concerning issues such as paternity or adoption, but instead is designed to add a new functional definition of parent and child to a state's existing formal definitions. For example, if the UPC adopted this provision as part of section 2-114, a child could qualify for an intestate share as the decedent's biological child,[483] an adopted child[484] or a child for whom a parent-child relationship is established.

The proposed statute[485] treats as a child a person who the court determines to be a child under a clear and convincing evidence standard based on guidelines set out in the statute. This determination will focus on the relationship between the parent

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482. A policy of supporting the family means not only the economic spoils of the decedent's estate, but also the psychological support that comes with being recognized as a family member under the law. *See* Harris, *supra* note 166, at 474 ("Recognition of more broadly defined families under an intestacy statute will help strengthen family ties."). Engel suggests that many laws, including intestacy laws, are detrimental to second marriages, stepparents and stepchildren. *See* Engel, *supra* note 107, at 355 ("[T]he intestacy codes continue to ignore families in remarriage situations, and the societal bias against stepfamilies and stepchildren is encouraged in the laws."). Similarly, laws that discriminate against gay men, lesbians and their children stigmatize their families and encourage private discrimination against those families. *See* Spitko, *supra* note 28, at 1063-64.

483. *See* UNIF. PROBATE CODE § 2-114(a) (1993).

484. *See* UNIF. PROBATE CODE § 2-114(b) (1993).

485. The proposal incorporates into a state's intestacy statute new definitions for child and parent. *See infra* Appendix I. Whether the child or parent inherit from each other will depend upon other provisions of the intestacy statute and on the existence of other heirs. Status as a child or parent may also give the person standing to bring a will contest and may bring the person within family allowance or family support provisions of the probate code. A legislature considering this proposal should examine the extent of its effect on that state's probate laws.

and child and will be based upon evidence that the relationship was ongoing, familial and mutually significant. To reduce the burdens on the court[486] and to address concerns about judicial discretion, the statute will include an evidentiary presumption that a parent-child relationship existed. If factors establish this presumption, an heir contesting the existence of a functional parent-child relationship must produce clear and convincing evidence to overcome the presumption.

A. Determination by the Court

The proposed statute includes a list of factors for use by the probate court in determining whether a parent-child relationship existed between the decedent and a survivor. The factors, and an analysis or explanation of each, are as follows:

(1) The relationship between the parent and child began during the child's minority. The younger the child, the greater the weight to be given to this factor.

Although a relationship that begins during the child's minority is more likely to be a parent-child relationship than one that begins after the child becomes an adult,[487] a meaningful parent-child relationship can develop between adults. In addition, if a family is formed when two stepchildren are minors and one stepchild is eighteen, creating an intestate share for the two minor children but not for the adult child without considering other factors is too arbitrary. Since, however, a relationship between a stepparent and a minor stepchild is more likely to develop into a parent-child relationship than a relationship with an adult stepchild, the age of the child when the relationship began should be a factor. If the relationship began when the child was two years old and continued throughout the child's minority, that relationship is more likely to be a parent-child relationship than a relationship that began at age seventeen or when the child was an adult.

(2) The duration of the relationship was sufficient for the formation of a parent-child bond.

Related to the first factor, this factor looks at the duration of the relationship. A relationship that began when the stepchild was seventeen and continued for twenty years, with a great deal of

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486. *See* Harris, *supra* note 166, at 481 (noting that evidentiary presumptions can reduce the costs associated with the indeterminacy of a functional definition of a family relationship).

487. *See* Mahoney, *supra* note 195, at 930.

interaction and perhaps caring for the stepparent by the stepchild as the stepparent aged, may be a parent-child relationship that should be recognized for intestacy purposes. In contrast, a relationship that began only two years before the stepparent's death may not have developed into a parent-child relationship, particularly if the stepchild is an adult.

The statute does not require continuous contact between the parent and the child; however, a long gap in the relationship could suggest that a parent-child relationship did not exist. In *Stevenson*,[488] the decedent, Helen, had married James when his children were approximately three and four years old.[489] Helen cared for the children for several years until she and James separated.[490] For a period of some six or seven years the children lived with James, but during that period they remained in contact with Helen.[491] James and Helen then began living together again, and the children stayed in the care of Helen while James was on military duty in Vietnam.[492] The court found that the thirty-five year relationship between the stepchildren and Helen provided evidence of a continuing relationship, despite the six or seven years of limited contact.[493] The court noted that a parent-child relationship could continue even if the stepparent no longer lived with the stepchildren due to divorce.[494] Even if the stepparent and stepchildren lived apart for a lengthy period of time, other evidence could show that a close relationship persisted.[495]

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488. *See In re* Estate of Stevenson, 14 Cal. Rptr. 2d 250 (Cal. Ct. App. 1992).

489. *See id.* at 252.

490. *See id.*

491. *See id.*

492. *See id.*

493. *See id.* at 254 ("[E]ven if the relationship between the stepparent and child does not flourish during the separation, the length of the time spent together may outweigh the fact that the relationship was temporarily interrupted.").

494. *See id.*

495. *See id.* ("Given the frequency of separation and divorce, it makes sense to recognize that relationships between stepparent and child may continue to flourish even though the relationship between the stepparent and natural parent does not."); *cf.* Brett R. Turner, *Blended Families in the 1990s: Property Division Issues Involving Nonmarital Children* (1997), *avialable in* 1998 WL 9, 6 DIVORCE LITIG. 115, *122 ("The stepparent-stepchild relationship lasts only for the duration of the marriage, and there is no policy basis upon which to impose a duty of future support upon the stepparent.").

(3) The decedent was married to or was a committed partner[496] *of a biological or adoptive parent of the child.*

Although the mere fact of the marriage of a child's biological or adoptive parent to another person does not create a parent-child relationship between the stepchild and the stepparent, the fact that the parents have decided to formalize the creation of a family should be considered as a factor.

The California statute and Mahoney's proposal both require that the stepparent be married to the stepchild's legal parent.[497] The statute proposed in this Article does not create such a requirement. Although marriage of the parents is a factor that should be given weight, in some families the parents cannot legally marry because they are of the same sex and in other families the parents choose not to marry.

As the court in *Estate of Claffey*[498] noted, "the necessary 'relationship,' . . . must encompass something more than an exchange of wedding vows between the legal father and a stranger."[499] Just as marriage of two adults does not necessarily create a relationship between the stepparent and the stepchildren, the lack of marriage does not necessarily indicate that no relationship exists. In *Stevenson*, the court noted that the parties agreed that the biological father and the stepmother had married, although there was no evidence as to when—and presumably whether—the two did marry.[500] The children thought their stepmother was their biological mother, and from the facts recited would have thought so whether or not their parents had actually married.[501]

By not requiring marriage, the statute opens up the possibility that a "parent" could be any person who spends a

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496. The term "committed partner" as used in the statute relies on the definition of de facto partner developed by Waggoner. If the statute does not incorporate the definition of de facto or committed partner elsewhere in the intestacy provisions, this section would have to include a definition of the term. *See* Waggoner, *supra* note 3, at 79-80.

497. *See* CAL. PROB. CODE § 6454 (West 1991 & Supp. 1999); Mahoney, *supra* note 195, at 929.

498. 257 Cal. Rptr. 197 (Cal. Ct. App. 1989). In *Claffey*, the stepchildren argued that the California statute applied to them because their legal father had married the decedent while they were minors. *See id.* at 198-99. The court found insufficient evidence to establish a "family" relationship, in part because the stepchildren had not lived with their legal father and the decedent. *See id.* at 200.

499. *Id.* at 199.

500. *See In re* Estate of Stevenson, 14 Cal. Rptr. 2d 250, 253 n.5 (Cal. Ct. App. 1992).

501. *See id.*

significant amount of time with the child—a grandparent or other relative, a neighbor or even a hired caregiver. The statute must provide sufficient guidance so that a parent under the statute is truly a parent.

(4) The parent held the child out as his or her child, referring to the child as his or her child or treating the child as his or her child.

Evidence of the parent's treatment of the child can come from statements of those who knew the family. In *Stevenson*, James' brother Otis testified, "it was totally that she was proud of those boys. I mean she treated them like her sons."[502]

(5) The parent provided economic and emotional support for the child; the child provided economic and emotional support for the parent.

This factor resembles the identification of a parent under the in loco parentis doctrine.[503] A court could look to the application of the in loco parentis doctrine in other contexts for assistance in interpreting this factor. The court would consider evidence that the parent provided financial support for the child or that the parent acted as a psychological parent to the child. The court also would look for evidence that a mutually close and loving relationship existed between the parent and the child. Evidence could show, for example, that the parent had been involved in the day-to-day care of the child. If the child is an adult the court may look for evidence that the child provided financial assistance or emotional support for the parent. For example, evidence could show monitoring of health care and frequent visits.

(6) Treatment of the child by the parent was comparable to the decedent's treatment of his or her legal children.

Hanson notes that comparing a stepparent's treatment of a stepchild with the same parent's treatment of a biological or adoptive child is useful, particularly in determining whether a parent-child relationship continued after the child became an adult.[504] Since the relationships between parents and their children change after the children leave home, mere decline in contact between a parent and a child does not necessarily indicate the absence of a parent-child relationship. If the relationship of a

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502. *Id.* at 255.

503. *See supra* text accompanying notes 289-300 (describing the in loco parentis doctrine); *see also supra* text accompanying notes 432-434 (describing Mahoney's proposal advocating the use of the in loco parentis doctrine in determining whether a de facto family relationship existed).

504. *See* Hanson, *supra* note 438, at 276-79.

stepparent and a stepchild continues to be comparable to that of the stepparent with his or her biological or adoptive children, the stepchild can use that evidence to show that the stepchild's relationship with the stepparent was a parent-child relationship.[505] Of course, not all stepparents have legal children, so this factor will not be applicable in all situations.

(7) The decedent named the child or parent as a beneficiary to receive property at the decedent's death through a nonprobate transfer.

Nonprobate transfers contemplated here include: naming the child or parent as a beneficiary under a pay-on-death or transfer-on-death account; as a beneficiary on a life insurance policy; as a beneficiary on an employee benefit plan; as a joint tenant with right of survivorship on real property, bank accounts or stock accounts owned by the decedent; or as a beneficiary under a trust established by the decedent.

Increasingly, property is transferred at death by nonprobate as well as probate means.[506] If a decedent has provided for a child or a parent through a nonprobate transfer, naming the child or the parent as a beneficiary may indicate general donative intent. The nonprobate transfers may provide the best evidence of what the decedent would have provided if he or she had executed a will. On the other hand, the decedent may have provided for the parent or the child through a nonprobate transfer as a substitute gift—a gift in lieu of a share of the probate estate. For example, a parent may name a stepchild as the beneficiary of an insurance policy under the assumption that the decedent's children, and not the stepchild, will receive the probate assets. Evidence of the decedent's treatment of his or her other children, if any, will be useful in applying this factor, as will information concerning planning associated with naming the beneficiaries of nonprobate assets.

B. Presumption

If a combination of factors exists, the factors will give rise to a presumption that the relationship was a parent-child relationship. The presumption can then be rebutted only by clear and convincing evidence that the relationship was not functionally that of a parent and a child. The presumption created by this proposal requires the existence of two factors, plus proof of one of the three additional factors. A parent-child relationship can

505. *See id.*

506. *See* WAGGONER ET AL., *supra* note 14, at 31-32.

certainly exist even if these factors are absent, and the existence of these factors does not mean that in every situation a parent-child relationship existed. The presumption merely attempts to shift the burden of proof at the appropriate point. This proposal, and particularly the presumption, is a starting point for discussion since it may be criticized for being overbroad in the number of families that it includes. Yet, if the purposes of the statute include support for families, as well as approximating the intent of the decedent, an inclusive statute may be appropriate.

A presumption that a parent-child relationship existed will arise if the following factors exist:

(1) The parent and the child lived in the same household for: (a) periods totalling at least five years during the six years preceding the decedent's death or (b) periods totalling twelve years.

Although the length of time the parent and the child lived together is not determinative of the quality of their relationship, the longer they lived together the more likely it is that a functional parent-child relationship existed. The difficulty with requiring that the parent and the child live in the same household at the time of the decedent's death is that most children, regardless of whether they are legally or functionally related to their parents, leave home when they reach adulthood. The presumption, therefore, requires a longer period of time if the parent and the child no longer live together because the likelihood that a relationship will continue throughout the joint lives of the two persons increases if they lived in the same household for a long period of time, presumably while the child was growing up.

(2) The relationship between the parent and the child began when the child was a minor.

Although it is not necessary for a finding by the court that a functional relationship existed, for purposes of the presumption it is appropriate to require that the relationship began when the child was a minor. This requirement is also part of both the California statute and the Mahoney proposal.[507]

(3) One of the following factors:

(a) The decedent named the child or the parent as a beneficiary to receive property at the decedent's death through a nonprobate transfer, including naming the child or the parent as a beneficiary under a pay-on-death or transfer-on-death account, as a beneficiary on a life insurance policy, as a beneficiary on an

507. *See* CAL. PROB. CODE § 6454 (West 1991 & Supp. 1999); Mahoney, *supra* note 195, at 930.

employee benefit plan, as a joint tenant with right of survivorship on real property, bank accounts, or stock accounts owned by the decedent, or as a beneficiary under a trust established by the decedent.

As described above, providing for a child or a parent by nonprobate means provides strong evidence that a parent-child relationship existed. A presumption based on this factor could be rebutted by evidence that the decedent had named the beneficiary to receive a nonprobate asset because the decedent expected that the beneficiary would not receive a probate distribution.

(b) The decedent was married to or was a committed partner of a biological or adoptive parent of the child.

Marriage between the decedent and the child's legal parent is a factor making existence of a parent-child relationship more likely. The California statute and the Mahoney proposal make this a requirement.[508] The factor, expanded to include committed partners as determined under the probate statute, is sufficiently strong to warrant its use in creating a presumption under the proposed statute.

(c) A court determined in another proceeding that the parent had acted in loco parentis with the child.

The finding of an in loco parentis relationship is at the heart of the functional definition of parent and child. If another court has already made a determination, albeit for different purposes, that a person was acting in loco parentis, then that determination can serve to create a presumption for intestacy purposes. This proposal does not include a restriction on when the prior court proceeding occurred, permitting the use of a finding made years before the decedent's death. If the finding occurred thereby many years before the decedent's death, and thereafter the relationship ceased to function as a parent-child relationship, then evidence that the relationship had changed can be used to rebut the presumption.

If a presumption exists, then another heir of the decedent can challenge the existence of a parent-child relationship by presenting contrary evidence. The other heir could show, for example, that the child's legal parent and the decedent did not commingle their finances and that the decedent did not provide financial support for the child. The other heir could also provide evidence that the decedent did not treat the child as his or her

508. *See* CAL. PROB. CODE § 6454 (West 1991 & Supp. 1999); Mahoney, *supra* note 195, at 930.

child and did not refer to the child as his or her child, or that the decedent treated the child differently from the way the decedent treated his or her legal children. Evidence to rebut the presumption would go to the question of how the parent and the child interacted, focusing on whether they acted functionally as parent and child.

Conclusion

The form of American families has changed and will continue to change. What remains constant is the function families perform for their members and for society. Families create caring, nurturing and loving relationships that do not depend on formal requirements that the family members be related by blood, legal marriage or adoption to be considered family. The law in some areas has begun to recognize new families, but intestacy law lags behind. The Hawaii statute and the California stepchild provision are important steps, but are limited in their scope. Intestacy laws should encompass the children of the new families such as stepchildren, children of gay and lesbian families, and children in families headed by opposite-sex, unmarried partners.

This Article proposes statutory changes that, particularly if combined with Waggoner's proposal creating an intestate share for de facto partners, could begin to make intestacy statutes more inclusive and more useful. Intestacy laws should approximate the intent of the decedent and provide support, both economic and psychological, for all families. It is hoped that this Article, and the statute it proposes, will encourage law reform efforts to accomplish these goals.

APPENDIX I

Section [Insert Appropriate Number]
Parent and Child Relationship

[To be added to the existing section describing the parent and child relationship. *See, e.g.*, UNIF. PROBATE CODE § 2-114 (1993)].

(a) For purposes of intestate succession, an individual is the child of another individual and an individual is the parent of another individual if the person seeking to establish the relationship proves by clear and convincing evidence that a parent-child relationship existed between the two individuals at the time of the decedent's death. This section shall not create inheritance rights for any person other than the individuals for whom a parent-child relationship is established pursuant to this section.

(b) [Factors.] Although no single factor or set of factors determines whether a relationship qualifies as a parent-child relationship, the following factors are among those to be considered as positive indications that a parent-child relationship existed:

(1) The relationship between the parent and child began during the child's minority. The younger the child, the greater the weight to be given to this factor;

(2) The duration of the relationship was sufficient for the formation of a parent-child bond;

(3) The decedent was married to or was a committed partner of a biological or adoptive parent of the child;

(4) The parent held the child out as his or her child, referring to the child as his or her child or treating the child as his or her child;

(5) The parent provided economic and emotional support for the child; the child provided economic and emotional support for the parent;

(6) Treatment of the child by the parent was comparable to the parent's treatment of his or her legal children; and

(7) The decedent named the child or parent as a beneficiary to receive property at the decedent's death through a nonprobate transfer.

(c) [Presumption.] An individual's relationship with the decedent is presumed to have been a parent-child relationship if:

(1) The parent and the child lived in the same household for:

(i) periods totaling at least five years during the six years preceding the decedent's death or (ii) periods totaling twelve years;

(2) The relationship between the parent and the child began when the child was a minor; and

(3) One of the following factors:

(i) The decedent named the child or parent as a beneficiary under a pay-on-death or transfer-on-death account, as a beneficiary on a life insurance policy, as a beneficiary on an employee benefit plan, as a joint tenant with right of survivorship on real property, bank accounts, or stock accounts owned by the decedent, or as a beneficiary under a trust established by the decedent;

(ii) The decedent was married to or was a committed partner of a biological or adoptive parent of the child; or

(iii) A court determined in another proceeding that the parent had acted in loco parentis with the child.

(d) [Force of the presumption.] If a presumption arises under subsection (c), the presumption is rebuttable only by clear and convincing evidence.