# Family Violence and Family Property: A Proposal for Reform

Robin L. Preble*

## Introduction

Property law is one way of controlling the family[1] by determining who constitutes family and the rights to which family members are entitled. It reflects prevailing economic realities as well as predominant behavioral ideals.[2] Intestacy statutes, in particular, embody government policy decisions regarding who is to have a right in an intestate's estate and thus what family behaviors and relationships are socially desired and acceptable.[3] The traditional family is encouraged and supported by family property rights which ensure that family members will be provided for.[4] It is in this context of family property as family policy that the problem of family

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1. Family, for the purposes of this article, is defined as those persons who are related by blood or marriage and as such would be eligible to take under the intestate succession statutes of the Uniform Probate Code [hereinafter UPC]. *See* UPC §§ 2-102 through 2-105 (1990).

2. "The rules of inheritance are a means of exploring the human condition and connectedness with others. They force us to confront our moral obligation to future generations. They create and reflect family and community configurations. . . . They are also one of the primary means by which the community defines deviancy and thereby controls the private and public activities of its members." LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 33 (1991).

3. *See generally* ALISON REPPY & LESLIE J. TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS: DESCENT AND DISTRIBUTION, PROBATE AND ADMINISTRATION 67-90 (1928); MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 4-35 (1989). *See also* WAGGONER ET AL., *supra* note 2, at 69-71 (discussing the historical roots of intestacy rules and practices such as primogeniture—the preference of male descendants over female descendants—which have since been abandoned as the concepts of family and property have evolved).

4. In other words, when the decedent leaves behind any estate of value after death, the whole of family property law via intestacy schemes, elective share, omitted spouse, pretermitted heir and other provisions guarantees that the spouse or other surviving family members will have access to the decedent's property. A primary exception to these family property rights is the statutory forfeiture of such benefits where the benefitting family member killed the decedent. *See infra* part III.C.1. (discussing so called "slayer" statutes).

violence[5] and intestate succession rights in particular must be examined.

This article asserts that the failure to recognize the relevance of family violence to family property policy is a grave shortcoming that is ultimately harmful to both individual families and society at large. Additionally, the failure to address family violence in the non-criminal context of family property law undermines efforts to condemn and deter family violence. To remedy this defect of law and policy, this article advocates that Minnesota family property law, and the Uniform Probate Code upon which much of state law is based, be reformed to require that evidence of family violence be considered by the probate court as part of property distribution proceedings. Statutory schemes such as intestacy laws are problematic because they represent legislative policy decisions, yet presently they fail to acknowledge or deter family violence. Thus, a model statutory standard is proposed whereby if a "past pattern of abuse"[6] by a family member upon the decedent is shown, the abusing family member would be denied significant inheritance rights in the decedent's estate.

Part I highlights the problem of family violence and discusses the current system of intestate succession in Minnesota and under

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5. The term "family violence" is preferred over "domestic abuse" because it is more descriptive of the problem and is inclusive of all of the forms of violence between family members that this proposal seeks to address. For the purposes of this article, family violence includes only violence between persons who are related by blood or marriage. Violence between former spouses, or unmarried couples, is not included. *See* the proposed family violence statute *infra* at appendix A (providing an exhaustive definition of family violence). *See also generally* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT (1984) [hereinafter TASK FORCE ON FAMILY VIOLENCE] (discussing the problem of family violence nationwide and the many types of violence to be addressed and combatted).

Although violence and abuse obviously can and does occur between people in a variety of relationships, including unmarried heterosexual and homosexual couples, such violence, while equally harmful, has little relevance to the present discussion. Intimate relationships that fall outside of the traditional family remain beyond the scope of inheritance laws. *See infra* part I.C. (discussing the current intestacy scheme in Minnesota and under the UPC). Thus, fortunately or unfortunately, there is no danger of these abusers taking property by intestacy since these relationships are not formally recognized and thus no property rights attach.

6. *See* Proposed Family Violence Statute, subd. (c), *infra* at appendix A. The "past pattern" standard is modeled after Minnesota's Domestic Homicide Statute. *See* MINN. STAT. § 609.185(6) (1994) [hereinafter DOMESTIC HOMICIDE STATUTE]. The statute imposes first-degree murder liability for anyone who "causes the death of a human being . . . while committing domestic abuse, when the perpetrator has engaged in a past pattern of domestic abuse upon the victim and the death occurs under circumstances manifesting an extreme indifference to human life." *Id.* The statute is currently under review by the Minnesota Supreme Court. *See* State v. Grube, No. C1-94-518. *See also infra* part II.B.1. (discussing consitutionality of statutory "pattern" language).

the Uniform Probate Code. Part II lays out the proposed reform and discusses its elements and operation. Part III examines the asserted rationales for the current scheme and suggests that the decedent's intent and public policy would be furthered by adopting a standard for addressing family violence in intestate distribution proceedings. This section also examines relevant precedent supporting the adoption of the proposed family violence statute. Part IV anticipates and addresses concerns regarding the practical implementation of the proposed statute. Finally, Part V concludes that even beyond the direct impact of the reform in individual cases, the symbolic importance of articulating a clear policy condemning family violence on all fronts, including family property law, is ample justification for the reform.

## I. Family Violence and the Current System of Inheritance

Under the current system of family property law, the widespread problem of family violence is not being adequately addressed. Although there is much statistical evidence about the nature and degree of the problem, outside the realm of criminal law policy makers have yet to respond adequately to the complex issue of family violence. This failure leaves individual victims of family violence with few viable means of protecting their property. Further, the absence of a coherent family violence policy within family property law leaves states to support family violence unwittingly through the recognition of inheritance rights in the decedent's estate.

### *A. The Statistics*

According to experts, "[w]ith the exception of the police and the military, the family is perhaps the most violent social group, and the home the most violent social setting, in our society."[7] Although the problem of family violence, once brushed off as mere "domestic disputes,"[8] has gained increasing attention from the law and the community in recent decades, there are still many indications that family violence is not yet being fully and adequately addressed by our legal system.[9] Although wife beating, for example,

7. Richard J. Gelles & Murray A. Straus, *in Violence in the American Family*, CRIME AND THE FAMILY 88 (Alan J. Lincoln & Murray A. Straus eds., 1985).

8. *See* Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies From Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 121 (1991) (*citing* James Ptacek, *The Clinical Literature on Men Who Batter: A Review and Critique: Family Abuse and Its Consequences, in* NEW DIRECTIONS IN RESEARCH 149, 149-62 (G. Hotaling ed., 1988)).

9. *See generally* ROSEMARIE TONG, WOMEN, SEX, AND THE LAW 124-52 (1984).

was criminalized in all states by 1920,[10] the reticence of police, prosecutors, courts, and legislators to intervene in family violence situations remains problematic today.[11] Statistics show that anywhere from 382,000 to 566,000 women[12] are beaten every year in Minnesota alone.[13] Nationwide, the statistics are staggering. Three to four million women are physically abused by husbands or partners each year in the United States.[14] Two to four thousand of

10. *See* Asmus et al., *supra* note 8, at 116 (*citing* R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST PATRIARCHY 59-64 (1979)).

11. For example, statistics show that the criminal justice system continues to treat assaults involving domestic relationships differently than those involving strangers. One study "found that, out of the forty-three cases involving misdemeanor assault, thirty-four cases (79%) were dismissed, eight cases (9%) resulted in convictions, and one case remained pending. These statistics illustrate the continued de facto decriminalization of domestic abuse by the courts." Asmus et al., *supra* note 8, at 117 (citing Mary O'Doherty & Andrew Wolfson, *Violence Against Women: One County's Record Shows Abuse Cases Are Routinely Dropped*, COURIER-J. Feb. 17, 1991, at 1). This compares with national conviction statistics for all felony assaults of 84% (including both guilty pleas and convictions at trial) with only 11% resulting in dismissals. BARBARA BOLAND ET AL., U.S. DEP'T OF JUSTICE, THE PROSECUTION OF FELONY ARRESTS, 1988 20-23 (1991) (Table 1) [hereinafter THE PROSECUTION OF FELONY ARRESTS]. (*Note*: These statistics do not appear in the report itself but are derived by combining the assault statistics of the five major jurisdictions listed.) Further, even the typical outcome of 100 felony arrests for all crimes nationally is 54% with only 21% dismissed in court. *Id.* at front cover.

12. The use of statistics showing the abuse suffered by women is intended only as an example of the type and frequency of family violence in the United States. While women are not the only victims of family violence, they are more frequently victimized than men and thus statistics reflecting violence towards women are more illustrative of the problem of family violence. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES (1992) 149 [hereinafter CRIMINAL VICTIMIZATION] (reporting that the victimization rate of violent crimes against women committed by relatives was 3.8 per 1,000, while the rate for men was 0.8 per 1,000). Family violence is by no means, however, exclusively a women's issue. Children who witness such abuse are indirectly harmed whether or not they themselves are directly abused and many grow-up to become abusers themselves. *See* TASK FORCE ON FAMILY VIOLENCE, *supra* note 5, at 2-3 (discussing the cyclical nature of family violence).

13. *See* Asmus et al., *supra* note 8, at 120.

14. *Id.* (*citing* a letter from Eleanor Smeal, entitled "Stop Violence Against Women" (published by The Fund for the Feminist Majority) (Summer 1991)). Other available statistics show similar levels of domestic violence nationally. One scholar states that, "[o]ne-third to one-half of all women who live with male companions experience degradation in the form of brutality or threatened brutality." Tong, *supra* note 9, at 124 (*citing* Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 624 (1980)). *But see* Armin A. Brott, *Battered-Truth Syndrome: Hyped Stats on Wife Abuse Only Worsen the Problem*, WASH. POST., July 31, 1994, at C1 (asserting that the current widely cited figures that millions of women are abused each year are inaccurate and are creating a "false epidemic."). Brott also takes issue with other widely reported statistics. Relying on the National Family Violence Survey (NFVS) sponsored by the National Institute of Mental Health and conducted by Murray Straus and Richard Gelles, the article attacks the widely held beliefs that women are far more likely to be the victims of family violence than men and that domestic violence is the most common cause of injury to women. *Id.* According to the article, "the NFVS—and a

those women will be killed.[15] In Minnesota, the statistics show an increase in such murders over the past several years. According to one scholar:

> Recent homicide statistics for Minnesota confirm that sixteen women were murdered in 1988. In 1989, at least eighteen women were murdered by their partners. Eleven of those women had left the abusive relationship or were trying to leave when they were killed. In 1990, at least twenty-seven women were murdered, twenty-two of them by a partner.[16]

Additionally, by some estimates family violence is the leading cause of injury to women.[17] One study concluded that forty percent of women seeking treatment in emergency rooms and nineteen percent of female trauma patients were the victims of family violence.[18] These disturbing numbers indicate the widespread and continuing trend of such abuse, despite the proliferation of criminal legislation.

Women are not the only victims, however, and spousal battery is not the only type of family violence about which to be concerned. Other statistics show that thousands of children are victimized by family violence every year. In 1992, over 46,000 children nationally were *known* to have suffered abuse by a parent.[19] Further, many such statistics, which reflect only incidents reported to researchers or the police, skew the picture and underrepresent the extent of the problem.[20] Experts acknowledge that most family violence is unre-

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variety of other studies—have found that men are just as likely to be the victims of domestic violence as women." *Id.* Additionally, the article asserts that the injury figures are based on an inaccurate interpretation of a small study that was not applicable to the general population of American women. *Id.*

15. *See* Asmus et al., *supra* note 8, at 120.

16. *Id.* (*citing Women Murdered in Minnesota in 1990*, WOMEN MURDERED IN MINNESOTA IN 1990, MINNESOTA COALITION FOR BATTERED WOMEN UPDATE, (Minnesota Coalition For Battered Women, St. Paul, Minn.), Jan. 28, 1991, at 1). *See generally* TASK FORCE ON FAMILY VIOLENCE, *supra* note 5.

17. *See* REPORT ON THE SURGEON GENERAL'S WORKSHOP ON VIOLENCE AND PUBLIC HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVICES AND DEP'T OF JUSTICE, PUBLIC HEALTH SERVICE (1986). *But see* Brott, *supra* note 14.

18. *See* Demie Kurz & Evan Stark, *Not-So-Benign Neglect: The Medical Response to Battering*, *in* FEMINIST PERSPECTIVES ON WIFE ABUSE 249, 249-51 (Kersti Yllö & Michele Bograd eds., 1988).

19. *See* CRIMINAL VICTIMIZATION, *supra* note 12, at 150 (Table III).

20. *See id.* at 1, 149. The statistics in the report are compiled from a survey of the general public and as such rely on a victim's willingness to report the crime. *Id.* at 1. Additionally, statistics compiled by survey also rely on an initial understanding by the surveyed individual that he or she was in fact a victim or perpetrator of a crime. According to another national government survey, "[a] large proportion of family violence is committed by people who do not see their acts as crimes against victims who do not know they are victims." TASK FORCE ON FAMILY VIOLENCE, *supra* note 5, at 5.

ported and undocumented.[21] Thus, the real incidence of family violence is probably much higher.[22] According to the U.S. Attorney General, "[a]scertainable reported cases of child abuse and neglect have doubled from 1976 to 1981. In addition to the one million reported cases of child maltreatment, there may be yet another million unreported cases."[23]

In light of these statistics, it is clear that family violence in all its forms demands more attention from the legislatures and the courts. While many states, including Minnesota,[24] have instituted policies that criminalize "domestic abuse" the continued high-level of violence is evidence that the message is not yet loud enough and is not being heard. The law may have come a long way in de-emphasizing the historical view of marriage and family as private sanctuaries beyond the scrutiny of the law, but it has not yet gone far enough.[25]

### *B. The Reality: Family Violence and Family Property Rights*

Consider the following scenarios:

*Scenario #1*: John and Jane[26] are in their mid-thirties and have been married for ten years. They have two children. The mar-

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21. GAIL A. GOOLKASIAN, NATIONAL INSTITUTE OF JUSTICE, CONFRONTING DOMESTIC VIOLENCE: A GUIDE FOR CRIMINAL JUSTICE AGENCIES 55 (1986).

22. *Id.*

23. TASK FORCE ON FAMILY VIOLENCE, *supra* note 5, at 11 (citing THE AMERICAN HUMANE ASS'N, CHILD PROTECTION DIV., *Highlights of Official Child Neglect and Abuse Reporting, 1982* (1984)).

24. *See, e.g.*, Minn. Stat. § 518B.01 (1993) [hereinafter DOMESTIC ABUSE ACT]. According to one authority, "[a] survey published in 1985 revealed that every state had passed some form of legislation in response to concern about domestic violence . . . ." WALTER WADLINGTON, DOMESTIC RELATIONS: CASES AND MATERIALS 259 (3d ed. 1995). The rationale for such statutes is expressed in the Arkansas Domestic Abuse Act which states that "this chapter shall meet a compelling societal need and is necessary to correct the acute and pervasive problem of violence and abuse within households in this state." ARK. STAT. ANN. § 9-15-101 (1994).

25. The current intestacy scheme as it stands establishes a default scheme of property rights based on legal status alone, regardless of the beneficiary's behavior or the nature of relationship between the decedent and the intestacy beneficiary. This approach likely stems from the long held belief that behavior within the confines of the family was not a matter of public concern. *See* Franklin E. Zimring, *Legal Perspectives on Family Violence*, 75 CALIF. L. REV. 521, 522-28 (1987) (discussing the zone of privacy that has traditionally been accorded the family and which has defined the limits of legal inquiry).

26. Most of the facts used in this hypothetical scenario were taken from an actual Minnesota case. *See* State v. Hebert, No.C3-91-1882, 1992 WL 145327 (Minn. Ct. App. June 30, 1992). Unlike the hypothetical scenario, however, the Hebert case culminated in murder, where the angry and abusive husband ultimately killed his wife and buried her body in a shallow grave. The defendant was convicted of second-degree felony murder and sentenced to 150 months in prison. *Id.* at *1. Kate

riage has always been rocky and over the years John has repeatedly beaten Jane causing her to be hospitalized for her injuries on several occasions. The abuse over the years has included incidents where John picked up a baseball bat and threatened to hit Jane with it, threatened Jane's life, punched her in the head and, on one occasion, drove her out into a remote area threatening her with a knife. Jane has also told friends about black eyes and fleeing the couple's home to get away from John. Jane has called the police and 911 for help on several occasions. After years of such abuse, Jane finally sought a legal separation from John and an order for protection. Additionally, Jane moved out of the marital home into a battered women's shelter and eventually into her own apartment. Angered by her defiance, John continued to threaten Jane and violated the restraining order on at least one occasion, prompting Jane to call the police and have John arrested. She had been separated from John for six months when she was killed in a car accident on her way home from work. Jane left no will.

*Scenario #2*: Eric[27] is a young man in his mid-twenties. He has never been married and has no children, but has lived with his girlfriend Becky for five years. Although Eric is now a well adjusted and successful adult, as a child he was physically abused and neglected by his parents. His teachers noticed unusual bruises on his arms and legs on several occasions. Additionally, they observed that Eric often wore the same clothes to school for weeks at a time. His teachers reported their concerns to the social services bureau. The agency's investigation concluded that Eric had been physically abused and neglected by his parents. There were also some signs of sexual abuse. Consequently, Eric was removed from his parents' home and placed in foster care. Although he lived with the same family for many years, he was never formally adopted.[28] When he

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Hebert, the defendant's wife and victim, endured all of the abuse that occurred in this scenario and more. She had moved out of the home, into a women's shelter and into her own apartment. *Id.* She had been granted an order for protection against the defendant and had been separated from him for about six months at the time of the murder. *Id.* On the night of the murder, Kate had made arrangements with the defendant to look after their daughter while Kate attended a counseling session. When Kate arrived at the house, an argument erupted. The defendant then shoved Kate causing her head to slam against a bed post. The fall resulted in a depressed fracture of the occipital bone of Kate's skull causing her death. *Id.* at *2.

27. Although this scenario is not based on a specific case, disturbing cases of abuse and neglect abound. *See, e.g., In re* M.N., 1994 Minn. App. LEXIS 1021 (children beaten with cribbage board and books and denied food); *In re* C.K., 426 N.W. 2d 842 (Minn. 1988) (children beaten and threatened with knives and chains).

28. Under the UPC, had Eric been adopted, his biological parents would no longer have been able to inherit from him. *See* UPC § 2-114 (b) (1994) ("[a]n adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents"). The comment to this section notes that, "for inheritance pur-

turned eighteen, Eric moved out on his own and worked his way through college. When he collapsed and died suddenly of a heart attack, Eric had neither seen nor spoken with his parents in over ten years. He left no will.

*Scenario #3*: Ted is a middle-aged man in his forties.[29] He is not married and although he has a steady job, he is still largely dependent on family money and support. His grandparents were very successful in several business ventures and the family has continued to prosper. Ted is aware that when his grandmother dies (his grandfather having already passed-away) he will inherit a large sum of money under her will. Frustrated and distraught over his lack of financial independence, Ted conceived a plan to kill his ailing grandmother by smothering her with a pillow while she slept. One night after drinking heavily, Ted decided to act on his plan. He went to his grandmother's room and smothered her. Ted was subsequently arrested and prosecuted for the murder of his grandmother.

### *C. The Law's Response*

The above scenarios are disturbing, and in all cases involve criminal conduct. Yet, despite this violence and criminality, neither Minnesota intestacy law nor the Uniform Probate Code have any mechanism which would allow probate courts to consider the history of violence in the first two scenarios. Only when the violence reaches the level of murder does it command the attention of family property law.[30]

In *scenario #1*, for example, despite a clear record of physical abuse and violence, John is entitled to a substantial portion, if not all, of Jane's probate property under both Minnesota law and the Uniform Probate Code.[31] In distributing the property to John the

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poses, an adopted individual becomes part of the adopting family and is no longer part of the natural family." *Id.* at Comment Subsection (b). Thus, although adoption theoretically provides a possible remedy for someone like Eric, as a practical matter it is unlikely that adoption is a viable solution for most children who are victims of family violence.

29. This scenario is loosely based on the landmark case of Riggs v. Palmer, 22 N.E. 188 (1889). In *Riggs*, the grandson of the decedent was charged and convicted of the decedent's murder. *Id.* at 189. The court concluded that the grandson was barred as a matter of equity from taking any benefit due to his own wrongful acts. *Id.* at 189-90. *See also infra* part III.C.1. (discussing the significance of the case).

30. *See infra* part III.C.1. (discussing slayer statutes).

31. Depending on whether the decedent has any surviving children, the surviving spouse's share may be increased or decreased. *See* MINN. STAT. § 524.2-102 (1993) ("[t]he intestate share of the surviving spouse is . . . if there is no surviving issue of the decedent, the entire intestate estate"). The UPC, however, makes provision for surviving parents of a decedent without children. *See* UPC § 2-102 (1990)

probate court considers nothing beyond the legal existence of the marital relationship. The only issue for the court is the amount of his inheritance—not whether he is or should be entitled to the property. Even marital separation has no legal effect on intestate succession and is not considered by the court.[32] Only a final divorce[33] or the felonious killing[34] of Jane by John would terminate his intestate rights to Jane's estate.[35] Thus, family violence that does not reach the level of homicide is ignored by family property law. Instead, intestacy statutes *presume* that Jane would intend for her property to be distributed to her legal family — including her violent and abusive husband. As they currently stand, inheritance laws provide no mechanism for considering family violence. Legislatures and policy makers have deemed family violence irrelevant.

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("[t]he intestate share of a decedent's surviving spouse is: (2) the first [$200,000], plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent"). If Jane died leaving neither surviving descendants nor surviving parents, then John would be entitled to Jane's entire estate under the UPC. *See* UPC § 2-102 (1)(i) (1990). Under Minnesota law, if the decedent has surviving children, the surviving spouse is still entitled to a substantial portion of the decedent's estate, but less than the entire estate. *See* Minn. Stat. § 524.2-102 (1993) ("[t]he intestate share of the surviving spouse is . . . if there are surviving issue all of whom are issue of the surviving spouse also, the first $70,000, plus one-half of the balance of the intestate estate"). Under the UPC, however, the surviving spouse would be entitled to the entire estate if the only surviving descendants of the decedent were also descendants of the surviving spouse. *See* UPC § 2-102 (1)(ii) (1990) ("[t]he intestate share of a decedent's surviving spouse is: . . . the entire intestate estate if: . . . all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent").

32. MINN. STAT. § 524.2-802 (1993); UPC § 2-802 (1990) (stating that "[a]n individual who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse . . ." and that "[a] decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section").

33. *See* MINN. STAT. § 524.2-802, *supra* note 32; UPC § 2-802, *supra* note 32.

34. *See* MINN STAT. § 524.2-803 (a) (1993). This statute, known as a "slayer statute," provides that only "[a] surviving spouse, heir or devisee who *feloniously and intentionally* kills the decedent" is deprived of his or her property rights in the decedent's estate. *Id.* (emphasis added). Thus, a negligent, accidental or other killing that is deemed unintentional is not covered by this statute. The UPC requires the same degree of intent for the killer's interest in the decedent's estate to be revoked or forfeited. *See* UPC § 2-803 (b) (1990). *See also infra* part III.C.1. (discussing slayer statutes).

35. Once a favored relationship, such as marriage, is recognized by the probate court, there is virtually no way to alter or terminate the intestacy presumptions. Although one can avoid the intestacy scheme by writing a will, even a will cannot accomplish the complete disinheritance of an abusive spouse. *See infra* part III.E. (discussing the statutory provisions which intervene to protect a spouse from disinheritance as well as socio-economic and other factors which influence an individual's ability and motivation to write a will).

Similarly, in *scenario #2*, Eric's estate is subject to the same prescriptive and invariable intestate succession laws. Because Eric had no legal wife and no issue, intestacy law provides that his entire estate passes to his parents.[36] The court may not consider the history of abuse by the very parents who stand to benefit. The fact that Eric's parents failed fundamentally in their fiduciary duties as parents, to the extent that Eric's welfare could only be guaranteed by removing him from his home, is not considered.

In *scenario #3*, however, the law is finally willing to consider the criminal behavior of the beneficiary, Ted. Under a so-called "slayer statute,"[37] Minnesota law provides that the "surviving spouse, heir or devisee who feloniously and intentionally kills the decedent is not entitled to any benefits under the will or under this article, and the estate of decedent passes as if the killer had predeceased the decedent."[38] Thus, in Ted's case, the law shows a willingness to open its eyes and examine the behavior of the beneficiary, but only when it can no longer ignore his behavior — when in fact, it is the beneficiary's act of violence that triggers the laws of succession.[39]

The law's approach to the third scenario seems demonstrably correct. Common sense and equity dictate that Ted should not benefit from his criminal acts, especially where murder is involved.[40] For these and other reasons, slayer statutes operate to deny the killer any property interests in the decedent's estate.[41] Under a

36. *See* MINN. STAT. § 524.2-103 (1993). The statute provides that "[t]he part of the intestate estate not passing to the surviving spouse . . . or the entire intestate estate if there is no surviving spouse, passes as follows: (1) to the issue of the decedent . . . . (2) if there is no surviving issue, to the parent or parents equally." *Id. See also* UPC § 2-103 (1990) (same).

37. *See supra* note 34 and *infra* part III.C.1.

38. MINN. STAT. § 524.2-803 (a) (1993).

39. *See generally* Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489 (1986) (discussing slayer rule as necessary to preserve the integrity of the property transfer scheme).

40. In fact, the perception of inequity in allowing a murderer to benefit from the murder which he committed, motivated by that benefit, is the oldest rationale for slayer statutes. *See id.* at 492-93. Although other important policy reasons for terminating a killer's property interest in the decedent's estate have been demonstrated, equity remains a compelling consideration in this area of the law. *See id.* at 494-96 (discussing other rationales for the adoption of slayer statutes).

Indeed, equity underlies more recent criminal anti-profit or "Son of Sam" laws in effect in many states which prohibit a convicted murderer from collecting any profits from the publication or sale of the rights to his or her story. *See, e.g.*, ALA. CODE § 41-9-80 (1991); CAL CIV. CODE § 2225 (West Supp. 1994); MINN. STAT. § 611A.68 (1992); N.Y. EXEC. LAW § 632-a (1994 WIS. STAT. ANN. § 949.165) (West Supp. 1994). For a detailed analysis of these criminal antiprofit laws, *see* Sue S. Okuda, *Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality*, 76 CAL. L. REV. 1353 (1988).

41. *See supra* note 34 and *infra* part III.C.1.

slayer statute like that in Minnesota, the property will pass as if Ted had pre-deceased his grandmother.[42] Ted will not be able to take under his grandmother's will. The statutory scheme works well in Ted's case where a greed-motivated killing is involved because it both furthers donative intent[43] and conforms to social ideals of deterrence, equity and justice.[44] Yet where the violence falls short of murder, the law has so far failed to serve adequately either of these objectives. Current standards neither attempt to discover the decedent's likely intent, nor do they apply a strict standard to abusive conduct. Instead, they ignore both.

As the law now functions, an intestate victim of family violence is presumed to intend that his or her property pass to the abuser until the moment of death at the hands of the abuser. To illustrate the point: while the fatal blow is coming down upon the victim, the abuser's right to family property is intact. When the blow strikes and kills (only if it strikes and kills) is the abuser's inheritance right terminated, either because the decedent's intent is presumed to have suddenly shifted, or because the beneficiary's conduct has reached a point that the law cannot comfortably ignore. Regardless of the asserted rationale, however, the law presently takes an interest in the beneficiary's behavior only at the moment of death and not sooner. No matter how many blows have been struck before, until one is fatal the law is indifferent. Given the prevalence and gravity of family violence, this current threshold for the forfeiture of inheritance rights is intolerably high.

These hypothetical cases demonstrate the need for a family property scheme that requires probate courts to consider evidence

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42. *See* MINN. STAT. § 524.2-803(a) (1993) ("A surviving spouse, heir or devisee who feloniously and intentionally kills the decedent is not entitled to any benefits under the will or under this article, and the estate of decedent passes as if the killer had predeceased the decedent").

The UPC reaches the same result but uses language of revocation. *See* UPC § 2-803(c) (1993) ("The felonious and intentional killing of the decedent: (1) revokes any revocable (i) disposition or appointment of property made by the decedent to the killer in a governing instrument . . . ."); UPC § 2-803(e) (1993) ("Provisions of a governing instrument are given effect as if the killer disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the killer predeceased the decedent").

43. *See infra* part III.A. (discussing the goal of honoring the decedent's intent to the greatest extent possible).

44. Even in the context of intentional killing, however, some argue that current family property laws and specifically slayer statutes are less than ideal. For an in-depth discussion on the problems of mercy killings, *see* Jeffery G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 808 (1993) (asserting that the law of wills need not exactly parallel the criminal law and that "the slayer rule should not be applied in cases of mercy killing or assisted suicide, even if the criminal law continues to regard such actions as unlawful").

of family violence. As discussed in detail below, the adoption of the family violence statute would serve both a greater effectuation of a decedent's likely intent and further the important public policy goals of condemning and deterring family violence.

## II. The Proposed Reform

In light of the compelling policy reasons to address family violence in the context of family property law, the next step is constructing a viable statutory standard. Such a standard should further the public interest in condemning and deterring family violence without violating any rights of the abuser.[45] This article asserts that both can be accomplished by adopting the proposed family violence statute.[46]

### *A. The Proposed Family Violence Statute*

The proposed family violence statute would protect the estates of family violence victims such as Jane,[47] Eric[48] and others whose abuse and suffering are currently ignored. Under the proposed statute, the property rights of an abuser in the decedent's estate are forfeited where family violence committed by the abuser against the decedent is shown. The proposed statute creates two standards for determining whether family violence is present: the first is applicable to family violence committed against the decedent while an adult; the second applies to family violence committed against the decedent while the decedent was a minor. Under both standards, the court's inquiry is limited to only certain specified records of family violence. In addition, the benefits that are forfeited under the family violence statute are more limited than those forfeited under slayer statutes.

#### 1. Forfeiture of Statutory Benefits

Under the proposed statute, an individual who is found to have committed family violence against the decedent loses certain statutory inheritance interests in the decedent's estate. The proposed statute states:

> An individual who commits family violence against the decedent forfeits the following benefits with respect to the dece-

45. For purposes of this article and the proposed family violence statute, an abuser "is any family member of the decedent who commits family violence against the decedent . . . ." Proposed Family Violence Statute, subd. (a), *infra* at appendix A.

46. The full text of the proposed family violence statute is provided *infra* at appendix A.

47. *See supra* part I.B. and note 26 (scenario #1).

48. *See supra* part I.B. (scenario #2).

> dent's estate: an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, exempt property, and a family allowance. The decedent's intestate estate passes as if the abuser disclaimed his [or her] intestate share.[49]

This section defines what property rights are forfeited under the proposed statute. All of the benefits subject to forfeiture[50] are statutorily conferred benefits. As such, the primary purpose behind the proposed family violence statute — the condemnation and deterrence of family violence by refusing to give the state's imprimatur to perpetrators of family violence — can only be effectuated by requiring forfeiture of all statutory inheritance benefits.

With respect to decedents who die intestate, the proposed statute operates to forfeit the abuser's intestacy interest as well as the option of taking an elective share or the other statutory rights listed above.[51] When the decedent leaves a will which disinherits an abusive spouse or child, the proposed statute operates to override omitted spouse and omitted child shares.[52] This provision honors the intent of the victim of family violence who took actions to disinherit the abuser. Overriding omitted spouse and omitted child provisions is justified where family violence is present because it furthers both the donative intent of the decedent, as well as the public interest in deterring family violence.[53] Moreover, the traditional rationales for omitted spouse or child provisions are weak where family violence exists. The state's concern for a spouse omitted from the decedent's will or a child who is unintentionally disinherited is outweighed by the evidence of family violence indicating contrary intent, as well as outweighed by policies to condemn family violence.[54] Where the de-

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49. Proposed Family Violence Statute, subd. (b), *infra* at appendix A. This section is adapted from the forfeiture section of the UPC's slayer statute. *See* UPC § 2-803 (b) (1990).

50. For specific examples of statutory provisions establishing the benefits subject to forfeiture under the proposed family violence statute, *see* UPC § 2-202 (1990) (elective share); UPC § 2-301 (1990) (omitted spouse); UPC § 2-302 (1990) (omitted children); UPC § 2-402 (1990) (homestead allowance); UPC § 2-403 (1990) (exempt property); and UPC § 2-404 (1990) (family allowance).

51. *See supra* text accompanying note 49.

52. Under the UPC, a surviving spouse is protected from disinheritance due to a premarital will. *See* UPC § 2-301 (1990). A surviving spouse who is intentionally disinherited and is not the victim of a premarital will is also protected via a forced or elective share right. *See* UPC § 2-202 (1990). *See also* UPC, *Part 2: Elective Share of Surviving Spouse, General Comment* 73-74 (1983). The UPC also protects omitted children in certain situations. *See* UPC § 2-302.

53. *See infra* part III.A.-B. (discussing the ideal of honoring the decedent's likely intent and the public policy interests in deterring and condemning family violence as powerful rationales for adopting the proposed reform).

54. "In American law, the decedent's spouse is the only relative favored by a protection against intentional disinheritance. The decedent's children and possibly more remote descendants are granted protection only against unintentional disinheritance." WAGGONER ET AL., *supra* note 2, at 464.

cedent suffered family violence committed by the surviving spouse or child and has manifested an intent to disinherit the abuser, there is no longer any reason to ignore the decedent's intent and allow the abuser to benefit. When family violence is shown, the public policy interest shifts. The ideal of providing an economic safety net for a surviving spouse or child is supplanted by the necessity of condemning the family violence committed by the spouse or child.

It is also important to note that the proposed family violence statute does not go as far in the forfeiture of property as the Uniform Probate Code's slayer statute, upon which it is largely based.[55] Under the slayer statute, an individual who feloniously and intentionally kills the decedent also loses powers of appointment conferred on the killer by the decedent, as well as some trust interests, any interests in property held by the killer and the decedent as joint tenants, and other property and fiduciary interests.[56] Because of the lesser culpability of an abuser who does not kill, the proposed family violence statute is less extreme in its sanctions. In addition, the proposed family violence statute does not override express testamentary gifts to the abuser by the decedent. Thus, even where evidence of violence is present, the proposed family violence statute will not result in a forfeiture of the abuser's property where the decedent has left a will in which property is given to the abuser. Just as the proposed statute honors the decedent's intent where he or she leaves a will disinheriting the abuser, it honors the testamentary intent to pass property despite the infliction of family violence.

2. Inquiry Limited to Court Records

When determining whether a family member of the decedent committed acts of family violence against the decedent, the proposed statute limits the scope of the court's inquiry to existing civil or criminal records of the benefitting family members. For example, the statute does not permit the court to solicit testimony regarding the nature of the relationship between the decedent and any family member. The court may only consider records of convictions, arrests, or issuances of orders for protection to the extent that they document incidents of violence against the decedent perpetrated by the abuser.

The scope of the inquiry under the proposed family violence statute is purposefully more limited than under other abuse ori-

55. *See* UPC § 2-803 (1990).

56. *See id.* at subd. (c) (revocation of benefits under governing instrument).

ented statutes, such as Minnesota's domestic homicide statute.[57] Where homicide is involved, there is a stronger justification for considering any and all evidence of family violence which possibly led to the killing. The proposed family violence statute, however, would apply only to cases where the decedent's death was not caused by the abuser. The lesser culpability of the abuser requires a higher threshold for the loss of the property interest.

### 3. Past Pattern of Abuse Required for Family Violence Against the Decedent While an Adult

When the family violence was committed by the abuser against the decedent while the decedent was an adult, the proposed statute requires that a pattern of abuse against the decedent be shown. The statute provides that:

> Commitment of family violence resulting in forfeiture under section (b) is established:
>
> (1) by a past pattern of family violence committed by the abuser against the decedent within [5] years of the decedent's death when the family violence is committed against the decedent while the decedent was an adult. A pattern can be established only by (i) court documents showing a conviction of the abuser for family violence against the decedent; (ii) arrest of the abuser for family violence against the decedent; or (iii) an issuance of an order for protection on behalf of the decedent against the abuser.[58]

The pattern standard is modeled after the "past pattern of domestic abuse" standard employed in Minnesota's domestic homicide statute.[59] This standard does not require a specified number of incidents. Instead, it focuses on the relationship among such incidents, and their connection in time which creates a pattern.[60]

The proposed statute also ensures that relatively minor or isolated and remote instances of abuse will not be sufficient to deprive a beneficiary of his or her property interest in the decedent's estate. Only the specified records (of conviction, arrests or issuances of or-

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57. *See* DOMESTIC HOMICIDE STATUTE, *supra* note 6 (1992) (permitting the court to consider domestic abuse which "constitutes a violation of" domestic abuse statutes. The language of violation encompasses behavior which never resulted in arrest or any other legal action, but which nevertheless constitutes a *de facto* violation of the statutory standard).

58. *See* Proposed Family Violence Statute, subd. (c)(1), *infra* at appendix A.

59. *See* DOMESTIC HOMICIDE STATUTE, *supra* note 6, at subd. (6) (1992) (charging with first degree murder anyone who "causes the death of a human being . . . while committing domestic abuse, when the perpetrator has engaged in a past pattern of domestic abuse upon the victim and the death occurs under circumstances manifesting an extreme indifference to human life").

60. *See infra* part II.B.1. (discussing void-for-vagueness challenges to other statutes employing a pattern standard).

ders for protection) within the specified period ([5] years prior to the decedent's death) which establish a pattern of violence[61] would activate the statute. Thus, records establishing a pattern of violence outside the statutory period or a paucity of records within the statutory period would not result in forfeiture. This allows for the possibility that the abuser and the decedent may have reconciled, sought counseling or treatment, and the violence ended.[62] This approach furthers the goal of condemning family violence while acknowledging and supporting the efforts of those who have succeeded in confronting and conquering the problem.

4. Special Standard for Family Violence Against the Decedent While a Minor

The proposed statute creates a stricter standard for forfeiture where child abuse is involved. Public policy demands this result because of the clear abuse of trust and the ripple effects throughout later adult life of abuse suffered as a child.[63] Thus, to better protect the most vulnerable victims of family violence and to send a clear message to child abusers, the proposed statute states that:

> Commitment of family violence resulting in forfeiture under section (b) is established . . .
>
> (2) by court documents when family violence is committed against the decedent while the decedent was a minor. Court documents must show (i) a conviction for family violence by the abuser against the decedent while the decedent was a minor; (ii) action by governmental authorities to protect the decedent from the abuser; or (iii) a tort judgment against the abuser in favor of the decedent for family violence committed by the abuser against the decedent while the decedent was a minor.[64]

This standard ensures that evidence of family violence suffered by the decedent as a child, even if remote from the time of the decedent's death, will still come before the court. However, because of the remoteness of the abuse, the statute allows only very clear and

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61. By definition, a pattern requires more than one incident. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 841 (1977) (defining "pattern" as "a reliable sample of traits, acts, or other observable features characterizing an individual.") *See also infra* part II.B.1.

62. The author recognizes that this is not usually the result where family violence is involved. Family violence, as a general proposition, is often periodic or cyclical, and thus includes periods of "reconciliation." *See* TASK FORCE ON FAMILY VIOLENCE, *supra* note 5, at 2-3. This is not the type of reconciliation this provision seeks to accommodate. Rather, this allowance is intended to avoid the unnecessarily harsh results that can sometimes be produced by rigid and inflexible legal standards.

63. *See infra* notes 104-106 and accompanying text (discussing lasting effects of child abuse).

64. *See* Proposed Family Violence Statute, subd. (c)(2) *infra* at appendix A.

highly reliable evidence to effect forfeiture. Only a conviction of the abuser for family violence against the decedent while a minor, records of governmental action taken to protect the decedent from the abuser, or a tort judgment[65] in favor of the decedent against the abuser for family violence committed by the abuser against the decedent while the decedent was a minor would effect forfeiture.

### *B. Constitutional Issues*

If adopted, the proposed family violence statute would provide a new means of addressing family violence. However, because the proposed statute may revoke inheritance rights outside the established realm of homicide and slayer statutes, it will probably be attacked on several state constitutional grounds. The most significant challenges are likely to be that the statute (1) employs a standard that is unconstitutionally vague, and (2) contravenes prevalent state constitutional provisions forbidding the forfeiture of a criminal's property upon conviction. Because the proposed statute incorporates aspects of slayer statutes, which have been widely adopted despite similar objections, and portions of Minnesota's domestic homicide statute, it is unlikely that such challenges would succeed.

#### 1. Void-for-Vagueness

If adopted, it is likely that the "pattern" language of the proposed family violence statute would be challenged as unconstitutionally vague. The vagueness doctrine ensures that, as a matter of due process, a law is not so vague that "[persons] of common intelligence must necessarily guess at its meaning and differ as to its application."[66] The purpose of the doctrine is to invalidate statutes that either provide insufficient notice as to what type of conduct is prohibited, or that permit arbitrary and discriminatory enforcement by law enforcement officials.[67] Thus, to overcome this chal-

65. Cases of adult victims of child abuse bringing actions against parents and other family members for the infliction of physical or sexual abuse are becoming more common. Such actions often involve the use of recovered memories as evidence. *See, e.g.*, Farris v. Compton, 652 A.2d 49 (D.C. 1994); Phillips v. Johnson, 599 N.E.2d 4 (Ill. App. Ct. 1992). Although these actions and the validity and reliability of recovered memories are highly controversial, such suits are nonetheless highly probative for our purposes in two respects: (1) the intent of the decedent toward the abusive family member is clear, and (2) the judgment itself, if in favor of the decedent, is fully litigated evidence of the fact of violence.

66. Connally v. General Construction Co., 269 U.S. 385, 391 (1926). For a general discussion of the void-for-vagueness doctrine, *see* LAWRENCE W. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-28 (1978).

67. *See* TRIBE, *supra* note 66, at § 12-28.

lenge, the proposed family violence statute must demonstrate that it provides adequate notice of the conduct that would result in forfeiture and that the standard does not permit undue discretion in application by the courts. The statute satisfies both of these requirements.

First, the conduct which would result in forfeiture under the proposed family violence statute is adequately defined and provides clear notice of the triggering conduct. The operation of the statute depends on conduct that is either already unlawful[68] or that is the subject of other statutes or formal procedures.[69] In either case, the prior existence of the statutes and governmental procedures referred to in the proposed family violence statute ensures that there is adequate notice. The statute does not define or proscribe any new standard of conduct.

Second, due to the specificity of what conduct is prohibited under the statute, the standard does not give the courts unfettered discretion. The courts may only consider certain conduct and they must find that such conduct was part of a pattern of abuse and occurred within a specified time prior to the decedent's death.[70] Thus, the statute does not create a danger of discriminatory enforcement.

Additionally, in light of decisions in both state and federal courts upholding the use of pattern language where the conduct comprising the pattern is sufficiently defined, precedent indicates that the pattern standard will likely survive any vagueness challenge.[71] In Minnesota, for example, defendants have already chal-

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68. Specifically, the conduct that constitutes the forbidden family violence under the proposed statute is the same conduct that is already proscribed and criminalized as domestic abuse. *See* Proposed Family Violence Statute, subd. (a)(2), *infra* at appendix A (definition of family violence). The statute incorporates the definition of domestic abuse used in Minnesota's domestic abuse act. *See* DOMESTIC ABUSE ACT, *supra* note 24, at § 518B.01, subd. 2(a) (" 'Domestic abuse' means: (i) physical harm, bodily injury, assault, or infliction of fear of imminent physical harm, bodily injury or assault, between family members; or (ii) terroristic threats, within the meaning of (citations omitted), or criminal sexual conduct, within the meaning of (citations omitted), committed against a family or household member by a family or household member").

69. The issuance of orders for protection, the government's authority to act to protect a threatened child, or a tort judgment are examples of the other pre-existing statutory or governmental procedures to which the proposed family violence statute refers, and which define the scope of the court's inquiry. *See* Proposed Family Violence Statute, subd. (c), *infra* at appendix A.

70. *See* Proposed Family Violence Statute, subd. (c) (1), *infra* at appendix A. *See also supra* part II.A.3. (discussing the practical application of the proposed family violence statute's "past pattern" standard).

71. *See, e.g.*, H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989); State v. Christie, 506 N.W.2d 293 (Minn. 1993), *cert. denied*, 114 S. Ct. 1316 (1994); People v. Longoria, 862 P.2d 266 (Colo. 1993).

lenged the "pattern" standard of the state's domestic homicide statute as unconstitutionally vague.[72] Although the Minnesota Supreme Court has yet to rule on the constitutionality of the language in the domestic homicide statute,[73] the Minnesota high court did recently hold that the "pattern" standard incorporated in the state's patterned sex offender statute[74] was not unconstitutionally vague.[75] Similarly, the U.S. Supreme Court held that the "pattern" language in a federal RICO statute was sufficiently specific to survive a vagueness challenge.[76] The Court defined the term "pattern" at issue in the RICO statute as "an 'arrangement or order of things or activity,' . . . [i]t is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them 'ordered' or 'arranged.' "[77] Thus, the use of a pattern standard has been recognized as legally cognizable in other contexts and does not in and of itself present a barrier to the statute's constitutional validity.

Finally, it is noteworthy that the above vagueness analysis has traditionally been applied primarily to criminal statutes[78] and laws potentially applicable to protected expression.[79] The proposed family violence statute, however, is not a criminal statute and does not impose criminal liability. Nor does it address any form of protected expression. As a civil statute, it would be entitled to greater

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72. *See* Margaret C. Hobday, Note, *A Constitutional Response to the Realities of Intimate Violence: Minnesota's Domestic Homicide Statute*, 78 MINN. L. REV. 1285, 1307 (1994) (discussing void-for-vagueness challenges to Minnesota's domestic homicide statute).

73. This article was in press while the Minnesota Supreme Court was reviewing the state's domestic homicide statute. *See* State v. Grube, No. C1-94-518.

74. *See* MINN. STAT. § 609.1352 (Supp. 1994) (patterned sex offenders; special sentencing provision).

75. *See* State v. Christie, 506 N.W. 2d. 293 (Minn. 1993.)

> The plain language of the statute indicates that the statute afforded appellant fair warning as to his actions. The patterned sex offender statute is to be applied if the offender has been convicted of a predatory crime . . . and that crime was 'part of a predatory pattern of behavior that had criminal sexual conduct as its goal.' * * * Therefore, we hold that the statute is not void for vagueness.

*Id.*

76. *See* H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 299, 238 (1989).

77. *Id.* (citing 11 OXFORD ENGLISH DICTIONARY 357 (2d ed. 1989)).

78. *See, e.g.,* Lanzetta v. New Jersey, 306 U.S. 451 (1939) (voiding a statute on vagueness grounds which made it a crime to be a member of a "gang").

79. *See* TRIBE, *supra* note 66, at § 12-28 ("[T]he Supreme Court requires more specificity of a statute potentially applicable to expression sheltered by the first amendment than in other contexts . . . .") (*citing* Smith v. Goguen, 415 U.S. 566 (1974); Grayned v. City of Rockford, 408 U.S. 104 (1972)).

latitude in specificity than if it imposed criminal penalties.[80] Thus, even if the statute for some reason did not satisfy the above analysis, it is still likely to be upheld due to the lesser penalties involved.

2. Forfeiture of Estate and Corruption of Blood

Many states have constitutional provisions prohibiting the forfeiture of a criminal's property upon conviction.[81] This policy is traceable to the old common law doctrines of forfeiture of estate and corruption of blood.[82] These doctrines either deprived a person convicted of certain crimes of his property upon conviction, or prevented the person's issue from inheriting from or through that person.[83] In either case, the felon's heirs had to suffer the loss of their property rights. Ultimately, this harsh result spurred the abolishment of these doctrines.[84] In an effort to protect the families of criminals from the loss of family property and their inheritance rights, some states adopted constitutional provisions which prohibited the taking of a criminal's property.[85]

These constitutional provisions created some difficulties for legislatures wishing to adopt slayer statutes, and led to bizarre decisions by courts who reasoned that such provisions and slayer statutes were fundamentally incompatible.[86] Many states, however,

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80. *See, e.g.,* Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952) (upholding against a vagueness challenge an ordinance requiring carriers to "avoid, so far as practicable" "congested" routes).

81. *See, e.g.,* ARK. CONST. art. 2, § 17; COLO. CONST. art. II, § 9; IND. CONST. art. I, § 30; NEB. CONST. art. I, § 15.

82. *See generally* Alison Reppy, *The Slayer's Bounty — History of Problem in Anglo-American Law*, 19 N.Y.U. L.Q. REV. 229 (1942).

83. *See* Fellows, *supra* note 39, at 540 (summarizing these doctrines as they pertain to the constitutionality of slayer statutes).

84. *Id.*

85. *See supra* note 81.

86. *See, e.g.,* Hagan v. Cone, 94. S.E. 602 (Ga. App. 1917); Wall v. Pfanschmidt, 106 N.E. 785 (Ill. 1914); Wilson v. Randolph, 261 P. 654 (Nev. 1927).

In addition to slayer statutes, at least one domestic homicide statute was struck down for constitutional reasons. Tennessee adopted a domestic homicide statute in 1991. TENN. CODE ANN. § 39-13-202(a)(4) (1991). Subsequently, however, the statute was struck down on state constitutional grounds. *See* State v. Hale, 840 S.W. 2d 307 (Tenn. 1992). The Tennessee legislature, however, responded by amending the statute. *See* TENN. CODE. ANN. § 39-13-202(a)(4) (Supp. 1994).

The constitutional hurdles for domestic homicide statutes usually involve several issues: (1) the expansion of traditional *mens rea* for first degree murder liability, (2) void-for-vagueness challenges, and (3) the right to a fair trial. For an in depth discussion of the constitutional issues involved in domestic homicide statutes, *see* Hobday, *supra* note 72, at 1294-1317. For the most part, these concerns have either been largely resolved by Minnesota or other courts, or are irrelevant to the proposed reform. The *mens rea* concerns, for example, are irrelevant to the proposed family violence statute because the reform does not seek to define a new crime. Thus, no *mens rea* element is required. For a discussion of the vagueness issues, *see supra* part II.B.1.

which have adopted slayer statutes and have confronted this issue have resolved it in favor of the statute's constitutionality.[87] Further, if the policy behind these constitutional provisions against forfeiture was to protect innocent family members from the loss of family property, then this goal is only furthered by the proposed family violence statute.

Unlike the obsolete doctrines of forfeiture of estate and corruption of blood, which deprived the felon of *all* of his or her property, the proposed statute would only require that the abuser forfeit certain inheritance interests in the decedent's estate.[88] Property already owned by the abuser would not be affected. According to one scholar, "[a] more sound interpretation of the constitutional prohibitions against forfeiture of estate and corruption of blood suggests that they apply only when *the criminal's entire estate* is required to be forfeited."[89] This is not the case under the proposed family violence statute. Additionally, although it is arguable that even denying the abuser his or her statutory interests in the decedent's estate could deprive the abuser's heirs of potential property, this result is unlikely. In family violence situations, it is more likely that the decedent's heirs are also heirs of the abuser. By forfeiting the abuser's rights and distributing the property to the remaining family members of the decedent, the proposed reform would operate to divert additional property to the non-abusive heirs, rather than taking it from them. Thus, enduring state constitutional provisions prohibiting forfeiture of estate and corruption of blood are not likely to be obstacles to the enactment of the proposed family violence statute.

## III. The Rationale for Reform

There are many compelling reasons for adopting the proposed family violence statute. The statute would, in many cases, further the decedent's likely donative intent — a major goal of family property law. It would also serve as a powerful example of society's collective resolve to condemn family violence. In addition, the family violence statute's linkage of behavior and property rights is well supported by other legal precedent. Finally, the proposed family violence statute would provide a remedy for an injustice which is currently ignored and for which traditional means of controlling one's property may be of little, if any, utility.

87. *See* Fellows, *supra* note 39, at 538-45.

88. *See* Proposed Family Violence Statute, subd. (b), *infra* at appendix A.

89. Fellows, *supra* note 39, at 543 (emphasis added).

### *A. The Ideal of Honoring The Decedent's Likely Donative Intent*

The effectuation of the decedent's intent is a major goal of property law.[90] For example, where the decedent has a valid will the state is obligated to act in accordance with the decedent's express intent in distributing her property,[91] with limited exceptions such as elective share provisions.[92] Further, some states now excuse technical defects in order to effectuate the decedent's intent, if the will substantially complies with statutory requirements.[93] The 1990 Uniform Probate Code has gone a step further and includes a provision that would allow courts to dispense with the formal requirements of will execution and focus instead on the decedent's discernable intent.[94] This standard does not even require that for-

90. *See* UPC § 1-102 (1990). This section, entitled "Purposes; Rule of Construction" states that "[t]his Code shall be liberally construed and applied to promote its underlying purposes and policies." § 1-102(a). Among the purposes listed is the desire "to discover and make effective the intent of a decedent in distribution of his property." § 1-102(b)(2).

91. However, where a decedent attempts to create a will but fails to meet all of the statutory requirements, the decedent's express intent may be ignored entirely due to a defect in execution. In some instances, the result is that the decedent's will is declared invalid and the decedent's estate is administered under the laws of intestacy. *See, e.g.,* Estate of McKellar, 380 S.2d 1273 (Miss. 1980) (holding that the decedent's will was statutorily deficient for lack of the decedent's signature and therefore invalid). *See generally* WAGGONER ET AL., *supra* note 2, at 161-248 (discussing the formalities involved in the execution of wills).

92. Elective share provisions protect the surviving spouse and guarantee a statutory share in the decedent spouse's estate. As such, these provisions will override even an explicit intent on the part of the decedent to disinherit his or her spouse. *See, e.g.,* MINN. STAT. § 524.2-201, subd. (a) (1993) ("the surviving spouse has a right of election to take an elective share . . . ."); UPC § 2-202 (1990) (elective share).

93. *See, e.g.,* Will of Ranney, 589 A.2d 1339 (NJ 1991) (upholding a will signed by the attesting witnesses on the self-proved affidavit rather than on the will itself because execution substantially complied with statutory requirements). *See also* UPC § 2-502 (pre-1990). This section largely codifies the doctrine of substantial compliance by reducing the formal requirements previously required by the UPC. *Id.* The comment following this section notes that "[t]he formalities for execution of a witnessed will have been reduced to a minimum . . . . The intent is to validate a will which meets the minimal formal requirements." *Id.* at comment. The movement toward the doctrine of substantial compliance was bolstered when it was approved by the American Law Institute and incorporated into the Restatement 2d of Property. *See* RESTATEMENT (SECOND) OF PROPERTY § 33.1 (1990). "[T]he court should apply a rule of substantial compliance, under which a will is found validly executed if the document was executed in substantial compliance with the statutory formalities and if the proponent establishes by clear and convincing evidence that the decedent intended the document to constitute his or her will." *Id.* at comment.

94. *See* UPC § 2-503 (1990) (the formal requirements of will execution may be dispensed with in the court's discretion "if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute" the decedent's will, or revocation, addition, alteration or revival thereto). This provision entitled "Writings intended as wills, etc." is commonly referred to as the "dispensing power" provision. To date, this provision has

mal requirements of execution be substantially complied with where the decedent's intent is clear.[95]

Intestacy law, however, was developed to accommodate those who die without a will and thus whose donative intent is not expressly known to the state. To bridge this gap, intestacy law adopted a scheme that represented a typical decedent's dispositions.[96] Indeed, these dispositions, which favor spouses and lineal descendants, are deeply ingrained in Anglo-American law.[97] Although the idea of family has changed over time,[98] the tendency of people to leave their property to their family has remained rather constant.[99] As one noted family law scholar remarked:

> [i]n Western liberal democracies, intestate succession law is essentially designed to accommodate the needs of the typical decedent. As the law that applies if the decedent did not make other arrangements for the disposition of his property within the limits permitted by public policy, it is Everyman's will.[100]

So far then, the law has been satisfied to take an approach supported by statistics and probabilities,[101] confident that the option of

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been adopted in two states. *See* COLO. REV. STAT. ANN. § 15-11-503 (1994); MONT. CODE ANN. § 72-2-523 (1993). According to the comment following the UPC provision, "Section 2-503 means to retain the intent-serving benefits of Section 2-502 formality without inflicting intent-defeating outcomes in cases of harmless error." UPC § 2-503, *supra*, at comment.

95. *See* UPC § 2-503 (1990).

96. *See* WAGGONER ET AL., *supra* note 2, at 71. The text excerpts a passage from an opinion which is representative of this rationale:

> The purpose of these statutes . . . is to provide a distribution of real and personal property that approximates what decedents would have done if they had made a will. Spouses and children enjoy a favored position under the laws of intestate succession because, on statistical average, they are the natural objects of most peoples' [sic] bounty.

King v. Riffee, 309 S.E.2d 85, 87-88 (W.Va. 1983). *See generally* 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. 321 (reporting that the presumed dispositions of intestacy law reflect what a large portion of the population actually chooses to do when distributing its property).

97. *See* WAGGONER ET AL., *supra* note 2, at 69-71.

98. *See* MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 11 (1981) [hereinafter THE NEW FAMILY].

99. *See generally* Fellows et al., *supra* note 96.

100. GLENDON, THE NEW FAMILY, *supra* note 98, at 21. Further, according to Glendon, the rise in status of the spouse to the point where the spouse is now the favored beneficiary is nothing short of remarkable. *Id.* at 22. Glendon notes that historically, the spouse was largely left out of family property succession, with the emphasis placed on ascendants and descendants in the direct bloodline. *Id.* Over time, the law began to protect the spouse and the spouse gradually acquired a greater legal interest in the decedent's estate. The culmination of this trend is that today a surviving spouse is guaranteed a large portion of the decedent's estate. *Id.* at 24-25.

101. *See generally* Fellows et al., *supra* note 96.

writing a will offers a viable alternative for those with non-typical donative intentions.[102]

But, where the decedent's donative desires are not typical and the option of writing a will or executing will substitutes are not utilized,[103] this approach clearly fails to achieve its stated goal. Rather than effectuating the decedent's intent, the law overrides it and imposes its own "intent" with respect to property distribution. Saved costs and greater efficiency might justify this approach where there is little probative evidence of the decedent's intent and where an unflagging obligation to discover that intent would mire the court in lengthy investigations into every aspect of the decedent's life. However, where evidence is readily available to the court that is strongly indicative of the decedent's likely intent, there is no good reason to ignore this evidence. Such is the case where family violence is involved.

Instead of assuming and imposing an intent, the proposed family violence statute would, in essence, require the court to make sure that the decedent's actual intent was likely to be effectuated by the intestacy presumptions. In this regard, evidence of family violence committed against the decedent by a family member must be viewed as highly probative evidence of the decedent's intent — an intent *not* to distribute property to an abusive family member. If any intent is to be presumed and enforced via statute, it should be an intent *not* to pass property to a violent abuser. Thus, like slayer statutes, the proposed family violence statute should be adopted to further this intent. Effectuating this intent not to reward an abuser is both more likely to comport with the decedent's actual intent as well as with society's collective intent not to condone family violence.

### *B. Public Policy*

Society's collective desire to deter and condemn family violence is well founded. The effects of family violence extend far beyond the immediate victim to affect children and others who grow-up and live in an atmosphere of violence.[104] Statistics show that experiencing or witnessing abuse as a child is the greatest predictor of later criminal and abusive behavior.[105] According to national law enforcement officials, "[t]he tragedy of family violence goes be-

102. *But see infra* part III.E. (discussing why the legal ability to write a will is not necessarily a viable option for many).

103. *See* Fellows, et al., *supra* note 96; *see also* John M. Astrachan, *Why People Don't Make Wills*, 118 TR. & EST. 45 (1979).

104. *See* TASK FORCE ON FAMILY VIOLENCE, *supra* note 5, at 2-3.

105. *Id.*

yond the pain of any single episode. The research of the past decade has demonstrated the frightening degree to which family violence is cyclical in nature, with violence in one generation begetting violence in the next."[106] Public policy regarding this violence, however, has been expressed almost exclusively through criminal law.[107] Yet given the compelling policy reasons for condemning family violence on all fronts, the failure of family property law to do so is intolerable. Further, unless a statute like the proposed family violence statute is adopted, family property law will continue to unwittingly reward perpetrators of family violence by allowing them to inherit property from the very person they abused.

Additionally, if serving the donative intent of the decedent, as discussed above, is the only recognized purpose for reform, then many victims of family violence may not be helped. A solely intent-based rationale will not support forfeiture of an abuser's inheritance rights where evidence of the decedent's intent is unclear or seems to be in favor of distribution to an abuser. For example, recall Jane from the first scenario discussed above.[108] Jane had the strength and independence to extract herself from her abusive marriage, seeking the assistance of a shelter and ultimately moving into her own apartment. In Jane's case the evidence of her intent to disassociate herself from her husband is very strong. One believes that but for her untimely death, Jane would have divorced John and thereby terminated his intestacy rights. Thus, under an intent based rationale, it is easy for the law to recognize Jane's intent and deny John his inheritance interest in Jane's estate in order to serve her intent.

But what if Jane, like many abused women, did not leave?[109] Many studies have shown that abused women and wives in particular believe they will be in more danger if they do leave or feel com-

106. *Id.* at 2.

107. The criminalization of violence across the spectrum, including all forms of family violence, has been society's primary approach to the problem. In this respect, much progress has been made, such as the recognition and criminalization of more subtle and complex types of violence like terroristic threats. *See* MINN. STAT. § 609.713 (1994) (criminalizing terroristic threats); DOMESTIC ABUSE ACT, *supra* note 24 (including terroristic threats within the definition of domestic abuse).

108. *See supra* part I.B.

109. The inability of many women to leave an abusive and violent relationship has come to be known as "battered woman's syndrome." *See generally* LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984). Further, some feminist theorists posit that women's greater sense of obligation and responsibility regarding family life explains why they often remain in violent relationships. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 19-23 (1991) (showing that asking "why didn't she leave" is the wrong question).

pelled to stay for economic and family reasons.[110] Further, many such victims may actually desire that the abuser's property rights be preserved and that no punitive action be taken against their abuser.[111] To be effective, any reform that seeks to address family violence must be justified by more than a desire to honor the decedent's intent. The reality is that the decedent's intent may sometimes conflict with the public interest in condemning family violence.

It is precisely because in many abusive situations evidence of the victim's donative intent may be lacking or contrary to public policy that this reform is most needed. Moreover, research suggests that any apparent intent of a family violence victim to reward the abuser must be viewed as itself a product of the violence.[112] Such apparent "intent" is more likely a coerced state of mind resulting from repeated and continued abuse. As a result, honoring such an "intent" is akin to honoring the intent of the abuser instead of that of the decedent.

The seriousness of family violence, however, and society's interest in fostering healthy families and a stable community requires that the forfeiture apply in these situations. Thus, even where the intent of an intestate decedent is unclear or apparently in favor of the abuser, the public interest in condemning family violence should be effectuated and the abuser's property rights forfeited. Only where the decedent has clearly expressed an intent to pass property to the abuser by will or will substitutes should such an intent be honored.[113]

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110. *See* WALKER, *supra* note 109; Mahoney, *supra* note 109; Tong, *supra* note 9.

111. *See generally* WALKER, *supra* note 109. *See also* Tong, *supra* note 9, at 124-50 (discussing the psychological syndrome suffered by battered women).

112. *See* Mahoney, *supra* note 109, at part III (stating that battering is about domination which includes a process of separation assault by the abuser who seeks to dominate the "woman's body and volition."). *Id.* at 65.

113. While such an intent may still remain troubling for society generally, the primary problem this article seeks to address is the statutory presumption that an individual victim of family violence intends for his or her property to pass to the abuser despite the abuse. This presumption arises when the decedent dies intestate. In addition, other statutory provisions presume that it is always desirable to protect a spouse from intentional disinheritance. This presumption is similar to the intestacy presumption and is just as problematic in the context of family violence. Both approaches work to defeat the intent of the decedent while also contravening the public interest in condemning family violence by rewarding the abuser with the decedent's property. Each of these situations is addressed by the proposed family violence statute. When the decedent leaves a valid will which expressly states an intention to pass property to an abusive family member, however, different issues are involved. Given that the ideal of donative freedom remains a cornerstone of property law, only the strongest of rationales is likely to justify overriding a decedent's explicit intent.

### C. *Precedent for Linking of Familial Behavior and Property Rights*

In addition to the larger policies that would be served by the adoption of the proposed family violence statute, there is also strong precedent for the linking of behavior within the family to family property rights. The widespread adoption of slayer statutes and the declining doctrine of abandonment, desertion, or refusal to support are two significant examples.

#### 1. Slayer Statutes

Currently most states have some form of a slayer statute which terminates the property rights of beneficiaries who murder or otherwise intentionally cause the premature death of the decedent.[114] Although state requirements vary,[115] most jurisdictions follow the example of the Uniform Probate Code which provides that, "[a]n individual who feloniously and intentionally kills the decedent forfeits all benefits under this Article with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, exempt property, and a family allowance."[116]

The slayer rule was first promulgated in New York in the late eighteenth century in *Riggs v. Palmer*.[117] The court relied on the equitable doctrine that a person should not benefit from his criminal acts.[118] More recently, however, as the slayer rule has been embraced by state legislatures across the country, it has come to be viewed as a necessary safeguard of the property transfer system.[119] When the beneficiary's criminal act of homicide is viewed as a disruption of the property transfer scheme, the state has an interest in punishing such action in order to preserve its own order. According to one family law scholar, killings motivated by greed,

> potentially interrupt the normal disposition of property in three ways: the killings cause the victims to lose personal enjoyment of their property; the killings may deny the victims the opportu-

114. *See, e.g.*, ALASKA STAT. § 13.11.305 (1994); ALA. CODE § 43-8-253 (1994); CAL. PROB. CODE § 250 (Deering 1995); IDAHO CODE § 15-2-803 (1994); ME. REV. STAT. ANN. Tit. 18-A, § 2-803 (West 1994); MINN. STAT. § 524.2-803 (1994); MONT. CODE ANN. § 72-2-813 (1994); N.M. STAT. ANN. § 45-2-803 (Michie 1994); S.C. CODE ANN. § 62-2-803 (Law. Co-op 1993).

115. *See, e.g.*, ARK. STAT. § 28-11-204 (1994) (requiring a conviction to precipitate forfeiture); MICH. STAT. ANN. § 27.5251 (Callaghan 1993) (allowing court to make independent inquiry into beneficiaries intent etc.).

116. UPC § 2-803 (b) (1990).

117. 22 N.E. 188 (1889). *See also supra* note 29 and part III.C.1.

118. *Riggs*, 22 N.E. 188, at 190.

119. *See generally*, Fellows, *supra* note 39.

> nity to change their existing estate plans; and the killings interfere with the order of death of the victims and the slayers, placing property transfers conditioned on survivorship in jeopardy of being controlled by surviving slayers.[120]

Thus, whether or not one subscribes to the equitable and moral justifications for the doctrine and their place in the law, it seems clear that the harms from such conduct extend beyond the moral realm. When a beneficiary kills to obtain property the fabric of government authority and regulation is interfered with and disrupted.

With respect to family violence, however, the non-equitable rationale is less clear. Unlike in slayer situations, where the proposed family violence statute would apply, the deaths are not caused by the abuser. Thus, there is no parallel interference with the property transfer scheme. Nevertheless, to the extent that the law of intestacy is designed to serve the following purposes, the violence is problematic: first, if intestate statutes are intended to mimic the most likely disposition of the intestate's property yet they ignore evidence probative of the intestate's donative intent, the intent-honoring objective is not being served; second, if, as has historically been the case, inheritance rights are intended to reflect societal values and favored familial behavior,[121] the systematic ignorance of family violence is both disturbing as a social model and contradictory to the objectives of the law in other areas.

At its core, the proposed reform simply transposes the policies behind the widely promulgated slayer statutes into the context of family violence. While the equitable doctrine underlying the slayer statutes is relevant to this inquiry,[122] the proposed family violence statute focuses on the function of intestacy statutes as a proxy for the intestate's most likely donative intent as well as the law's function as a primary sculptor of societal attitudes and behavioral norms.

### 2. Abandonment, Desertion or Refusal to Support

As discussed above, the law of succession is primarily concerned with the effectuation of the decedent's intent to the extent it is discernable.[123] While the law has demonstrated a willingness to override the decedent's intent in order to protect family members,[124] it has also shown a willingness to examine the behavior of

120. *Id.* at 493.

121. *See* GLENDON, *supra* note 3. *See also* WAGGONER ET AL., *supra* note 2.

122. *See* Fellows, *supra* note 39, at 490-91 (discussing and evaluating the historical reliance on equity as the primary justification for slayer statutes).

123. *See supra* part III.A.

124. For example, elective share provisions protect the surviving spouse from disinheritance by guaranteeing a statutory share in the decedent spouse's estate.

the beneficiary. For example, in a few jurisdictions spousal rights to the decedent's estate depend on the surviving spouse's behavior toward the decedent.[125] In these jurisdictions, statutes creating spousal rights in a decedent spouse's estate "also include express provisions excluding from the benefits, a spouse who has been guilty of specified misconduct, usually including as a ground of forfeiture, abandonment or desertion."[126]

The Uniform Probate Code, however, has rejected this approach, as have most states.[127] Under the Uniform Probate Code adultery, abandonment and other behavioral standards are no longer grounds for terminating spousal property rights.[128] Only divorce or the killing of one's spouse will terminate spousal property rights.[129] Thus, as the comment to the Uniform Probate Code provision regarding the "Effect of Divorce, Annulment, and Decree of Separation" explains, "the present section requires some definitive legal act to bar the surviving spouse. Normally this is divorce."[130] As a result, violent and abusive behavior by one spouse toward another is unavailable as a grounds for terminating spousal property rights under the Uniform Probate Code. While the trends that led to the widespread repeal of subjective behavioral standards are progressive in many ways, it does not necessarily follow that all standards for considering the behavior of the surviving spouse or other beneficiaries should be eliminated. Many of the policy reasons behind these old standards remain compelling in the context of family violence.

A primary distinction between these old behavioral standards and that of the proposed family violence statute is that the former restrictions applied only to the surviving spouse of a decedent and not to other family members. This probably resulted from the fact that "[i]n American law, the decedent's spouse is the only relative

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These provisions will override even an explicit intent on the part of the decedent to disinherit his or her spouse. *See, e.g.*, MINN. STAT. § 524.2-201 (1993) ("the surviving spouse has a right of election to take an elective share . . . ."). § 524.2-201 (a); UPC § 2-202 (1990) (elective share). *See also generally* WAGGONER ET AL., *supra* note 2, at 464.

125. E.L. Strobin, Annotation, *Abandonment, Desertion, or Refusal to Support on Part of Surviving Spouse as Affecting Marital Rights in Deceased Spouse's Estate*, 13 ALR3d 446, 449 (1994).

126. *Id.*

127. *See, e.g.*, UPC § 2-802 (1990) and comment following (discussing the effect of divorce, annulment, and a degree of separation on spousal property rights under the UPC and commenting that normally only an act which affects the spouse's legal status as a spouse will suffice to terminate spousal property rights).

128. *Id.*

129. *Id. See also, supra* part III.C.1.

130. UPC § 2-802 (1990) at comment.

favored by a protection against intentional disinheritance."[131] Thus, the greater protection provided to the surviving spouse came at the price of loyalty to the decedent. In so far as this continues to be the case, revocation of spousal rights is best analyzed under confidential relationship theory discussed below.[132]

The absence of historical restrictions on the behavior of other family members with respect to the decedent, however, takes on new significance where family violence is involved. As noted above, the current intestacy scheme modeled in the Uniform Probate Code does not protect the decedent's children or other relatives of the decedent from intentional disinheritance.[133] Yet it presently presumes an intent on the part of the decedent to pass property to abusive family members who, but for the decedent's lack of a will, could otherwise be completely disinherited. It is ironic that what family property law will allow by the explicit expression of the decedent's intent (i.e. the intentional disinheritance of family members other than the surviving spouse, for any reason or no reason), it will not presume even where there is evidence of family violence — behavior which contravenes compelling public policy interests. Recall, for example, the second scenario discussed above involving Eric and his girlfriend Becky.[134] Although Eric could have disinherited his parents entirely and for any reason, had he left a will, they will nevertheless be entitled to a portion of his estate despite their abuse of him because their behavior is not currently considered a part of the family property equation.

### *D. Other Relevant Precedents Supporting the Proposed Family Violence Statute*

The proposed statute is also supported by more recent and innovative approaches to legal problems. Confidential relationship theory, traditionally a means of policing economic transactions,[135] reinforces the need for reform when applied in the context of family violence. Additionally, Minnesota's progressive domestic homicide statute also serves as a valuable model of reform spurred by a comprehensive understanding of the nature of family violence.

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131. *See* WAGGONER ET AL., *supra* note 2, at 464.

132. *See* text *infra* part III.D.1.

133. Both Minnesota law and the UPC, however, provide a remedy for the unintentional disinheritance of the decedent's children. *See* MINN. STAT. § 524.2-302 (1993) (pretermitted children); UPC § 2-302 (1990) (omitted children).

134. *See supra* part I.B. (scenario #2).

135. For a general discussion of the common law doctrine of confidential relationship, *see* 4 G. PALMER, THE LAW OF RESTITUTION, §§ 19.2-3 (1978).

1. Confidential Relationship Theory

An issue related to the behavioral standards discussed above is the existence of a confidential relationship[136] between spouses and family members. Because of this special relationship, the mere existence of criminal laws and penalties to deal with family violence is not a sufficient response. Unlike an assault between strangers, there is more involved in family violence than just violence. Family members stand in a fiduciary and confidential relationship to each other. This is especially true in the parent-child context where a parent is legally liable for the welfare of his or her children.[137]

Such a fiduciary relationship also exists between spouses.[138] Indeed, in these situations the abusers, as family members, are in a class of persons entitled to special rights not extended to friends, intimates and other non-family members.[139] Succession law has chosen to confer special rights and benefits to individuals who participate in a traditional family.[140] These benefits are undoubtedly a form of reward or incentive for individuals who engage in behavior and assume responsibilities favored by the state — monogamy, marriage and child rearing. When viewed from this perspective, it becomes apparent that to address only the criminal aspect of family violence (i.e. the violence itself) is to ignore the breach of duty and special relationships involved — relationships encouraged and rewarded by society generally. Given the special rights of family privilege, it seems only appropriate to demand that the law address the behavior of those who not only violate the criminal law, but the public policy interests in healthy and stable family environments.

To the extent then, that the system is successively seeking out and punishing familial abusers under the criminal law as it would

136. Black's Law Dictionary defines the confidential relation as, "[a] fiduciary relation . . . which exists between . . . parent and child, . . . ancestor and heir, . . . husband and wife." BLACK'S LAW DICTIONARY 298 (6th ed. 1990). It summarizes the legal doctrine of confidential relationship, stating that "the law, in order to prevent undue advantage from the unlimited confidence or sense of duty which the relation naturally creates, requires the utmost degree of good faith in all transactions between the parties." *Id.*

137. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 3.3 (a) (1), at 203-04 (2d ed. 1990) (discussing common law affirmative duties to act based upon certain relationships to other persons, including the duty of parents to aid, protect and otherwise take reasonable steps to care for their children).

138. *Id. See also* Beverly Balos & Mary Louise Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 MINN. L. REV. 599, 601 (1991) (asserting the need for the application of confidential relationship theory to cases of nonstranger rape in order to overcome difficulties in the prosecution of such cases).

139. *See supra* part I.C. (discussing current statutory scheme of family property rights and guarantees).

140. *Id.*

in a non-family context, the criminal law is doing its job.[141] Yet to the extent that we do not address the breach of fiduciary duty also involved, we are failing to attack the entire problem. To punish the behavior in one context, yet ignore it in another context specifically designed to encourage families and support familial relationships is difficult to reconcile. Law enforcement officials themselves have stressed the need for a more expansive attack on family violence. The U.S. Attorney General's Office has stated that "[i]ntervention in family violence cases cannot be limited to the criminal justice system. There must be a strong, coordinated effort by the criminal justice system, victim assistance agencies and the entire community."[142]

### 2. Minnesota's Domestic Homicide Statute

Aware of and concerned about family violence, Minnesota legislators in 1990 voted to amend the first degree murder statute to include liability for anyone who "causes the death of a human being . . . while committing domestic abuse, when the perpetrator has engaged in a past pattern of domestic abuse upon the victim and the death occurs under circumstances manifesting an extreme indifference to human life."[143] The statute reflects an unusual and aggressive approach to the problem of family violence in that it imposes first degree liability for extreme recklessness rather than intent to kill,[144] the traditional standard for first degree murder liability.[145] The statute "presumes intent based on a number of factors, including the victim-defendant relationship and the defendant's repeated abuse of the victim."[146] The statute is important, however, not because it presumes intent based on other behavior,[147] but because it

141. There is evidence, however, to suggest that even on this front family violence is not being adequately acknowledged and prosecuted. *See, e.g.*, O'Doherty & Wolfson, *supra* note 11.

142. TASK FORCE ON FAMILY VIOLENCE, *supra* note 5, at 5-6.

143. DOMESTIC HOMICIDE STATUTE, *supra* note 6, at subd. (6).

144. Few jurisdictions have adopted domestic homicide statutes. Other jurisdictions which have taken this approach include Washington and Tennessee. *See* WASH. REV. CODE § 9A.32.055 (1988) (imposing first degree liability where the defendant is shown to have "previously engaged in a pattern or practice of assault or torture" of the victim); TENN. CODE ANN. § 39-13-202(a)(4) (1991) (amended in 1993) (imposing first degree liability where it is shown that the "death result[ed] from one or more incidents of a protracted pattern or multiple incidents" of abuse).

145. *See* LAFAVE & SCOTT, *supra* note 137 (discussing traditional *mens rea* requirements and standard for traditional murder liability).

146. *See* Hobday, *supra* note 72, at 1286.

147. The criminal law already recognizes that intent may be inferred from other acts. For example, felony murder statutes impose first degree murder liability where the defendant was engaging in felonious conduct and the death was foresee-

infers intent from the abusive relationship between the defendant and the victim — the "past pattern of domestic abuse."[148]

Although other states have been slow to follow Minnesota's progressive lead, the domestic homicide statute still serves as a valuable example of the viability of a more vigorous family violence policy and the need for new approaches to the problem. In addition, the domestic homicide statute implicitly recognizes two important aspects of family violence that are otherwise largely ignored by current approaches to the problem: first, that family violence is a process and thus it is the pattern of abuse that must be addressed by the law, regardless of the number or severity of the individual acts forming the pattern; and second, that family violence is a crime of trust as well as of violence — that is, such violence is arguably more disturbing than violence among strangers precisely because of the existence of a confidential relationship between the victim and the abuser. The domestic homicide statute's use of a pattern standard as well as the imposition of greater liability upon family members who abuse to the point of death marks the beginning of an new approach to family violence. This more informed understanding of family violence is incorporated in the proposed family violence statute.

### *E. Writing a Disinheriting Will or Seeking Divorce From the Abuser: False Solutions to the Problem of Family Violence*

Related to the need for a more informed understanding of the complexity of family violence, is the additional need to recognize that traditional methods for handling property disposition are inadequate where family violence is present. Just as family violence is more than a crime of violence, family property distribution involves more than matters of property. For example, one might question why the ability to write a disinheriting will is not an adequate remedy for an abused family member. The answer to this question is not simply a matter of the decedent's intent.

While every competent adult has the power to write a will, there are many intervening forces that may either prevent the writing of a will or partially defeat it, even if written and otherwise valid.[149] One study showed that sixty-five percent of individuals

able. *See, e.g.,* Domestic Homicide Statute, *supra* note 6, subd. (3). *See generally* LAFAVE & SCOTT, *supra* note 137, at § 2.13, § 7.5.

148. DOMESTIC HOMICIDE STATUTE, *supra* note 6, at subd. (6).

149. Current statutory provisions, such as a spouse's right to an elective share and omitted spouse provisions, operate to defeat such attempts at disinheritance. *See, e.g.,* UPC § 2-202 (1990) (elective share); UPC § 2-301 (1990) (omitted spouse

surveyed with a family income under $50,000 had no will.[150] The study also produced the following statistics:

| Estate Size: | Have Will | No Will |
|---|---|---|
| $0-$12,999 | 14.7% | 85.3% |
| $13,000-$24,999 | 23.6% | 76.4% |
| $25,000-$49,999 | 38.8% | 61.2% |
| $50,000-$99,999 | 50.2% | 49.8% |
| $100,000-$500,000 | 69.0% | 31.0% |
| Family status: | | |
| No children | 10.9% | 89.1% |
| Some minor children | 32.2% | 67.8% |
| All adult children | 72.6% | 27.4%[151] |

These statistics show a correspondence between the size of an individual's estate and the likelihood that the individual would have a will. The presence of children in a family also seems to correlate with will writing.[152] Thus, will writing seems to be primarily a function of economic desirability or practical need. Those with less property may find will writing and the consulting of a lawyer too costly and time consuming. Couples with no children may have less motivation to write a will because there are no dependents to worry about.

Unfortunately, statistics also demonstrate that individuals in lower economic groups are at somewhat greater risk for family violence.[153] While family violence pervades every segment of soci-

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provision with respect to a premarital will of the decedent stating that "[i]f the testator's surviving spouse married the testator after the testator executed his [or her] will, the surviving spouse is entitled to receive, as an intestate share, no less than the value of the share of the estate he [or she] would have received if the testator had died intestate.") *Id.* This section applies only to a premarital will and imputes an intent to the testator similar to that attributed to the decedent under the intestacy statutes. According to the comment following this section, "[t]his section reflects the view that the intestate share of the spouse in that portion of the estate not devised to certain of the testator's children . . . is *what the testator would want the spouse to have* if he or she had thought about the relationship of his or her old will to the new situation" (emphasis added). *Id.* at comment. *See generally* WAGGONER ET AL., *supra* note 2, at 473-78 (discussing the elective share doctrine).

150. *See* Fellows et al., *supra* note 96, at 336-39.

151. *Id.*

152. These statistics, however, may partially reflect an individual's advancing age which has also been shown to increase the likelihood that an individual will have a will. *Id.*

153. Statistics compiled by the U.S. Department of Justice indicated that the highest victimization rates for family assault occurred in families with annual incomes of $29,999 or less. *See* CRIMINAL VICTIMIZATION, *supra* note 12, at 152 (Table V). Further, the lowest victimization rates for assault by a family member occurred in families in the highest income groups—those with an annual income of $30,000 or more. *Id.*

ety,[154] some segments appear to be hit harder than others. Thus, ironically, intestacy statutes may apply a scheme of presumed dispositions to a segment of the population where a greater prevalence of family violence shows such presumptions may be least warranted. Divorce is also not a solution. Not only is divorce not available as a practical matter to some victims of family violence, such as children and elderly relatives,[155] but it may actually increase the violence.[156] Statistics show that often divorce actually increases the abusive behavior and the likelihood that the victim, often the former wife, will suffer serious bodily harm, if not death.[157] Finally, whether the traditional remedy offered be the writing of a will or the seeking of a divorce, these formal and independent actions are often beyond the abilities of victims of family violence precisely because they have been abused into subservience and have assumed the role of victim and dependent.

## IV. Practical Implementation of the Reform

As with any proposed reform, the attempt to provide an answer to a problem often only elicits more questions. Aside from the possible state constitutional challenges to the proposed family violence statute discussed above,[158] several non-legal practical con-

154. *See* Asmus et al., *supra* note 8, at 121 ("domestic violence occurs in all socio-economic and racial groups") (*citing* ADVOCACY PROGRAM DATA SUMMARY REPORT, MINNESOTA DEP'T OF CORRECTION PROGRAM FOR BATTERED WOMEN 84-86 (1987)).

155. Although a few cases where children sought to divorce their parents were widely covered in the media, this practice is not only extremely rare, but practically insignificant. *See* Kingsley v. Kingsley, 623 So.2d 780 (Fla. Dist. Ct. App. 1993). In the *Kingsley* case it is likely that the child's action was supported and funded by his foster/adoptive parents. Without such rare emotional and financial support, it would be extremely difficult, if not impossible, for child victims of family violence to seek divorce as a viable remedy.

Further, even if such a remedy was more widely accepted and available, it would probably prove too costly and time consuming for many victims. In the case of adult children of abusive parents who are living independently, there is little motivation to seek such a drastic legal remedy. These individuals are no longer living in the family home and may have effectively cut-off all social relations with the abuser(s). Yet, if they die intestate, any clear intent to disengage from the abusive family member will be ignored to the extent that, depending on individual circumstances, the abuser may take all or a significant amount of the victim's estate. Similarly, dependent elderly relatives might be reluctant to seek divorce.

156. *See* CRIMINAL VICTIMIZATION, *supra* note 12, at Appendix V; Mahoney, *supra* note 109, at 58. Mahoney notes that conflicting studies indicate that threatening to leave an abusive relationship "may be very effective at ending the violence" or it may cause the violence to escalate. *Id.* (citation omitted). Thus, Mahoney asserts that we need to consider the victim, usually the battered wife, "the best judge on this issue," because she is both the target of the violence and the closest observer. *Id.* at n.2.

157. *See* CRIMINAL VICTIMIZATION, *supra* note 12, at Appendix V.

158. *See supra* part II.B. (discussing state constitutional challenges to the proposed family violence statute).

cerns regarding the implementation of the proposed statute also need to be considered. Below, many of these questions and concerns are anticipated and addressed.

### *A. The Privacy Concern*

Concerns about family privacy and unwarranted government intrusion into intimate relationships are of great significance. The proposed reform, however, is actually highly protective of family privacy. Under the proposed statute the court will only be able to inquire to the extent the state has already recognized the violence and intervened by issuing an order for protection, removing a child from the home, or arresting or convicting a family member for family violence against the decedent.[159] In other words, the probate court will only be able to go where the criminal law or child welfare agencies have gone before it. Thus, the reform merely allows the state via its probate courts to act on knowledge it already has. Where the other branches of the law have made the decision to intervene and take action, it makes little sense to keep the probate court and family property law in the dark. More importantly, however, there is no significant privacy issue created because the scope of the inquiry is limited to public records. By definition, the criminal law has already determined the specified actions or offenses to be a matter of public concern, not family privacy.

Moreover, the privacy of the family has increasingly given way to overriding state interests in other areas. A noted criminal law scholar has observed that:

> The taking of life, incest, and the imminent threat to the life or health of a minor child all trigger the law's willingness to penetrate the privacy of family life because family privacy considerations are outweighed by other important public goals. An issue in the current debate about spouse battering and about the proper threshold for intervention to halt child abuse concerns whether other behaviors should be added to the short list that has been a staple element of the jurisprudence of family privacy all along.[160]

The persistence of widespread family violence and the need to address the problem consistently across all fronts of the law, as demonstrated in this article, confirm that the answer is yes.

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159. *See supra* part II.A. (discussing operation of proposed family violence statute).

160. *See* Zimring, *supra* note 25, at 526.

### B. *Concern that Denying Intestate Share to Abuser Would Drive a Wedge Into the Family*

This perception is related to the family privacy issue. The sacredness of family privacy was long used to shield abusers and the rest of society from the ugly reality that many torts and crimes are committed within the confines of the family structure. In the name of family privacy, courts frequently declined to intervene in a variety of familial disputes, ranging from a wealthy husband's refusal to provide his wife with indoor plumbing,[161] to incidents of serious violence.[162] Courts often justified their policy of nonintervention by asserting that it was better for the family if they were left to work the problem out among themselves. One scholar summarized this view stating: "Preferring to assume that the wedge is driven by intervention rather than violence, it reflects an ideology in which the 'sanctity' of marriage and the family supersedes the safety and autonomy of women—the primary victims of domestic violence."[163] In view of what is now known about the cyclical nature of family violence[164] and the inability of many victims to help themselves out of such situations, this approach can no longer be justified or tolerated.

### C. *The Probate Process: The Specter of Increased Bureaucracy*

For many, this proposed reform may seem intuitively right, yet in the glaring light of everyday administrative concerns it may appear to create only more inefficient bureaucracy that produces few results. Yet the reality is that probate courts regularly examine extrinsic evidence with regard to a multitude of ordinary probate problems. For example, when probating a will, courts may be required to examine evidence of proper execution;[165] that the

161. *See* McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953). In this landmark family privacy case, the court held that "[t]he living standards of a family are a matter of concern to the household, and not for the courts to determine, even though the husband's attitude toward his wife, according to his wealth and circumstances, leaves little to be said on his behalf." Although one may be inclined to agree with this doctrine on the facts of the given case, it is noteworthy that such an approach has many implications for the proper role of state intervention regarding neglect of minor children. *See generally* Zimring, *supra* note 25, at 523-24 (discussing the implications and complications of the family privacy doctrine as applied to child neglect law and a parent's right to discipline his or her child).

162. *See* Zimring, *supra* note 25, at 526-27.

163. *See* Asmus et al., *supra* note 8, at 117.

164. *See* TASK FORCE ON FAMILY VIOLENCE, *supra* note 5, at 2-3.

165. *See, e.g.*, UPC § 2-502 (1990) (outlining minimal requirements for valid will execution, and noting that "[i]ntent that the document constitute the testator's will can be established by extrinsic evidence").

testator intended the document to be his or her will;[166] or evidence of the contents of a lost will.[167] Thus, in the context of wills, the courts are already conducting sophisticated inquiries in order to best effectuate the testator's donative intent.

Additionally, in more complex areas of family law, such as divorce and lack of support by a parent of a child, courts already examine the parties' behavior and consult extrinsic evidence. For example, the Uniform Probate Code excludes from its definition of who is a surviving spouse for inheritance purposes, former spouses whose divorce from, or annulment of the marriage to, the decedent was invalid for some reason, as well as those former spouses whose marital property rights were validly terminated.[168] To determine the status of a surviving spouse, the court must examine any legal records of marriage, divorce, annulment etc. Similarly, under the proposed family violence statute, the court would only be required to consider the criminal and civil records of the surviving family members of the decedent.

Further, in at least one context, the Uniform Probate Code currently requires courts to inquire into extrinsic evidence more extensively than would be required under the proposed family violence statute. In order to encourage parental responsibility, the Uniform Probate Code restricts inheritance rights "from or through a child by either parent or his [or her] kindred"[169] unless that parent has "openly treated the child as his [or hers], and has not refused to support the child."[170] This behavioral standard requires the court to conduct a wide ranging and loosely defined inquiry. Unlike the limited inquiry defined in the proposed family violence statute, the scope of the court's investigation under this existing provision is not limited to specified records, nor is the time period specified or at all limited. Thus, in light of the degree to which courts already gather and consult extrinsic evidence relating to family property rights, the proposed family violence statute would not create any new or more complex administrative burdens.

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166. *Id.*

167. *See, e.g.,* UPC § 3-402 (1990); MINN. STAT. § 524.3-402 (1994). *But see* 70 A.L.R.4th 323 (1989) (noting that many jurisdictions presume the decedent destroyed the will if the decedent is known to have executed a will and it cannot be found after the decedent's death).

168. *See* UPC § 2-802 (1990) (defining the effect of divorce, annulment, and a decree of separation on inheritance rights of former spouses).

169. UPC § 2-114(c) (1990).

170. *Id.*

### D. *Concern that the Impact of the Reform would be Limited*

Admittedly, the proposed reform is not a cure-all for family violence. Due to its narrow focus and specific requirements, the statute would address only the clearest cases of family violence — cases where there are records establishing a pattern of violence immediately prior to the decedent's death. Unfortunately, the proposed statute would not remedy the many cases of undocumented family violence. Nevertheless, the proposed family violence statute would address substantially more cases of family violence than the current scheme which fails to address family violence to any degree.

## VI. Conclusion

Ultimately, there is no clear and convincing reason not to implement the proposed family violence statute. In those cases where the statute would operate to deny abusers any benefits from those they abused the positive effects are clear. Yet even in situations where the statute would not operate directly, perhaps the great majority of cases, the reform would nevertheless serve an important function. It would represent an end to the tacit acceptance of family violence and would send a clear message that family violence is a relevant public concern in any context. Finally, the adoption of the proposed family violence statute would bring family property law into line with prevailing social and behavioral ideals. While these ideals may yet need to be expanded further, the current scheme's failure to address and condemn family violence is unacceptable.

## Appendix A

### *PROPOSED FAMILY VIOLENCE STATUTE*[171]

Effect of Record of Family Violence on Intestate Succession and Elective Share Right

(a) [Definitions.] In this section:

(1) "Abuser" is any family member of the decedent who commits family violence against the decedent as defined herein.

(2) "Family Violence" means: (i) physical harm, bodily injury, assault, or infliction of fear of imminent physical harm, bodily injury or assault, between family members; or (ii) terroristic threats, within the meaning of [relevant state statute(s)], or criminal sexual conduct, within the meaning of [relevant state statute(s)], committed against a family member by a family member.[172]

(b) [Forfeiture of Statutory Benefits.] An individual who commits family violence against the decedent forfeits the following benefits with respect to the decedent's estate: an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, exempt property, and a family allowance. The decedent's intestate estate shall pass as if the abuser disclaimed his [or her] intestate share.[173]

(c) [Commitment of Family Violence; How Determined.] Commitment of family violence resulting in forfeiture under section (b) is established:

(1) by a past pattern of family violence committed by the abuser against the decedent within [5] years of the decedent's death when the family violence is committed against the decedent while the decedent was an adult. A pattern can be established only by (i) court documents showing a conviction of the abuser for family violence against the decedent; (ii) arrest of the abuser for family violence against the decedent; or (iii) an issuance of an order for protection on behalf of the decedent against the abuser; and

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171. This statute is largely modeled after the UPC's slayer statute. *See* UPC § 2-803 (1990). The statute also incorporates elements of Minnesota's domestic abuse and domestic homicide statutes. *See* MINN. STAT. § 518B.01 (Supp. 1994); MINN. STAT. § 609.185 (Supp. 1994). The incorporation of language from these statutes is noted throughout.

172. This section adopts the definition of domestic abuse as defined in Minnesota's Domestic Abuse Act. MINN. STAT. § 518B.01, subd. 2 (a) (1994). The only alteration is the use of the term "family violence" instead of domestic abuse. As noted above, this article uses the term family violence because it is more descriptive of the problem and better represents the range of violence, abusers and victims that the proposed statute intends to address. *See supra* note 5 (discussing choice of the term family violence).

173. This section is adapted from the forfeiture section of the UPC's slayer statute. *See* UPC § 2-803 (b) (1990).

(2) by court documents when family violence is committed against the decedent while the decedent was a minor. Court documents must show (i) a conviction for family violence by the abuser against the decedent while the decedent was a minor; (ii) action by governmental authorities to protect the decedent from the abuser; or (iii) a tort judgment against the abuser in favor of the decedent for family violence committed by the abuser against the decedent while the decedent was a minor.

(d) [Broad Construction.] This statute shall not be considered penal in nature, but shall be construed broadly to effect the policy of this state to further the decedent's donative intent and to further the state's interest in deterring family violence and providing for surviving family members who have not engaged in abusive behavior.