

## ARTICLES

# INHERITANCE EQUITY: REFORMING THE INHERITANCE PENALTIES FACING CHILDREN IN NONTRADITIONAL FAMILIES

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*This Article examines how more than 50% of children living today may be disadvantaged by 1950s era inheritance laws that privilege and protect only those children living in nuclear families with their biological parents. Because so many children today are living in blended families—single-parent families, lesbian, gay, bisexual, transgender, or queer/questioning (LGBTQ) families, or are living with relatives—their right to inherit from the persons who function as their parents is severely limited by most state probate codes, even though they would likely be entitled to child support under the parent-child definitions of most of those states’ family law codes. In the unusual case of second-parent adoptions by the partner of a biological parent, many children will be cut off from being able to inherit from their biological parent, which is a truly unanticipated consequence of the “fresh start” provision of most probate codes that delineate the rights of adopted children. This Article explores the vast scope of the inheritance penalty, including the history of equitable adoption doctrines and attitudes about parenting. It includes model statutory language to resolve some of the myriad disabilities in these probate codes and a chart detailing how the adoption and inheritance laws of all fifty states interact to create the inheritance penalty.*

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## INTRODUCTION

In Charles Dickens's classic novel, *Great Expectations*, the orphaned Pip becomes a gentleman after learning that he will inherit great wealth from an anonymous benefactor.<sup>1</sup> Raised by his ill-tempered older sister and her benevolent husband, Pip had few opportunities to better his lot in life, and his fortunes rise and fall with those of his acquaintances and friends. Pip inherits nothing from his parents, who die when he is an infant, and his older sister agrees to raise him because he has no other family to take him in. Pip's unexpected good fortune comes at the hands of an escaped convict, Abel Magwitch, who decides to make a gentleman of the young child who saved his life when he escaped from the prison hulks and made his way to Australia to earn his fortune.

<sup>1</sup> CHARLES DICKENS, *GREAT EXPECTATIONS* (1861).

Although written 150 years ago, Dickens's novel depicts a life that is both remarkably common and rather uncommon today. Like Pip, nearly 70% of children in the U.S. today are being raised in nontraditional homes.<sup>2</sup> These relationships more often involve divorce, same-sex cohabitation, or both, rather than the death of both parents, but it is staggering that fewer than half of all children are raised in homes with both the child's married biological mother and father.<sup>3</sup> Like Pip, children today are also very unlikely to inherit significant wealth, relying instead on happenstance, good fortune, and the benevolence of others to find their "great expectations." Today, fewer than 50% of decedents' estates will be probated, and the vast majority of small inheritances will pass to spouses and children with little or no planning.<sup>4</sup> For those of us in the bottom 99% of the population, an inheritance is not something we expect nor is it likely to establish our future class standing, as it did fortuitously for Pip.<sup>5</sup>

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<sup>2</sup> I use the term "nontraditional" in this Article to refer to all types of family and household relations except the nuclear family of a married heterosexual couple with the couple's biological children. Nontraditional families would include divorced families, remarried families with children by different parents (blended families), same-sex families, unmarried cohabiting families, children raised by relatives, stepparent families, and the like. See *A Generation at Risk*, GRIEF SPEAKS (May 19, 2014), <http://www.griefspeaks.com/id113.html>.

<sup>3</sup> *Id.* See U.S. CENSUS BUREAU, C2010BR-14, HOUSEHOLDS AND FAMILIES: 2010, at 5 (2010), <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>; see also Jeannie Keever, *Census Data Shows Non-Traditional Families Are Growing*, HOUSTON CHRONICLE (Aug. 11, 2011), <http://www.chron.com/news/article/Census-data-shows-non-traditional-families-are-1849358.php> (explaining that in Texas, 39% of children live with a single parent, same-sex parents, grandparents, or other relatives, while 61% live in heterosexual families, and 61% include blended families with stepparents).

<sup>4</sup> Only 35% of Americans have a will, down from 45% in 2007. See *Lawyers.com Survey Reveals Drop in Estate Planning*, LAWYERS.COM (MAY 19, 2014), <http://press-room.lawyers.com/2010-will-survey-press-release.html>. At the same time, 20% believe they do not need such documents because their spouse and children will receive their property anyway. *Id.* This Article questions that assumption even for the relatively small 20%. A 1978 study showed that more than half of all people questioned had not made wills. See Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 3 AM. B. FOUND. RES. J. 319, 337 (1978). Two earlier works indicated the same thing. See Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 248 (1963); Joel R. Glucksmann, *Intestate Succession in New Jersey: Does it Conform to Popular Expectations?*, 12 COLUM. J.L. & SOC. PROBS. 253, 285 (1976). Identifying how many people have wills is difficult; it is not a question asked on the census and there is no easy way to correlate local deaths with local probate proceedings of wills. So most of the data is from small samples and has been recited over and over until it takes on mythical stature. Nevertheless, most people do not make wills, but the rates of will-making increase with age and with wealth. Neither of these conclusions is surprising.

<sup>5</sup> Scholars continue to marvel at unrealistic assumptions most people continue to possess. In a famous study into whether or not the estate tax should be repealed, the vast majority of people voted to repeal the tax, even though repeal would have benefitted only a small 1% or 2% of the population at the time. Today, that number is about 0.2% of the population. Nonetheless, people had such unrealistic expectations that they might someday inherit great wealth that they would opt not to impose an estate tax even though the odds of being affected by it are

But unlike orphans in England during the 1860s, people today are far more likely to encounter formal legal barriers to organizing their informal family relationships; they structure their lives with a greater attention to their legal rights and obligations. We generally have come to accept that law will play a greater role in our lives, including laws that determine family relationships and property distribution upon death. We know that property cannot be retitled without a probate judge's signature, and that child support or custody is enforceable only when backed by a court order. The supervisory role of law has pushed deeper into our private families and we have come to accept greater regulation of our parent-child relationships. A larger percentage of marginalized families will encounter the law than those of Pip's era, for no social workers visited Pip's sister's house, no school demanded a guardianship determination, and his sister did not have to prove his biological relationship in order to qualify for financial assistance. When his sister and brother-in-law died, Pip was unlikely to be notified by a court of his standing to intervene in the probate of their estates.

Modern family law has adjusted to the sexual revolution of the twentieth century, the mobility of our twenty-first century population, and the social acceptance of nontraditional families. It has tried to accommodate the needs of all children by enforcing child support orders<sup>6</sup> and making custody and visitation determinations based on the child's best interests.<sup>7</sup> Additionally, social welfare agencies have tried to provide stability in all homes, resulting in the greater influence of law in people's lives today.<sup>8</sup> The law of inheritance, however, remains largely mired in nineteenth century values and expectations, based on the lives and needs of the landed classes, where inheritance and bloodline determined personal success and ensured social and political stability. Like

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virtually zero. See Mayling Birney et al., *Public Opinion and the Push to Repeal the Estate Tax*, 59 NAT'L TAX J. 439, 439–40 (2006).

<sup>6</sup> E.g., Erica Bertini, *Married but Separated: Custodial Parents Can Seek Retroactive Child Support Under the Parentage Act*, 24 DUPAGE CNTY. B. ASS'N BRIEF 36, 36 (2012); Michael L. Hopkins, "What is Sauce for the Gander is Sauce for the Goose": *Enforcing Child Support on Former Same-Sex Partners Who Create a Child Through Artificial Insemination*, 25 ST. LOUIS U. PUB. L. REV. 219, 220 (2006).

<sup>7</sup> E.g., Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245, 302 (1996) (pointing out that high courts of many states have recognized, over time, the custodial parent's right to relocate with the child); James Herbie DiFonzo, *Toward a Unified Field Theory of the Family: The American Law Institute's Principles of the Law of Family Dissolution*, 2001 BYU L. REV. 923, 928–44 (2001); Suzanne B. Goldberg et al., *Family Law Scholarship Goes to Court: Functional Parenthood and the Case of Debra H. v. Janice R.*, 20 COLUM. J. GENDER & L. 348, 370–73 (2011).

<sup>8</sup> Although these laws are not perfect by any means, family law recognizes that people's lives do not always fit into neat patterns. See Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 854–59 (2004); Shani M. King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 592 (2011).

the probate codes of Dickens's Victorian England, contemporary probate codes continue to privilege the biological connection and are out of touch with the fluid and informal relationships of today's modern families. Although the inheritance laws have changed little over the last century and a half, the number and makeup of families whose affairs will be affected by inheritance laws have changed dramatically, and there are many more Pips in this country than lawmakers, judges, and the Uniform Law Commission<sup>9</sup> (ULC) like to acknowledge.

The tremendous gap between the desires of decedents to benefit the people in their lives with testamentary gifts, and the strictness of many laws of inheritance, propel us toward reexamining inheritance law regardless of whether their relationships are formally perfected. And ironically, more than just informal family relationships need protecting. The law also disadvantages a certain class of children who are legally adopted and whose parents have undertaken the costly and burdensome task of formalizing their parent-child relationship. In the case of second-parent adoptions by same-sex partners or unmarried partners of biological parents, a formal adoption may cut off the inheritance rights of adopted children to inherit from their biological parent even when that person continues to act as a parent. Most state probate codes will cut off a child's right to inherit from her biological parent upon an adoption by an unmarried co-parent, thus denying inheritance rights even when parents intend for the adoption to secure such rights. Without a legally recognized parent-child relationship, however, a child cannot inherit from a person who is, for all intents and purposes, his or her parent, and the death of that parent can lead to dire financial circumstances for minor children.<sup>10</sup> Thus, while nonadopted children cannot inherit from functional parents, some adopted children cannot inherit from biological parents either, raising serious concerns about the underinclusiveness of inheritance law and the inequitable effects of linking inheritance rights to biology and adoption.

This Article looks at two situations in which the interplay of adoption and inheritance law disadvantages millions of American children: (1) the lack of inheritance rights by children who are not adopted by their

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<sup>9</sup> The ULC is a group of law professors and expert practitioners whose mandate is to help create uniform statutes like the Uniform Probate Code, the Uniform Trust Code, and the Uniform Parentage Act. In the most recent amendments to the Uniform Probate Code in 2008, however, the ULC did not address any of the profoundly complicated issues facing the children of LGBTQ parents, despite purporting to deal fully with surrogacy. The Code still privileges the heterosexual married couple with their biological children in many aspects of adoption and inheritance. See UNIF. PROB. CODE § 2-120 (amended 2010).

<sup>10</sup> See, e.g., Carissa R. Trast, Note, *You Can't Choose Your Parents: Why Children Raised by Same-Sex Couples Are Entitled to Inheritance Rights from Both Their Parents*, 35 HOFSTRA L. REV. 857, 861 (2006).

*functional parents*; and (2) the inexplicable disinheritance of many children who are adopted by a co-parent.<sup>11</sup> In the former situation, children who are raised by parents, one or both of whom are not biological parents, are unlikely to inherit unless a formal adoption is finalized or expensive estate planning is undertaken. In many of those cases, however, formal adoption is not a legal option, either because a biological parent refuses to consent to an adoption, or the functional parents are prohibited by law from adopting. Barriers to adoption can occur when the parents are unmarried, in same-sex relationships, or facing economic penalties for marrying.<sup>12</sup> In the latter situation, where functional parents are able to legally adopt nonbiological children, their doing so *cuts off* the adopted child's inheritance rights from her biological parent, even if the biological parent consented to the adoption and continues to parent the child (such as through second-parent adoptions by unmarried or same-sex couples). Because the probate and adoption codes of most states are so mired in an ideology of traditional family relations and remain dependent on marital and biological status, they harshly penalize millions of children and are woefully out of touch with our postmodern family life.<sup>13</sup>

A number of scholars have pointed out the inequalities in inheritance rights between adopted children and children in nonformalized

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<sup>11</sup> A co-parent is defined as a person cohabiting with the unmarried biological parent of the child—either an unmarried opposite sex partner or co-parent in a same-sex relationship with the child's biological or adoptive parent. It is estimated that ten million children in the United States are currently being raised by lesbian, gay, or bisexual parents. Kelly M. O'Bryan, *Mommy or Daddy and Me: A Contract Solution to a Child's Loss of the Lesbian or Transgender Nonbiological Parent*, 60 DEPAUL L. REV. 1115, 1119 (2011) (relying on an estimate made by the American Bar Association). Using 2010 census data and other studies, the Williams Institute's Gary Gates reports that as many as 19% of gay men and 49% of lesbians have children. Gary Gates, *Family Formation and Raising Children Among Same-Sex Couples*, NAT'L COUNCIL ON FAMILY RELATIONS, <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-NCFR-LGBT-Families-December-2011.pdf> (last visited Nov. 25, 2015). Comparing 2000 and 2010 census data, Gates found that the number of same-sex couple households increased 80% to over 646,000. GARY GATES, THE WILLIAMS INSTITUTE, SAME-SEX COUPLES IN CENSUS 2010: RACE AND ETHNICITY (2012), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-CouplesRaceEthnicity-April-2012.pdf>. In many states LGBT parents are prohibited from adopting, or barriers exist to adoption, while many others may choose to adopt but cannot afford to and are uncertain that the judgments will be effective. These parents are successful in creating and sustaining meaningful family relationships. See Charlotte J. Patterson, *Family Relationships of Lesbians and Gay Men*, 62 J. MARRIAGE & FAM. 1052, 1052 (2000). In fact, approximately twenty-five percent of all same-sex couples are raising children. Richard E. Redding, *It's Really About Sex: Same-Sex Marriage, Lesbian Parenting, and the Psychology of Disgust*, 15 DUKE J. GENDER L. & POL'Y 127, 128 (2008).

<sup>12</sup> E.g., ARIZ. REV. STAT. ANN. § 8-103 (2014) (assigning preference to married couples for adoption); CONN. GEN. STAT. § 45a-726(a) (2013) (allowing the sexual orientation of an adoptive parent to be considered); MISS. CODE ANN. § 93-17-3(5) (2014) (explicitly prohibiting adoption by two people of the same gender); N.C. GEN. STAT. § 48-2-301 (2013) (precluding two unmarried individuals from jointly adopting); UTAH CODE ANN. § 78B-6-117 (2014).

<sup>13</sup> Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 5 (2000).

functional parent-child relationships.<sup>14</sup> Other scholars have pointed out the truly bizarre disinheritance of the biological child whose inheritance rights are cut off when a co-parent successfully adopts the child, a seemingly irrational outcome that has a relatively simple solution.<sup>15</sup> Many of these scholars have made cogent constitutional and policy arguments as to why these outcomes are undesirable. They have often offered a model statute or a constitutional argument for changing these laws. But because inheritance and adoption are defined and regulated by state law, no single change is likely to be effective everywhere, even if the Supreme Court were to hold, in a perfect case raising all the relevant issues, that state laws penalizing certain adopted and functional children were unconstitutional.<sup>16</sup> The remedies would likely be quite diverse and no federal law would be able to take into account all of the different statutory regimes of the states.

To promote further reform in this area, this Article's Appendix presents an analysis of the law and history of these inheritance penalties and includes an analysis of all fifty states' adoption and inheritance laws. For legislators, advocates, and judges, this Article provides a basic overview of the patchwork of state and federal laws, but legal reform at the state level will require a more thorough understanding of each state's unique legal situation. It provides guidance as to how the different laws regarding marriage, adoption, and inheritance interact and how best to tackle the daunting project of bringing inheritance rights to the millions of children who currently face the inheritance penalty. It also provides both policy and statutory suggestions for changes that can bring inheritance equity to the millions of children currently raised in nontraditional families.

In Part I, I explain how the adoption, marriage, and inheritance laws interact to create an inheritance penalty against children with nontradi-

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<sup>14</sup> E.g., E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1064 (1999); Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. REV. 367, 369 (2009). Spitko explains that the typical intestacy statutes do not distinguish on their face between the inheritance rights of heterosexual people and LGBT people and thus ignore an important distinction. By ignoring such a distinction, he argues that such statutes discriminate against LGBT people by denying them donative freedom and devaluing their relationships.

<sup>15</sup> E.g., Jason C. Beekman, *Same-Sex Parent Adoption and Intestacy Law: Applying the Sharon S. Model of "Simultaneous" Adoption to Parent-Child Provisions of the Uniform Probate Code*, 96 CORNELL L. REV. 139, 141 (2010); Laura M. Padilla, *Flesh of My Flesh but Not My Heir: Unintended Disinheritance*, 36 BRANDEIS J. FAM. L. 219, 228 (1997); Trast, *supra* note 10, at 861.

<sup>16</sup> Even if there were a perfect case for challenging state laws creating the inheritance penalty, and the Supreme Court ruled that such differential treatment was an equal protection violation, the states would still have difficulty passing the panoply of laws necessary to fully rectify the situation.

tional parents. In Part II, I explain the full scope of the inheritance penalty, its effects on testate as well as intestate estate plans, and the sources of its inequitable treatment of children. In Part III, I explain how different statutory or common law changes would affect the penalty, from marriage equality to the broadening of equitable adoption principles and language for statutory reform. In Part IV, I explore the history of adoption law and testamentary freedom, arguing that a more textured understanding of the myriad motives behind adoption and donative freedom call for a more textured solution. In Part V, I present model statutory language, portions of which could be adopted to tackle discrete inheritance issues. Finally, I provide a chart in the Appendix listing the relevant laws in all fifty states and the District of Columbia that involve the interplay of adoption and inheritance.

As a coda, I certainly realize that an article of this length could be written for each and every state. That is not my goal; my hope is that others will take up that challenge. Rather, I hope to provide a comprehensive overview of the legal terrain so that lawmakers, advocates, and judges can begin the process of making change in a rational and humane way. Bright-line rules are administratively efficient and often politically appealing, but are usually not equitable. And, in this case, they do not reflect the needs of the millions of children today growing up in non-traditional families. When laws stop protecting the very people they are designed to protect, and instead disadvantage not just a few marginal outliers, but large percentages of the very population they seek to benefit, it is past the time for change.

## I. THE PROBLEM: INHERITANCE PENALTIES AGAINST CHILDREN OF NONTRADITIONAL PARENTS

There are two prongs to the inheritance penalty problem—the first applies to children who are not legally adopted and ought, based on equitable principles and the intention of the decedent parent, to be able to inherit. I call this the *functional parent-child relationship*.<sup>17</sup> Children

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<sup>17</sup> I did not invent this term. Functional parent-child relationships have been discussed for years and most state family law codes provide mechanisms for functional children to receive support from functional parents. See, e.g., Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1 (1997); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309 (2007); Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83 (2004); Yehezkel Margalit, *Intentional Parenthood: A Solution to the Plight of Same-Sex Partners Striving for Legal Recognition as Parents*, 12 WHITTIER J. CHILD & FAM. ADVOC. 39 (2013); Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419 (2013). The Uniform Law Commission has also begun to recognize functional children in the context of inheritance in the 2008 Amendments to the Uniform Probate Code. UNIF. PROB. CODE § 2-116 (amended 2010).



not legally adopted by their functional parents are penalized when they are unable to inherit from, and through, those parents. These children might be stepchildren, foster children, children being raised by relatives, or children of same-sex parents when state laws prohibit adoption by the second parent. They might also be children in the process of adoption when an adoptive parent dies before the adoption goes through, or children conceived through assisted reproductive technologies when state laws are not sensitive to their unique circumstances. They might be genetically related to two gamete providers who have relinquished their legal claims to the offspring. But the intentional parents who are paying for the service and intend to raise the child might die before an adoption takes place, or state laws may prohibit their adoption of this child. A gestational surrogate would have no legal claim if she were not genetically related to the child. The vast legal complications raised by these new technological reforms have been documented and discussed by numerous scholars, but very little attention has been given to the inheritance penalties these children face, especially when parents using these new technologies do not formalize their intentions and relationships through available contract and statutory means.<sup>18</sup>

The second situation applies to children who are legally adopted, but because of the interplay between state adoption, marriage, and inheritance laws, are prohibited from inheriting from their biological parent who continues to act as a parent. I refer to this as the “cut-off penalty” because the law cuts off the child’s inheritance rights from a biological parent in circumstances where that parent would not want the rights to be extinguished, particularly in the case of second-parent adoptions by a biological parent’s unmarried partner or co-parent.<sup>19</sup> It might seem strange to think that a biological parent will have her parental inheritance relationship with her children severed when she permits her unmarried same-sex or opposite-sex partner to adopt her children. But that is precisely what the law dictates in the majority of states that have adopted the standard provision, articulated in the Uniform Probate Code—that a child’s relation and inheritance rights to her biological parents are severed upon formal legal adoption.<sup>20</sup>

To understand how these problems arise, we need to understand how the various laws work together and why the inheritance penalty is so much larger than simply the exclusion from the default rules of intestate succession. We need to explore why making a will does not solve this

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<sup>18</sup> See Spitko, *supra* note 14, at 1064; Tritt, *supra* note 14, at 369.

<sup>19</sup> See Beekman, *supra* note 15, at 141; Padilla, *supra* note 15, at 228.

<sup>20</sup> *E.g.*, MASS. GEN. LAWS ch. 190B, § 2-114(b) (2014); MONT. CODE ANN. § 72-2-124(2) (2014); N.J. REV. STAT. § 9:3-50(c)(2), (3) (2014); S.C. CODE ANN. § 62-2-109(1) (2013); see UNIF. PROB. CODE § 2-119.

problem and how even the most diligent of parents cannot plan or contract around all of these legal pitfalls. Only when we understand the full scope of the penalty can we begin to draft solutions.

The probate codes of all fifty states provide a relatively straightforward inheritance scheme.<sup>21</sup> If a person dies without having made a will, any property titled in that person's name at death will pass according to the default rules of intestate succession. These default rules privilege survivors in the following order: surviving spouses first, children and grandchildren next, and then parents, collateral relatives like siblings, aunts and uncles, or nieces and nephews.<sup>22</sup> If there are no biological relatives of the required degree of relationship<sup>23</sup> (i.e., persons defined as legal heirs), then the decedent's property escheats to the state. A number of states try to avoid escheat by permitting the property to pass to the heirs of the decedent's last surviving spouse (e.g., the decedent's stepchildren or collateral relatives of a former spouse), but there are fewer than one-third of states that will pass property beyond the bloodline.<sup>24</sup> For the majority of decedents, a surviving spouse and blood relatives are the only permissible heirs.

Most probate codes define "child" for purposes of intestate succession to be a biological child or an adopted child only.<sup>25</sup> Stepchildren, foster children, or other minors raised by a decedent, even those in a functional parent-child relationship, do not qualify as "children" under most probate codes.<sup>26</sup> This means that a minor who is raised by an adult, treated as a child, given that adult's name, listed as a dependent on the

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<sup>21</sup> See, e.g., COLO. REV. STAT. §§ 15-11-101 to -114 (2014); HAW. REV. STAT. §§ 560:2-101 to -114 (2014); ME. REV. STAT. tit. 18-A, §§ 2-101 to -114 (2014); MICH. COMP. LAWS §§ 700.2101-2114 (2014).

<sup>22</sup> Arkansas and Kentucky are unusual in providing for children before a surviving spouse. ARK. CODE ANN. §§ 28-9-204 to -205 (2014); KY. REV. STAT. ANN. § 391.010 (2012).

<sup>23</sup> Some states allow for only a relatively narrow slice of relatives to count as legal heirs. See, e.g., UNIF. PROB. CODE § 2-103. Others allow for a broad array, like fifth cousins four times removed or any relative within six, seven, or eight degrees of relationship. See, e.g., KY. REV. STAT. ANN. § 391.010.

<sup>24</sup> ARK. CODE ANN. § 28-9-215(2)(1); CAL. PROB. CODE § 240 (West 2015); CONN. GEN. STAT. § 45a-439(a)(4) (2013); IOWA CODE § 633.219(6) (2014); KAN. STAT. ANN. § 59-514 (2014); KY. REV. STAT. ANN. § 391.010(6); MD. CODE ANN., EST. & TRUSTS § 3-104(e) (LexisNexis 2014); MONT. CODE ANN. § 474.010(3); N.J. REV. STAT. § 3B:5-4(f); N.D. CENT. CODE § 30.1-04-03(6) (2013); OHIO REV. CODE ANN. § 2105.06 (West 2014); S.C. CODE ANN. § 62-2-103(6); UTAH CODE ANN. § 75-2-103(1)(f) (2014); see UNIF. PROB. CODE § 2-103(b).

<sup>25</sup> See UNIF. PROB. CODE § 1-201(5) (defining "child"), which conflicts with UNIF. PROB. CODE § 2-116 (allowing for functional children).

<sup>26</sup> See, e.g., UNIF. PROB. CODE § 1-201(5) (expressly excluding stepchildren, foster children, and grandchildren from its definition of "child"); see also FLA. STAT. § 731.201 (2014) (excluding from the definition of child a "stepchild, a foster child, a grandchild, or a more remote descendant"); NEB. REV. STAT. § 30-2209(3) (2014); TEX. PROB. CODE ANN. § 22.004 (West 2013).

adult's tax returns, and treated in all ways as the biological child of the adult, will not be able to inherit from that person if the child is not formally adopted. Instead, distant collateral heirs may take the estate to the exclusion of the person who had the closest relationship with the decedent and who the decedent most likely would have wanted to have inheritance rights.<sup>27</sup>

Most state family law codes also define “child” for purposes of parental rights to make decisions for the child, to control the child's property, or to pay child support.<sup>28</sup> When the family and probate code definitions do not align, there is an obvious gap that will result in some children being unable to inherit from a parent, even when that parent has a legally recognized parental relationship with that child.<sup>29</sup> This conflict can be quite common given the fact that most family law codes recognize functional children as children for child support, visitation, and parental decisionmaking purposes, whereas most probate codes do not.<sup>30</sup> Furthermore, all states provide certain benefits and presumptions to “spouses”

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<sup>27</sup> See *In re Estate of Ford*, 82 P.3d 747, 753 (Cal. 2004); *Miller v. Paczner*, 591 So. 2d 321, 323 (Fla. Dist. Ct. App. 1991); see also *In re Estate of Thompson*, 760 N.W.2d 208 (Iowa Ct. App. 2008); *In re Estate of Hannifin*, 311 P.3d 1016, 1019–20 (Utah 2013).

<sup>28</sup> E.g., ALA. CODE §§ 26-17-101 to -905 (2014); CAL. FAM. CODE §§ 7500–7962 (West 2014); TEX. FAM. CODE ANN. §§ 160.001–.763 (West 2013); WASH. REV. CODE §§ 26.26.011–.914 (2014).

<sup>29</sup> The Uniform Parentage Act (UPA) provides that parentage will be established by biological birth, adoption, or adjudication of parentage in the context of a gestational surrogacy agreement or assisted reproductive technology. UNIF. PARENTAGE ACT §§ 101–511, 701–809 (amended 2002). The state probate codes, except those that have adopted the 2008 UPC amendments, do not allow for the third option—it is biology or adoption only. See UNIF. PROB. CODE § 2-109. This gap is relatively small but can be widened in states that have more expansive parent-child definitions in their family law codes. The UPA has been adopted in 9 states.

<sup>30</sup> Although the Uniform Parentage Act has only been adopted in nine states, many others have adopted portions of it. The Parentage Act Summary defines the mother and father as follows:

[A] legal mother is one who carries a child to birth (rather than the one whose egg has been fertilized), but may also be one who is adjudicated as the legal mother, who adopts the child (thus expressly recognizing adoption), or who is the legal mother under a gestational agreement. In the last three instances, the woman who carries the child to birth is not the legal mother.

In Article 2, the legal father may be one of the following: an un rebutted presumed father (a man married to the birth mother at the time of conception, or a man who resided in the same household as the child during its first two years of life, and openly held the child out as his own), a man who has acknowledged paternity under Article 3, an adjudicated father as the result of a judgment in a paternity action, an adoptive father, a man who consents to an assisted reproduction under Article 7, or an adjudicated father in a proceeding confirming a gestational agreement under Article 8. The genetic father or the presumed genetic father is the legal father in the first three of these categories, but is not necessarily the legal father in the latter three categories.

*Parentage Act Summary*, UNIFORM LAW COMMISSION (July 12, 2009), <http://www.uniformlaws.org/ActSummary.aspx?title=Parentage+Act>.

(i.e., parents who are in legal marriages). For instance, the children of a married heterosexual couple are presumed to be the children of both, and both have equal parental rights and the children have equal rights to inherit from and through both parents.<sup>31</sup> But nonmarital children (i.e., children born to parents who are not married) do not benefit from the presumption of parental status, particularly in questions involving paternity.<sup>32</sup> Nonmarital children, children born from assisted reproductive technologies, children born to heterosexual parents but who reside with one parent and that parent's same-sex partner, children living with step-parents, and children born within same-sex relationships all are denied the benefits and presumptions of a child born in a traditional marriage.

Thus, where a state denies marriage rights to parents and where probate codes do not protect the functional parent-child relationship, inheritance penalties can create gross disparities between otherwise similarly situated children. Furthermore, the U.S. Supreme Court ruled unanimously, on May 21, 2012, that state law definitions of "child" would apply to federal determinations of eligibility to receive social security benefits.<sup>33</sup> This decision further entrenches state diversity and reflects the federal courts' unwillingness to adopt nationwide definitions for federal laws affecting family relationships.<sup>34</sup> Because these relationships are typically left to the purview of the states, the inheritance penalty created by state law has a very long reach.

To begin the task of correcting the inheritance penalty, we need to understand how it works, what state interests prompted the rigid rules that are in place, and what state interests should be protected in fashioning a remedy. In doing so, I am assuming that the state's interests in protecting or benefitting traditional family relationships, based solely on historical inertia and stereotypes, are not legitimate grounds for denying functional or cut-off children inheritance rights when there is parental intent that they be entitled to benefit.

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<sup>31</sup> See *Michael H. v. Gerald D.*, 491 U.S. 110, 120–22 (1989).

<sup>32</sup> See UNIF. PARENTAGE ACT § 201, which creates a father-child relationship when paternity is established either by acknowledgement, adjudication, or adoption. Where certain presumptions apply, the child is presumed to be the child of the father if the mother and the putative father are married and the child is born during the marriage. See UNIF. PARENTAGE ACT § 204.

<sup>33</sup> *Astrue v. Capato*, 132 S. Ct. 2021, 2032–33 (2012).

<sup>34</sup> Although much of the state-wide diversity in definitions of marriage concerning same-sex couples has been resolved with the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), state diversity remains in areas of common law marriages, qualifications for marriage, and the treatment of foreign marriages.

A. *The Functional Parent-Child Relationship and the Unadopted Child or Stepchild*

The first situation involving the inheritance penalty is that of a child in a *functional* parent-child relationship where the parent fails to adopt the child and the child is excluded from inheriting because the child does not qualify as a child under the state's probate code. However, the child would likely count as a child under the state's family law code or common law recognition of a functional familial relationship. In the absence of a somewhat flexible probate code,<sup>35</sup> a child is simply excluded from all the inheritance rights of being recognized as a child. Although one can understand the importance of the bright-line test for inheritance, there are many situations where distant heirs who have had no contact with the decedent for decades might inherit to the exclusion of a child who came into the decedent's home as a minor, was cared for and treated like a child, and who, upon reaching adulthood, cared for the parent as an adult child is likely to do.<sup>36</sup> In such a case, there is no good reason for denying inheritance rights to a child who functions as one, in many or all respects.

But many legislators and judges feel it is appropriate to require the adult to legally adopt a child before that child is entitled to inherit. Legal adoption creates a bright line that avoids the administrative costs of lengthy trials poring over evidence about a decedent's intent, or potentially rewarding fortune-hunting claimants who try to claim someone else's lawful inheritance. As discussed more fully below in Part IV, formal legal adoption is a costly and intrusive legal process that is not absolutely necessary in order to gain the benefits of a parent-child relationship during life, including the legal benefits of parental rights under most states' family law codes. The decision not to adopt is more often the result of cost, fear of the loss of privacy, or insecure adult relationships than it is a desire to restrict inheritances.<sup>37</sup> On the flip side, the

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<sup>35</sup> California allows a child to inherit even if he or she was not adopted, so long as there was a legal impediment to the parent's adopting. See CAL. PROB. CODE § 6454 (West 2015) (using the terms "foster parent or stepparent").

<sup>36</sup> See *In re Estate of Chambers*, No. B223492, 2011 WL 711854 (Cal. Ct. App. 2011); *Morgan v. Howard*, 678 S.E.2d 882, 884 (Ga. 2009); *In re Estate of Thompson*, 760 N.W.2d 208 (Iowa Ct. App. 2008); *In re Estate of Hannifin*, 311 P.3d 1016, 1019–20 (Utah 2013).

<sup>37</sup> Social science data about adoption abounds, often debunking traditional myths about adoption as creating second best families. Virtually no reliable studies have been done on whether adoption was specifically undertaken in order to influence inheritances, although the idea that adoption is a proxy for inheritance is a myth from the nineteenth century that certainly continues to prevail in legal circles. See, e.g., L. DiAnne Borders et al., *Are Adopted Children and Their Parents at Greater Risk for Negative Outcomes?*, 47 FAMILY RELATIONS 237, 237 (1998); see also Kathy Brodsky, *Ten Myths About Adoption*, PATH 2 PARENTHOOD (Mar. 28, 2015), <http://www.theafa.org/article/ten-myths-about-adoption>; *Debunking the Myths: The Facts About Adoption from Foster Care*, 12 OUTLOOK WEEKLY 21 (2007) [hereinafter *Debunking the Myths*]; Jack Demick, *Challenging the Common Myths About Adoption*,

decision to adopt is more likely to be based on a desire to protect legal parenting rights during life (like the right to travel abroad, to make educational and medical decisions for children, and custody over the child in the case of divorce or death), than on a desire to ensure inheritance rights.<sup>38</sup> Yet states continue to protect the functional parent-child relationship more during life than they do at death, when the only rights that would be affected are economic rights regarding property.

The administrative costs and difficulty of adjudication are not adequate reasons to deny inheritance rights for functional children precisely because courts routinely perform the exact same analysis under most family law codes. Moreover, at the time when adoption was not a legal possibility, courts routinely had to determine parentage and legitimacy through lengthy trials done with conflicting evidence, and without DNA or modern forensic evidence. It is not an impossible task.<sup>39</sup> In limited circumstances, courts currently do allow functional children to inherit under the doctrine of equitable adoption or estoppel where statutes would otherwise deny recovery.<sup>40</sup> Thus, litigation can provide one mechanism, albeit an inefficient one, for determining inheritance rights of functional children. Simply aligning probate code definitions of children with family law codes or common law rules regarding functional parenthood would go a long way in mitigating the harms of the inheritance penalty on some functional children.

Family law courts and scholars have embraced the functional parent-child relationship in numerous ways. For instance, the American Law Institute promulgated the *Principles of the Law of Family Dissolution: Analysis and Recommendations* in 2002 that promoted recognizing and protecting functional parent-child relationships. The early drafts and the final principles have been influential in numerous child visitation and

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23 BROWN UNIV. CHILD & ADOL. BEHAVIOR LETTER 8 (2007); Christine Narad & Patrick W. Mason, *International Adoptions: Myths and Realities*, 30 PEDIATRIC NURSING 483 (2004); Katarina Wegar, *Adoption, Family Ideology, and Social Stigma: Bias in Community Attitudes, Adoption Research, and Practice*, 49 FAMILY RELATIONS 363 (2000).

<sup>38</sup> Although it is hard to study why people choose to adopt rather than foster children or simply care for children, the literature suggests that most people choose adoption when they want to create a family and cannot do so naturally. But with the improved availability of assisted reproductive technologies, researchers suggest that adoption has become a second best alternative to having biologically-related children. See, e.g., Gulcin Gumus & Jungmin Lee, *Alternative Paths to Parenthood: IVF or Child Adoption?*, 50 ECONOMIC INQUIRY 802 (2012); Nicholas K. Park & Patricia Wonch Hill, *Is Adoption an Option? The Role of Importance of Motherhood and Fertility Help-Seeking in Considering Adoption*, 35 J. FAM. ISSUES 601, 605 (2014); Lynn D. Wardle & Travis Robertson, *Adoption: Upside Down and Sideways? Some Causes of and Remedies for Declining Domestic and International Adoptions*, 26 REGENT U. L. REV. 209, 213 (2014).

<sup>39</sup> E.g., *United States v. Collins*, 1 D.C. (1 Cranch) 592, 592 (1809); *Walker v. State*, 6 Blackf. 1, 1 (Ind. 1841); *Sword v. Nestor*, 33 Ky. (3 Dana) 453, 453 (1835); *Pigeau v. Duvernay*, 4 Mart. (o.s.) 265, 265 (La. 1816).

<sup>40</sup> See *infra* Part III.D.

child custody disputes.<sup>41</sup> Scholars too have pointed out the importance of using common law doctrines and equitable principles to protect children who have formed functional parent-child relationships with adults, even when the adults have not completed an adoption or legally formalized their relationships.<sup>42</sup> The Wisconsin Supreme Court in *Holtzman v. Knott (In re Custody of H.S.H-K.)*<sup>43</sup> was one of the first states to adopt equity principles to protect a functional parent-child relationship. Many courts have subsequently followed that case.<sup>44</sup> Other courts have simply recognized that harm to a child could occur if a functional parent-child relationship is not protected.<sup>45</sup>

Unlike the relative willingness of states to find functional parent-child relationships in the family law context, probate courts remain notoriously strict and hesitant to use equity jurisdiction to find a functional parent-child relationship in the inheritance law context through a very limited application of equitable estoppel. The court explained in *Bean v. Ford (In re Estate of Ford)*<sup>46</sup> that equitable adoption is only to be applied in unusual circumstances, circumstances where something exists that is more than a mere functional parent-child relationship. Most equitable adoption rules require the presence of a contract between the biological parent and the adoptive parent, a contract by which one biological parent agrees to surrender parental rights over the child and the other agrees to

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<sup>41</sup> See *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 (Mass. 1999); *Rubano v. DiCenzo*, 759 A.2d 959, 974 (R.I. 2000); *In re Parentage of L.B.*, 122 P.3d 161, 170 (Wash. 2005); see also DiFonzo, *supra* note 7.

<sup>42</sup> See, e.g., Courtney G. Joslin, *The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law*, 39 FAM. L.Q. 683, 684 (2005); see also *Developments in the Law: The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2052 (2003); Suzanne B. Goldberg, *Family Law Cases as Law Reform Litigation: Unrecognized Parents and the Story of Alison D. v. Virginia M.*, 17 COLUM. J. GENDER & L. 307, 333 (2006); Kathy T. Graham, *Same-Sex Couples: Their Rights as Parents, and Their Children's Rights as Children*, 48 SANTA CLARA L. REV. 999, 1006 (2008); Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 387 (1994); Charles P. Kindregan, Jr., *Collaborative Reproduction and Rethinking Parentage*, 21 J. AM. ACAD. MATRIM. LAW. 43, 47 (2008); Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 276 (1991); Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 666 (2002).

<sup>43</sup> 533 N.W.2d 419, 434–36 (Wis. 1995).

<sup>44</sup> *Kulstad v. Maniaci*, 220 P.3d 595, 609–10 (Mont. 2009); *V.C. v. M.J.B.*, 748 A.2d 539, 547–53, 555 (N.J. 2000); *DiCenzo*, 759 A.2d at 966–72; *Middleton v. Johnson*, 633 S.E.2d 162, 167–72 (S.C. Ct. App. 2006); *Parentage of L.B.*, 122 P.3d 161.

<sup>45</sup> *Wright v. Black*, 856 P.2d 477, 481 (Alaska 1993), *overruled by B.E.B. v. R.L.B.*, 979 P.2d 514, 515–20 (Alaska 1999); *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 219 (Ct. App. 1991); *Debra H. v. Janice R.*, 930 N.E.2d 184, 188–92 (N.Y. 2010); *Shondel J. v. Mark D.*, 853 N.E.2d 610, 615–16 (N.Y. 2006); *Multari v. Sorrell*, 731 N.Y.S.2d 238, 241 (App. Div. 2001); *Beth R. v. Donna M.*, 853 N.Y.S.2d 501, 509 (Sup. Ct. 2008); *Fish v. Behers*, 741 A.2d 721, 724 (Pa. 1999).

<sup>46</sup> 82 P.3d 747, 753–54 (Cal. 2004).

assume the rights and duties of a parent by formally adopting the child.<sup>47</sup> As the dissent in *O'Neal v. Wilkes* cogently explains, however, there are many situations where the elements of a contract are unlikely to exist, as when the biological and adoptive parents have never met, and where the custody of the child is transferred through the hands of numerous intermediaries before finally reaching the custodial parent.<sup>48</sup> In other cases, equitable adoption will apply only when there is a *legal* impediment to an adoption, as was required in the case of *In re Estate of Ford*. In that case, the California court refused to protect Terrold Bean's rights to inherit from his foster father because there had been no actual or legal impediment to the adoption, even though his foster parents thought incorrectly that there was a legal impediment and would have adopted but for their mistaken belief in the impediment.<sup>49</sup> To the extent donative intent is the holy grail of inheritance law, it makes no sense to limit inheritance rights of functional children when the evidence shows that a mistaken understanding of the law guided the decedent's decision to not adopt or to not make a will. We elevate form over substance when intent is gleaned from incorrect assumptions rather than actual facts.

Many courts apply a presumption *against* equitable adoption in the context of stepparents, on the theory that the law should not discourage stepparenting by imposing inheritance rights in the absence of a formal adoption.<sup>50</sup> The presumption assumes that people would not enter into relationships with single parents if there is a risk that they will be deemed to have equitably adopted the children simply by providing a home for them or by marrying their biological parent.<sup>51</sup> To further the presumption, the law of equitable adoption requires an unequivocal act other than the act of marrying the child's parent in order to impose inheritance obligations on a stepparent. And since marriage is a social good, it is often deemed to be better to deny inheritance benefits to children in the future when children are not parties to these agreements, than to impose any further impediments to marriage, which is a social good in the present.

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<sup>47</sup> *Habecker v. Young*, 474 F.2d 1229, 1230 (5th Cir. 1973) (determining Florida law); *Williams v. Dorrell*, 714 So. 2d 574, 575–76 (Fla. Dist. Ct. App. 1998); *Morgan v. Howard*, 678 S.E.2d 882, 884 (Ga. 2009); *O'Neal v. Wilkes*, 439 S.E.2d 490, 491 (Ga. 1994); *Lankford v. Wright*, 489 S.E.2d 604, 606–07 (N.C. 1997); see 2 AM. JUR. 2D *Adoption* § 62 (2014).

<sup>48</sup> *O'Neal*, 439 S.E.2d at 493.

<sup>49</sup> *In re Estate of Ford*, 82 P.3d 747, 752–55 (Cal. 2004).

<sup>50</sup> See, e.g., *Green v. Boyd*, 794 So. 2d 668, 668 (Fla. Dist. Ct. App. 2001); *Franklin v. Gilchrist*, 491 S.E.2d 361, 362 (Ga. 1997); *Davis v. Bennett*, 438 S.E.2d 73, 74–75 (Ga. 1994); *In re Estate of Thompson*, No. 08-0120, 2008 WL 4877762, at \*1 (Iowa Ct. App. Nov. 13, 2008); *Bellinger v. Boatmen's Nat'l Bank of St. Louis*, 779 S.W.2d 647, 652 (Mo. Ct. App. 1989); *In re Estate of Seader*, 76 P.3d 1236, 1246 (Wyo. 2003).

<sup>51</sup> See *Seader*, 76 P.3d at 1246; see also *infra* Part III.D.



But the stepchild situation is one of the most common nontraditional family structures that often results in particular inheritance inequities. In the classic situation of a second marriage by two adults with children by different partners, under most intestacy laws the surviving parent will take all or most of the deceased parent's property when the first parent dies. Then, when the surviving parent dies, her biological children will take all of her property under intestacy, including the property she inherited from her deceased husband, to the exclusion of the husband's biological children. Even under laws that grant half of the first parent's property to his children, the other half is likely to pass with all of the second parent's property to the second parent's children for a one-quarter/three-quarters division of the couple's assets unless they hire lawyers to conduct estate planning.<sup>52</sup> For the majority of us in the 99%, that is not likely to happen.

When something as simple as treating stepchildren similarly, or preventing the family heirlooms from passing completely away from the children, cannot be accomplished except through complex prenuptial agreements or estate planning, then something is amiss. And the result is not much better under testacy because most states' elective share statutes virtually guarantee a grossly unequal division of property unless the surviving spouse devises a share of the decedent spouse's property back to his or her children.<sup>53</sup> But even that will not protect descendants of predeceased stepchildren because most states' antilapse statutes will not save gifts to nonbiological relatives.<sup>54</sup> Thus, if a surviving wife takes her

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<sup>52</sup> The one-quarter/three-quarter split would occur if both spouses in a common law state held roughly equal amounts of property and each died intestate. The property of the first to die would pass half to the surviving spouse and half to that decedent's children by a different marriage. Now the surviving spouse would have three-fourths of the couple's property and upon her death intestate, it would entirely pass to her children by a different marriage. This division is probably the best that would occur. In many states the surviving spouse would take 100% of the decedent spouse's intestate estate, and could then pass all of it to her children, completely disinheriting the first spouse's children. Or, under the Uniform Probate Code, § 2-102, the surviving spouse would take the first \$150,000, homestead, exempt property, and family allowance, in addition to half the decedent spouse's intestate estate. UNIF. PROB. CODE §§ 2-102, 2-402 (amended 2010). If the survivor then passes this property to her children exclusively, the children of the first spouse to die receive very little.

<sup>53</sup> Under most states' elective share statutes, the surviving spouse is entitled to anywhere from 30%–50% of a decedent spouse's estate (either the net probate estate or the augmented estate, which includes property passing by will substitutes). Once homestead, family allowances, and exempt property are taken out, and the surviving spouse claims his or her elective share (on 30%–50% of the remainder), that leaves usually less than half an estate to pass by will to children. JEFFREY A. SCHOENBLUM, *MULTISTATE GUIDE TO ESTATE PLANNING* 6001–87 tbls.6.01, 6.02 & 6.03 (2014).

<sup>54</sup> See *Seader*, 76 P.3d at 1246. Many states' antilapse statutes apply only to save gifts from lapsing if the gift is given to biological relatives. See, e.g., UNIF. PROB. CODE § 2-603; ARK. CODE ANN. § 28-26-104(2) (2014); FLA. STAT. § 732.603 (2015); see also CAL. PROB. CODE § 2111 (2014) (applying antilapse to kindred of the decedent and the kindred of a surviving, deceased, or former spouse).

elective share from her deceased husband's estate, she will likely receive at least half of his property. Then, upon her death, if she "generously"<sup>55</sup> devises that property back to his children, those gifts may lapse if any of those children predeceased her, leaving lineal descendants. The lineal descendants (i.e., her step-grandchildren) will not take their parent's share. Like the law of intestacy, the law of antilapse also relies heavily on biological relationships and will not save a gift to a nonrelative. Of course, the exact opposite outcome would occur if the wife predeceased the husband, resulting in the husband's children taking the lion's share of the wife's property to the exclusion of her own children. And this can be even more galling to the children when a parent's new spouse inherits family property from *both* biological parents, as in the situation when the mother dies, the father inherits all of her property, then the father remarries, and the stepmother survives him and inherits all of his property, including what he inherited from the mother.

The stepchild inheritance problem is the direct result of many states' decision to embrace the partnership theory of marriage in their state elective share and intestacy laws.<sup>56</sup> By making the spouse the primary legal heir, thereby giving the surviving spouse between 50% and 100% of a decedent spouse's estate, the law recognizes the equitable claims of a spouse in a couple's accumulation of wealth. And it is assumed that upon the surviving spouse's death, the property not needed for her support will pass to, or be devised to, their children.<sup>57</sup> No longer does the surviving widow have to move out of the manor house, down the hill to the small dower estate on the fringes of the property, and depend on the eldest son for her pittance of an allowance.<sup>58</sup> Now, children have to wait

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<sup>55</sup> She is under no compulsion to return any of that property to his children, and may, if she chooses, allow it all to pass entirely to her children by intestacy or via a will. See Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 229–35 (1991).

<sup>56</sup> The partnership theory of marriage suggests that surviving spouses should take a significant portion of a decedent spouse's estate because the survivor likely contributed to the creation of that property and has an equitable claim to it. However, with the rise of shorter second and third marriages, the partnership theory doesn't always result in the most equitable outcomes. See Waggoner, *supra* note 55 (explaining the divided loyalties of surviving spouses who may have children by other relationships than with the decedent and recent statutory efforts to equitably protect both spouses and children).

<sup>57</sup> Commentary to the UPC's spousal share provision (UPC § 2-102) explains that the decedent's children are not the natural objects of the surviving spouse's bounty if they are not the children of the surviving spouse. See also Waggoner, *supra* note 55.

<sup>58</sup> Under the law of dower, the surviving widow had to be content with her life estate in one-third of the real property that the husband owned at death, while the eldest son, under primogeniture, inherited the remaining two-thirds of the real property, plus a remainder in the widow's one-third. Because the son took possession of the majority of the property, the widow had to relinquish possession and reduce her standard of living to accommodate the new family of the eldest son. Jane Austen's novel, *Sense and Sensibility*, depicts the surviving widow and three daughters being ejected from the manor house by the older half-brother who

until the death of both spouses before they are able to take their inheritance.

But with the ubiquity of second marriages and blended families, the assumption that the survivor will leave all of the couple's estate to their joint children no longer holds true. Many widows and widowers remarry without prenuptial agreements providing for the inheritance rights of prior children, and if those children begin to badger their mother or father about making a will, they often risk being disinherited altogether. If the father dies without a will, the stepmother inherits most of his property, and even if the children have a good relationship with their stepmother, they will get nothing from their father's estate if she dies intestate. This is because *her* property will pass to her lineal descendants or even collateral descendants. And, even if she feels duty bound to make a will giving her deceased husband's property back to his children, her own children will have every incentive to challenge her will or argue undue influence in order to take all of the property themselves.

What prevents courts from broadly applying equitable adoption doctrines, and legislatures from expanding the definition of "child" to include the functional child, seems to be an underlying belief that if the parent did not bother to actually adopt the child, especially when doing so is relatively simple and inexpensive, then the parent did not want the child to inherit, and so courts and legislators should not bend over backwards to do what the parent clearly did not want to do. The problem with this reasoning, however, is that there are many reasons why a parent might not go through with a legal adoption, very few of which are related to not wanting the child to inherit. The most common reasons for doing so are: 1) expense, or a belief that the expense is too great; 2) legal impediments, or belief that there are legal impediments; 3) the parent may have intended to adopt, but ran out of time, died unexpectedly, or was a procrastinator; 4) the parent did not feel the need to adopt because he or she had made a will; 5) the child reached adulthood and the parent did not think an adoption was necessary at that point; 6) the parent assumed incorrectly that the law of intestacy would protect functional children or stepchildren; 7) the parent eschewed the legal intrusion into family privacy that is necessitated by adoption procedures; or 8) the parent did not think about inheritance rights at all.<sup>59</sup> In all of these cases,

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took possession of all of the father's property upon his death. JANE AUSTEN, *SENSE AND SENSIBILITY* (2003).

<sup>59</sup> There are no good studies regarding the reasons why people choose not to adopt the children in their lives. However, there are studies that the home-assessment process can be intrusive and not reflective of the parents' situation. See Gerald P. Mallon, *The Home Study Assessment Process for Gay, Lesbian, Bisexual, and Transgender Prospective Foster and Adoptive Families*, 7 J. GLBT FAM. STUD. 9 (2011); see also *Debunking the Myths*, *supra* note 37 (relating to the common but incorrect belief that an adoption is high in cost). One can also

the parent treats the child as a child, wants the child to inherit, and is either mistaken about the facts or legal requirements of adoption or is unable to adopt because of state laws or circumstances beyond the parent's control. There is no good policy reason why, in these instances at the very least, the child should be precluded from inheriting. Yet the law on equitable adoption is unlikely to provide relief in even a small percentage of these cases.

All of the reasons listed above are cogent reasons why a parent might not feel comfortable going through the formal legal channels to adopt a child she is parenting. Considering that inheritance rights provide financial support to children when their parent is no longer able to support them, there are no good counterarguments which suggest that the child should not be able to inherit when that parent dies. It is ironic that most adults form functional parent-child relationships with dependent children because they care about the child's welfare and go to great expense to help rear the child, yet counterfactual presumptions and legal barriers are imposed to prevent them from continuing that care and support after their death. It makes no sense to limit a parent's ability to care for a child to the parent's lifetime when the two mechanisms for ensuring post-mortem provisions (adoption and will-making) are expensive legal activities. Most parents want to be able to provide the economic resources for their children after they are gone, even if they failed to take the simple steps necessary to make it happen.<sup>60</sup> It is simply irrational that the law imposes such barriers to the child's welfare when the functional parent is deceased and therefore unable to provide for the child; and there is no corresponding benefit to the parent himself from not protecting the child's claim to the parent's post-mortem financial support.

I argue that we should switch the current presumption about adoption. Only when a functional parent consciously considers adoption, has the means and opportunity to do so, and expressly chooses not to adopt, should the law presume that the parent does not want the child to inherit. Yet without the bright-line test of a formal legal adoption, courts fear they will be unable to keep a lid on equitable adoption cases and spurious claims by "undeserving" foster children, stepchildren, or even random neighborhood street urchins who claim that a deceased adult *acted* like a parent and wanted them to share in an inheritance. Scholarship and case

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glean from the cases some of the reasons suggested by the petitioners for the failure of a formal adoption to have been undertaken, as in *Ford*, which argued that the parents believed incorrectly that there was an impediment, or *Seader*, in which the functional parent decided not to adopt because his lawyers advised him that making a will would be sufficient protection of his stepdaughter.

<sup>60</sup> See Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt out of Intestacy*, 53 B.C. L. REV. 877, 930–31 (2012) (arguing that we should make wills accessible to all by channeling testamentary designations into tax records).

law show, however, that “the problem is like a comet in our law: though its existence in theory has been frequently recognized, its observed passages are few.”<sup>61</sup>

To the extent succession law aims to protect the intentions of a deceased parent rather than the needs of a dependent child, it is understandable that the law prefers bright-line rules to distinguish between adults who simply help care for a child, and those who step into a parent-like relationship with the child. Adults provide care to children for many reasons, and perhaps it makes sense to draw a line somewhere to separate the claims of some children from the claims of others. But few of the functional parent-child relationships I have been talking about form spontaneously on one side of the bright line or the other. An adult can gradually become involved with another adult who has children, and they can progressively become more and more a part of their children’s lives. The marriage of a biological parent to a stepparent may not be the bright line that indicates the stepparent is ready to take on full parenting responsibilities. Over time, the biological parent may become disabled and the stepparent becomes the hands-on parent. Or, as the children develop, they may find it easier to talk to a nonparent than a parent. They may also spend time with childless relatives or neighbors, helping them out as they age. As the children grow up and become more responsible, they may begin to care for aging adults, and only then might the bond between them become cemented.

There is no limit to the different ways in which parents can be parents and children can be children. And because many of the nontraditional parenting relationships form gradually, it may be that the child reaches adulthood before the relationship is developed enough that either party would have expectations about inheritance rights. And by then, the parent may not think of adoption as a necessity, or the law may prohibit it.<sup>62</sup> But as the child develops through life, even if she is not a minor dependent when the parent dies, there may still be important reasons why that child should be able to inherit, even if the parent did not think adop-

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<sup>61</sup> Tenhet v. Boswell, 554 P.2d 330, 334–35 (Cal. 1976). Even a cursory review of the last decade’s worth of equitable adoption cases shows that the claims of the children were quite strong; they were not the claims of fortune-hunting orphans seeking to make a quick buck off the death of the old man down the street. See, e.g., *In re Estate of Ford*, 82 P.3d 747, 755 (Cal. 2004); *Morgan v. Howard*, 678 S.E.2d 882, 883–84 (Ga. 2009); *In re Estate of Thompson*, 760 N.W.2d 208 (Iowa Ct. App. 2008); *In re Estate of Hannifin*, 311 P.3d 1016, 1019–20 (Utah 2013).

<sup>62</sup> See *Doby v. Carroll*, 147 So. 2d 803, 804–05 (Ala. 1962); *Hays v. Hays*, 946 So. 2d 867, 868 (Ala. Civ. App. 2006); *In re Appeal in Maricopa County Juvenile Action No. A-25646*, 637 P.2d 1092, 1093–94 (Ariz. Ct. App. 1981); see also K. M. Potraker, Annotation, *Adoption of Adult*, 21 A.L.R.3d 1012 § 2 (1968). Ironically, many courts deny adult adoptions that are sought with the intention of affecting inheritance rights. See Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 163–64.

tion was necessary. This is because very few of us actually think about death or the descent and distribution of our property until it is upon us.<sup>63</sup> Furthermore, if everyone put her financial house in order before dying, we wouldn't need the bright-line rules of intestacy laws at all. But until we can foresee our own deaths and can easily provide for the welfare of the important people in our lives, the law should presume inheritance rights for functional children precisely because the existence of the parent-child relationship during life strongly evidences the parent's devotion to the child's welfare.

### *B. The Cut-Off Child of Second-Parent Adoptions*

Where a legal impediment or a mistaken belief in a legal impediment to an adoption exists, the presumption should shift to allow inheritance by a functional child because that would conform to both the parent's and child's most likely expectations and intentions. This would take care of unmarried and same-sex couples, in which one parent is a biological parent and the other is the functional equivalent of a stepparent, whether they choose not to marry or are legally barred from marriage.<sup>64</sup> To encourage adoption and the formalization of the parent-child relationship for unmarried couples parenting children, a number of states have begun to allow what are called "second-parent adoptions" to remove the legal impediment of many state adoption codes that prohibited two unmarried adults from adopting a child.

The second-parent adoption allows a nonspouse to adopt a child without terminating the parental rights of the biological co-parent. This process is one commonly used by same-sex couples when one partner is the biological parent and is co-parenting with an adoptive parent. This may arise when an LGBTQ couple decides to use assisted reproductive technology (ART) to enable one of them to either carry a child or sire a child through the use of sperm donation or a gestational surrogate. The

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<sup>63</sup> As noted earlier, studies show that well over a majority of the population do not have wills and that although will-making increases with age and wealth, a significant number of people will die intestate. Whatever the reasons for the lack of basic estate planning, the facts cannot be avoided. If most people cite procrastination for why they do not make wills, it is reasonable to assume that a similar reason explains their inactivity in adopting the children in their lives. See Weisbord, *supra* note 60, at 889. As Weisbord argues, the lack of estate planning is not a result of agreement with the default rules. The same can be argued for equitable adoption. It is unlikely that people choose not to adopt because they agree with the default rule that unadopted children may not inherit.

<sup>64</sup> Until 2015, same-sex marriage was not recognized in a majority of states, leaving same-sex couples unable to benefit from the stepparent rules and exceptions for adoption and inheritance. Although same-sex marriage is becoming legally possible for a majority of LGBTQ couples, the availability of the right does not do away with the cut-off problem entirely, as many heterosexual and homosexual couples will choose not to marry because of numerous social, legal, and economic barriers that have nothing to do with their relationships with the children in their lives.

biological parent will have an automatic legal parent-child relationship with the child, which includes the child's right to inherit from that parent or directly from or through that parent's relatives. The nonbiological parent is then able to adopt the child as a second parent, taking the place of the other biological parent who, in the case of a sperm or egg donor, provided the other genetic material, but relinquished all parental rights in doing so. The second-parent adoption is legally equivalent to a stepparent adoption; the only difference is that the second-parent adoption does not require the marriage of the two parents, whereas a stepparent adoption, by definition, involves an adoption by the *spouse* of a biological or prior adoptive parent.

Second-parent adoptions are not permitted, however, in a majority of states.<sup>65</sup> Some state adoption laws allow only married couples or single individuals to adopt, thus precluding adoption by any unmarried partner of a biological or adoptive parent.<sup>66</sup> Most state adoption codes expressly permit a single person or a married couple together to adopt a child, but they say nothing about an unmarried couple or a co-parent who is not married to a biological parent. In the absence of express statutory authorization, adoption decrees in second-parent adoption cases may be overturned and voided on public policy grounds if the second parent is a same-sex partner or if the parents are living in an adulterous situation.

All states allow an unmarried individual to adopt a child, but doing so usually cuts off all parental ties, including inheritance rights, with *all* biological parents. An adoption by a married couple also cuts off all inheritance rights with biological parents. Things get more complicated when one biological parent retains parental rights, but allows another co-parent to adopt a child. In that case, if the biological parent and the co-parent are married, the co-parent is a stepparent and will benefit from streamlined adoption procedures, and the adoption will not cut off the inheritance rights of the child with the biological co-parent. But if the biological and co-parent are not married, the adoption generally falls into a kind of legal limbo unless the state either expressly permits or disallows adoptions.<sup>67</sup> Even where such adoptions are permitted, there may

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<sup>65</sup> California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Maine, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington allow it, along with the District of Columbia. See *infra* Appendix.

<sup>66</sup> Utah prohibits anyone cohabiting with an unmarried partner from adopting; Arizona and Utah give preferences for married couples, and Mississippi prohibits adoption by a same-sex couple. See *infra* Appendix.

<sup>67</sup> According to the Family Equality Council, second-parent adoptions are expressly permitted in 15 states plus the District of Columbia, uncertain in an additional 28 states, and expressly prohibited in 7 states. See *Second-Parent Adoption Laws*, FAMILY EQUAL. COUNCIL, [http://www.familyequality.org/get\\_informed/equality\\_maps/second-parent\\_adoption\\_laws/](http://www.familyequality.org/get_informed/equality_maps/second-parent_adoption_laws/) (last visited May 17, 2015). It is not clear whether the twenty-eight states for which second-

be legal or social obstacles for unmarried couples. For instance, many states that may allow second-parent adoptions have strong preferences for married couples, and at least five states have ruled that second-parent adoptions violate the state's adoption laws.<sup>68</sup>

Although the trend is toward allowing second-parent adoptions, states that require marriage (for either same-sex or opposite-sex couples) in order to adopt a child (either a child who is a stranger to both or a child who is the biological child of one of the partners) dramatically limit the ability of nontraditional parents to protect the legal interests of their children. Moreover, many judges in liberal counties in states that have not come out either way on second-parent adoptions typically grant them. Where they are granted, the judgment usually provides that the biological parent consents to sharing parental rights with the second parent without the termination of the biological parent's rights. These judgments also provide that the adoption should be treated like a step-parent adoption even though the parents are unmarried, either because they are unable or unwilling to marry.

The problem with these second-parent adoptions in states that have not expressly allowed them is that although the adoption judgment may give the second parent parental rights to make care and custody decisions on behalf of the child, the judgment cannot override inheritance laws that terminate an adopted child's inheritance rights through and from her biological parent.<sup>69</sup> These state inheritance laws, similar to Uniform Probate Code § 2-114, provide that all inheritance rights terminate between a child and her natural parents upon adoption except when the spouse of the natural parent adopts the child.<sup>70</sup> Because the inheritance laws create only one exception, the step-parent exception, adopted children will be *cut off* from inheritances by and through their natural parents, even when they continue to reside with them and the natural parent continues to

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parent adoptions are uncertain would limit the uncertainty to same-sex couples, or whether they would treat opposite-sex unmarried couples the same way. Similarly, it is not clear if unmarried opposite-sex couples are also prohibited from engaging in second-parent adoptions in the seven states that prohibit them, although it seems likely.

<sup>68</sup> Kentucky, North Carolina, Nebraska, Ohio, and Wisconsin. See *infra* Appendix.

<sup>69</sup> See Padilla, *supra* note 15, at 237.

<sup>70</sup> Ironically, the post-2008 UPC § 2-119 creates three other situations in which the child's rights to inherit from the biological parent are not cut off, but none deal with second-parent adoptions. The first new provision deals with adoption by a relative of a genetic parent, the second deals with adoption after the death of both genetic parents (which is relatively rare), and the third deals with adoption by those using assisted reproductive technology (ART). Notably, none of these new situations adequately address the inheritance needs of the child cut off in the co-parenting second-parent adoption or the functional child. See UNIF. PROB. CODE §2-119 (amended 2010).



have parental rights over the child in accordance with the second-parent adoption decree.<sup>71</sup>

Adoption and probate statutes, which effectuate the inheritance penalty, reflect a “fresh start” policy. The most current iteration of the Uniform Probate Code creates a parent-child relationship between an adoptee and her adoptive parents,<sup>72</sup> while a parent-child relationship is not deemed to exist between an adoptee and the adoptee’s genetic parents.<sup>73</sup> The comment to this section explains that “[t]his rule recognizes that an adoption severs the parent-child relationship between the adopted child and the child’s genetic parents. The adoption gives the adopted child a replacement family, sometimes referred to in the case law as ‘a fresh start.’”<sup>74</sup> State laws mirroring the Uniform Probate Code were intended to effectuate a policy that protects adoptive parents from claims of the child’s biological parents.<sup>75</sup> While these are laudable goals, the fresh start provision does not contemplate alternative family structures. In addition, some courts have interpreted the fresh start language strictly, to avoid adaptation of it for same-sex couples.<sup>76</sup> The fresh start presumption simply does not work at all in adoptions where the child continues to be parented by one biological and one adoptive parent, unless the adoption is analogized to a stepparent adoption. With statistics showing that over 50% of children are now being born out of wedlock,<sup>77</sup> probate codes that tie inheritance rights to the marital status of parents are clearly falling behind the curve of social practice.

Even stepparent adoptions can be problematic because they require the termination of the noncustodial parent’s rights. If a noncustodial parent refuses to give up parental rights to a child, the stepparent simply cannot adopt. If the noncustodial parent is abusive, neglectful, or otherwise subject to a judicial termination of parental rights, an expensive judicial process will be necessary to terminate the noncustodial parent’s rights before the stepparent can adopt. If the child’s parentage or non-custodial parent’s location is unknown, a hearing along with publication

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<sup>71</sup> Ralph C. Brashier incorrectly assumed that a second-parent adoption, which allows the continuation of parental rights for both the biological and adoptive parent, will allow the child to be the heir expectant of both parents. See Brashier, *supra* note 62, at 161–62.

<sup>72</sup> UNIF. PROB. CODE § 2-118(a).

<sup>73</sup> *Id.* § 2-119(a).

<sup>74</sup> *Id.* § 2-119 cmt.

<sup>75</sup> Beekman, *supra* note 15, at 150.

<sup>76</sup> *E.g., In re Adoption of Jane Doe*, 719 N.E.2d 1071, 1071–73 (Ohio Ct. App. 1998) (denying the petition of a woman to adopt her partner’s biological child, stating that the adoption by an adult who was not the child’s stepparent would terminate the parental rights of the biological parent by operation of law because the unambiguous language and meaning of the statute required strict construction).

<sup>77</sup> See *A Generation at Risk*, *supra* note 2; see also Keever, *supra* note 3; U.S. CENSUS BUREAU, *supra* note 3.

of the termination petition may be required. And if the other biological parent is deceased, the surviving parent may feel a strong sense of duty toward the memory of the deceased parent, and might not permit a step-parent adoption. These emotional and legal impediments all work against a child who is not formally adopted, by denying inheritance rights from and through the functional family (whether this is a stepparent or an unmarried co-parent who does not adopt), and against a child who is adopted by anyone but a stepparent, by denying inheritance rights from and through the biological co-parent.

The latter situation, the cutting off of the inheritance rights of the adopted child, is, in many ways, even worse than prohibiting inheritances by nonadopted, but functional children. The point of adoption, for most parents, is to legally cement the parent-child relationship and to ensure that their children can inherit from them. But when the adoption by the nonbiological co-parent ends up terminating the inheritance rights of a child from the biological co-parent, the law has created a serious double bind for parents. In the case of the typical lesbian couple, Mary and Sally, where Mary is the biological parent of the couple's two children, the children will be able to inherit only from Mary if Sally does not adopt them, and they can inherit only from Sally if Sally does adopt them. The same is true if the parents are Mark and Sally, where Mark is the biological parent and Sally adopts Mark's children after the death of his first wife, but Mark and Sally decide not to marry because doing so will have economic repercussions such as the loss of Sally's Medicaid or Social Security benefits.<sup>78</sup>

Thus, even in progressive states that have recognized the importance of second-parent adoptions for same-sex and cohabiting opposite-sex parents, these parents face a serious catch-22. Although the second-parent adoption gives both parents parental rights during life, the probate codes of the vast majority of these same states will not allow these children the same inheritance rights as children adopted by the married

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<sup>78</sup> The so-called marriage penalty is a very real barrier to many same-sex and opposite-sex couples deciding whether to marry. Married couples with dual-income pay more in income taxes, Medicare taxes, and social security and receive proportionately fewer benefits than similarly situated unmarried couples. There are also situations in which divorced individuals might lose insurance benefits, child support, or alimony benefits from their former spouse if they remarry. Some individuals balk at the prospect of potentially becoming responsible for a spouse's debts and may forego marriage as the easiest way to deal with many of these economic disparities. Many individuals on Medicaid risk losing coverage if they marry and their spouse's income raises their household income levels above the ceiling for Medicaid. And where one spouse is a non-resident, the income tax penalties can be quite significant for the resident spouse who has a choice of filing as married filing separately (which is usually the worst tax category) or married filing jointly (which makes the non-resident spouse's non-US income taxable). See, e.g., Jim Wang, *How Much the Marriage Tax Penalty Will Cost You*, U.S. NEWS (Mar. 12, 2014), <http://money.usnews.com/money/blogs/my-money/2014/03/11/how-much-the-marriage-tax-penalty-will-cost-you>.

spouse of a biological parent. And even if marriage becomes a legal possibility in all states for same-sex couples, that option would not resolve the cut-off problem for both straight and gay co-parents who choose not to marry, even if they have the wherewithal to adopt.

## II. BUT MOMMY WROTE A WILL: AVOIDING THE INHERITANCE PENALTY

When we talk about the law “cutting off” inheritance rights, most people think about the laws of intestate succession, the default rules for how property will pass when the decedent fails to write a will. If a biological parent of a child subject to the cut-off provision, or a functional parent who never adopted a child, writes a will naming the child as a beneficiary, then there is no penalty, right? Wrong. The cut-off provision may be located in the intestacy section of most state probate codes, but it has a much longer reach than merely to descents of intestate estates. And besides, intestate estates still constitute more than half of all estates. Many people, after living a lengthy life with several expressions of an intent to write a will or to adopt the child in their life, never get around to it. Should we punish the children for the omissions of their parents?<sup>79</sup>

The inheritance penalty may arise in a number of factual scenarios involving both descent and devises. Testamentary freedom, the bedrock of American inheritance law, grants individuals the freedom to control the disposition of their property after death. To this end, people can create wills to effectuate the desired distribution of their property and can name anyone as a beneficiary, including functional or biological children that would be subject to the cut-off provision. However, any part of a person’s estate that is not effectively disposed of by a testamentary instrument will be distributed according to the state’s intestacy scheme. The same is true of much devised property that lapses, any gift to a class like heirs, children, or issue, and any of these bequests that pass *through* the parent from grandparents, siblings, or other collateral relatives. Legal heirship is far more complex than who inherits if Mommy does not write a will—it pervades all aspects of the probate code, from questions of standing to homestead rights, to preferences as executor, to social se-

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<sup>79</sup> Justice Sears-Collins, dissenting in *O’Neal v. Wilkes*, explained that many of these inheritance penalties and barriers serve only to harm the very children they are supposed to protect. She explained that “where there is no person with the legal authority to consent to the adoption, such as in the present case, the only reason to insist that a person be appointed the child’s legal guardian before agreeing to the contract to adopt would be for the protection of the child. Yet, by insisting upon this requirement after the adopting parents’ deaths, this Court is harming the very person that the requirement would protect.” *O’Neal v. Wilkes*, 439 S.E.2d 490, 494 (Ga. 1994).

curity benefits, and to the tax rates and withdrawal rules of a decedent's IRA and 401(k) plan accounts.

The current intestacy scheme, as it exists in most states, is rigid and formalistic<sup>80</sup> and does not consider whether the decedent had an ongoing relationship with the designated heirs, who are the priority takers under intestacy.<sup>81</sup> In fact, it does not even matter if the decedent knew the heir personally.<sup>82</sup> Intestacy statutes rarely conform to the decedent's actual intent, although it provides a pretty good approximation for those decedents who leave a surviving spouse and biological children.<sup>83</sup> No intestacy system currently in place attempts to determine whether a parent and child functioned as a family.<sup>84</sup> Thus, a functional child may be cut off and property will pass in favor of a distant cousin who has never met the decedent.

The goal behind intestacy statutes, therefore, is not necessarily to approximate what persons the decedent would have wanted to benefit, but to give the decedent's property to the decedent's family, with the term "family" narrowly defined to mean family by biology or adoption.<sup>85</sup> In this way, the inheritance system "maintain[s] and perpetuate[s] the social unit that Americans have traditionally deemed essential for a stable and productive society—the family."<sup>86</sup> This falls short of addressing the needs of nontraditional families,<sup>87</sup> given the increase in LGBTQ and blended families within the past few decades.<sup>88</sup> Furthermore, intestacy law completely ignores a decedent's *nonmarital* partner, whether same or opposite sex.<sup>89</sup> The bright-line rules of intestacy "aid in the ease of ad-

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<sup>80</sup> Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 208 (2001) (describing intestacy schemes as assigning shares "mechanically"); Tritt, *supra* note 14, at 379 (describing succession statutes as "rigid" and "mechanical").

<sup>81</sup> Gary, *supra* note 13, at 3.

<sup>82</sup> Foster, *supra* note 80, at 207; Gary, *supra* note 13, at 3.

<sup>83</sup> Tritt, *supra* note 14, at 382; *see also* Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 651 (2002) [hereinafter *Parent-Child Relationship*].

<sup>84</sup> *Parent-Child Relationship*, *supra* note 83, at 665.

<sup>85</sup> Gary, *supra* note 13, at 3 (citing Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 324); *see also* Foster, *supra* note 80, at 206 ("[T]he U.S. inheritance system actually disserves support. Its principal function is not support, but rather preservation of the family."); *Parent-Child Relationship*, *supra* note 83, at 653.

<sup>86</sup> Foster, *supra* note 80, at 204; *see also* Spitko, *supra* note 14, at 1100 ("[I]ntestacy law not only reflects society's familial norms but also helps to shape and maintain them.").

<sup>87</sup> Gary, *supra* note 13, at 3; *Parent-Child Relationship*, *supra* note 83, at 646.

<sup>88</sup> *See* O'Bryan, *supra* note 11, at 1119.

<sup>89</sup> Spitko, *supra* note 14, at 1065. The acclaimed novelist of *The Girl with the Dragon Tattoo*, Stieg Larsson, died unexpectedly after delivering the manuscripts of his novels to his publisher. His partner of thirty years was entirely excluded from any financial benefits of his estate because he died intestate and Swedish inheritance law did not provide for unmarried partners. His father and brother ultimately worked out a settlement, but the law by no means required such largesse. Boyd Tonkin, *The Publisher Who Played with Fire: The Battle for*

ministration, but do so at financial and emotional cost to many families.”<sup>90</sup>

Of course, individuals can avoid intestate succession by executing a will, although most people fail to do so.<sup>91</sup> There are myriad reasons why people do not execute wills, including procrastination, lack of resources, or even just avoidance of difficult issues around death and dying.<sup>92</sup> And for those who do, some or all of their property still may be distributed according to intestate schemes because wills can be invalidated for any number of reasons, including incapacity, undue influence, revocation, fraud, or mistake. If a will, or parts of a will, are invalidated, the decedent’s property will pass through intestacy.

The collateral effects of the narrow intestacy rules privileging biology and adoption extend to another important doctrine of succession law, that of “representation.” Representation is the substitution of more remote relatives to take the property of a parent or other ancestor who predeceased the decedent but would have been a descendant had he or she survived.<sup>93</sup> If a functional child is not entitled to inherit from a functional parent by intestacy, she cannot represent her functional parent if that parent is an heir to another, but predeceased that ancestor. Adopted children are often precluded from inheriting from their natural parent’s relatives by representation due to the cut-off provision and fresh start policy. For instance, in *In re Estates of Donnelly*, the Washington Supreme Court relied upon the fresh start policy to deny an adopted child the right to represent her natural parent and take from her natural grandparent.<sup>94</sup> This can happen even though her natural parent continued to raise her and she maintained an ongoing relationship with her grandparents or other relatives.

The “stranger to the adoption rule,” which often prevents an adopted child from inheriting property through the adoptive parent from the adoptive parent’s relatives, is based on the presumption that the grandparents or other relatives were strangers to the adoption and may not necessarily consider the adoptive child a full-fledged member of the

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*Control of Larsson’s £30m Legacy*, THE INDEPENDENT (Dec. 20, 2013), <http://www.independent.co.uk/arts-entertainment/the-publisher-who-played-with-fire-the-battle-for-control-of-larssons-30m-legacy-9018974.html#>.

<sup>90</sup> *Parent-Child Relationship*, *supra* note 83, at 654.

<sup>91</sup> Gary, *supra* note 13, at 3; *Parent-Child Relationship*, *supra* note 83, at 649–51.

<sup>92</sup> *Parent-Child Relationship*, *supra* note 83, at 650–51.

<sup>93</sup> Representation allows a member of a younger generation to stand in the shoes of a member of an older generation who would have been an heir under intestacy but for that person’s death. See WILLIAM M. MCGOVERN & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES: INCLUDING TAXATION AND FUTURE INTERESTS § 2.2, at 51 (3d ed. 2004) (noting that representation allows a member of a younger generation to stand in the shoes of a member of an older generation who would have been an heir under intestacy but for that person’s death).

<sup>94</sup> *In re Estates of Donnelly*, 502 P.2d 1163, 1168 (Wash. 1972).

family. The opposite problem still arises for the cut-off child. This is a biological child with continuing ties to the biological parent and her relatives, and the odds are very slim indeed that the relatives would have the expertise and forethought to realize that the second-parent adoption of their grandchild would cut off the child's inheritance rights from them. These individuals need to be informed that their biological grandchild, with whom they still have a relationship, has been declared a stranger to them by law because of an adoption by a co-parent. The court explained that the legislative policy of providing a clean slate was preeminent in adoption law and that the new family of the adopted child was to be treated as her natural family.<sup>95</sup> Thus, this outmoded fresh start policy that underlay the stranger to the adoption policy will result in an adopted child of a same-sex or unmarried couple being unable to inherit by, from, or through any biological parent who is not legally recognized as her parent.

Besides intestate succession of a decedent's estate, however, the state's intestacy statute has an even wider reach. By defining who counts as a legal heir, the statute determines who has standing to challenge a decedent's will or to intervene in the probate of an estate.<sup>96</sup> Only legal heirs have a potential interest in an estate and thus have standing to challenge a particular distribution. Probate codes also establish the order of priority for who will be appointed executor or personal administrator of an estate, giving priority to spouses and children.<sup>97</sup> A functional child or cut-off child will be deemed a stranger to the decedent under most state codes.

The intestacy statute also determines legal heirs for purposes of homestead protections, retirement benefits, social security, and insurance.<sup>98</sup> Persons who are not legal heirs often cannot recover for the wrongful death of a parent or spouse.<sup>99</sup> Any testamentary document that bases distribution on terms like "heir," "child," "descendant," or "issue" will rely on the state's intestacy laws to determine the validity of the legal relationship. Even such diverse matters as mental capacity and un-

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<sup>95</sup> *Id.* at 1167.

<sup>96</sup> See MCGOVERN & KURTZ, *supra* note 93, § 12.1, at 497.

<sup>97</sup> See, e.g., OHIO REV. CODE ANN. § 2113.06 (West 2014) (prioritizing spouse, then *next of kin* as administrators of an estate); FLA. STAT. § 733.301 (2014) (prioritizing the surviving spouse over the *heir nearest in degree*); CAL. PROB. CODE § 8461 (West 2015) (prioritizing spouse, then children, then grandchildren).

<sup>98</sup> See *Astrue v. Capato*, 132 S. Ct. 2021, 2033–34 (2012) (holding that federal social security benefits were based on definitions of family relationships under state law).

<sup>99</sup> See, e.g., CAL. CIV. PROC. CODE § 377.60 (West 2015) (allowing spouses, domestic partners, children, and issue of deceased children to bring a wrongful death action); see also N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (McKinney 2014). New York allows only a personal representative to bring a wrongful death action, so if a putative child cannot be a personal representative, he or she cannot bring a wrongful death action.

due influence will ultimately rest on the definition of the legal heir for determining the “natural objects of a person’s bounty,”<sup>100</sup> or whether a particular person is in a “confidential relationship.”<sup>101</sup> And although many courts might recognize the functional parent-child relationship of a biological parent to her child in cases beyond the strict intestacy context, the broad reach of the category of legal heir cannot be understated.

Making a will may be effective in benefitting a same-sex partner and their cut-off children if it is not challenged and if it disposes of all of the biological parent’s property. But it will not help in the many instances in which a child would inherit through her biological parent. Thus, if grandparents, siblings, or collateral relatives die without writing a will and naming the child, she will not be able to take by representation her parent’s share if her parent predeceased the testator. So it is not enough for the parent to execute a will—all relatives who would seek to benefit the parent or the child must execute a will or other testamentary instrument so that these estates do not pass by intestacy. And all the issues of standing, mental capacity, executorship priorities, and the like, apply to grandparents, siblings, and collateral relatives of the parent as well. The same impediments apply to functional children whose inheritance rights are denied as to the cut-off child.

One big problem arises when a functional or biological parent of a cut-off child predeceases any relative who devises property to that parent. Under intestacy laws, a beneficiary who predeceases the decedent cannot inherit a share, but their descendants take by representation.<sup>102</sup> Under a will, however, the law treats that gift as having lapsed.<sup>103</sup> Every state has adopted an antilapse statute, however, which provides that a substitute gift is created in the *issue* of the will’s beneficiary, who will take the lapsed gift in place of the predeceased beneficiary. Though these statutes differ in classes of applicable beneficiaries,<sup>104</sup> they all apply to children and grandchildren. Thus, if a grandparent devises a gift to a parent, and the parent predeceases the grandparent, the cut-off or functional child will not take her parent’s share under antilapse statutes because the child is not deemed a child of that parent. So even making a will does not solve this problem if lapsed gifts come into play.

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<sup>100</sup> See MCGOVERN & KURTZ, *supra* note 93, § 7.1, at 295.

<sup>101</sup> See *id.* § 7.3, at 306.

<sup>102</sup> See *id.* § 2.2, at 51.

<sup>103</sup> See *id.* § 8.3, at 328–29.

<sup>104</sup> For instance, in Maryland, antilapse applies to any testamentary beneficiary who predeceases the testator. See MD. CODE ANN., EST. & TRUSTS § 4-401 (LexisNexis 2014). In the District of Columbia, antilapse applies to beneficiaries who are issue of the decedent. See D.C. CODE § 18-308 (2015). Under the UPC, the antilapse provisions apply only to beneficiaries who are related through the grandparents of the decedent. See UNIF. PROB. CODE § 2-603 (amended 2010).

Countless provisions in the average probate code benefit children or issue or descendants of a decedent, from antilapse rules to homestead protections to forced shares for minor children in Louisiana.<sup>105</sup> The cut-off provision applies to them all to deny a child the legal right to be deemed the parent's child for all inheritance purposes. And it does not stop with the parent. If the child is not the parent's child, she is not a grandchild, niece, aunt, sister, or cousin for any of the family members of the parent. This mushrooming effect of legal heirship means that every single relative would need to execute ironclad instruments naming a child to ensure that the inheritance penalty will not apply.

Yet, even if all relatives execute appropriate wills, trusts, or other testamentary instruments, legal heirship problems can still arise in class gifts. A class gift is property given to a group of people who share common characteristics and who are intended to get equal shares of property.<sup>106</sup> The inheritance penalty may arise in the class gift context in at least two ways. Adopted children, by virtue of the fresh start policy, are typically considered strangers to their birth relatives. As a result, adopted children can be excluded from class gifts to heirs, children, descendants, and issue of the biological parent or relatives. Children of unmarried and same-sex couples can be penalized in another way. If a functional parent never adopted his partner's child, but had two biological children of his own and executed a will leaving his property to "his children," the functional child might be excluded from that class even if the testator intended for her to be included. Functional and cut-off children both will be excluded from class gifts under traditional interpretations.

Thus, even if all functional parents write wills and name their children as beneficiaries, only a fraction of the problems are avoided. In the case of the biological child being cut off from her parent's inheritances, she is cut off from inheriting through her parent as well. Thus, grandparents, aunts and uncles, and brothers and sisters all have to write wills to avoid the cut-off provision. And, the estate planning must be quite detailed, for no will or trust or beneficiary designation should rely on the terms "heir," "child," "issue," or "descendant" if the cut-off child is to take her share. In the case of the child who is not adopted by her functional parent, that parent also must take extra steps in estate planning to provide for her functional child, as must her entire family. For instance, the child might not have the standing to challenge a claim to a grandpar-

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<sup>105</sup> For a typical antilapse statute, see UNIF. PROB. CODE § 2-603. A good example of a homestead protection that privileges recognized descendants exists under Florida law. See FLA. STAT. § 732.401 (2014); see also LA. CIV. CODE art. 1493 (2014).

<sup>106</sup> See MCGOVERN & KURTZ, *supra* note 93, § 1.1, at 3 (defining a class gift as "a gift to a group, like 'children,' as distinguished from a gift to individuals, like 'John and Mary'").



ent's estate. Or, she will not be entitled to Social Security or insurance benefits if the adoption is not made legal. But, in the case of unmarried and same-sex couples, they are over a barrel with either decision they make, to adopt or not to adopt. Adoption may allow the child to inherit from and through the adoptive parent, but the adoption cuts off the rights of the child to inherit from and through her biological co-parent. Unlike the traditional child who is entitled to inherit from both parents, the cut-off child is legally denied the possibility of inheriting from two parents.

And the penalty can spiral downward as well. A functional or cut-off child who predeceases a testator, even if the child is named, may find that her children are not entitled to the benefits of antilapse statutes because she is not of the statutorily required degree of relationship. In the case of *In re Estate of Seader*, for instance, a couple had two genetic children and the wife had a daughter from a prior marriage.<sup>107</sup> Despite numerous aborted plans to adopt the daughter, the father failed to get around to it.<sup>108</sup> Instead, he simply wrote a will leaving his estate in three equal shares, to his two sons and his wife's daughter, who he characterized as his child. But the daughter predeceased the father by a few months, and the daughter's two sons were not allowed to argue equitable adoption because the court held that doctrine applied only in the case of intestacy.<sup>109</sup> Since the daughter was provided for under the will, equitable adoption was not applicable.<sup>110</sup> But the daughter's children could not benefit from the state's antilapse statute without a finding that the daughter was a child.<sup>111</sup> Thus, the father's estate was divided into two shares for the biological sons, and the stepdaughter's children were cut out.<sup>112</sup>

There are countless ways in which the denial of a parent-child relationship for intestacy purposes disadvantages the functional child and the cut-off child, ways that cannot be adequately planned around. Many benefits depend on the status of being a child, but for those who are distanced from the legal system, it is especially difficult to properly draft instruments to effectively avoid the inheritance penalty. And how many people actually think about the myriad effects of the penalty until it is too late? Even if the solution were to make adoption easier and simpler so that more functional parents took formal legal steps to protect their chil-

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<sup>107</sup> 76 P.3d 1236, 1237 (2003).

<sup>108</sup> *Id.* (stating that the father consulted with a lawyer but decided it was too expensive).

<sup>109</sup> *Id.* at 1248.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Ironically, had one of the sons predeceased his father leaving issue, the issue would have taken their father's share under the state's antilapse statute, but the stepdaughter's issue would not be allowed to take their mother's gifts, even though she was a named beneficiary. The court held that because she was named specifically, the court could not infer that the stepfather included her as a daughter, rather than simply as a named beneficiary. *See id.* at 1247.

dren's inheritances, making adoption easier does not address the problem of the cut-off child. In fact, making adoption easier may cause parents to exacerbate the inheritance penalty for their children. Although probate courts still have some flexibility in using equitable principles to protect donative intent, if explicit statutory changes are not made, the solution is likely to be piecemeal in most states, addressing each category of child differently. There are two policy changes that would help.

The first change would be to reexamine the traditional history of adoption in an effort to unlink the age-old connection between adoption and inheritance, recognizing that the linkage is based on outdated expectations regarding adoption.<sup>113</sup> If we understood adoption decisions to be primarily about relationships and powers during life, then perhaps the fear of the nonadopted child inheriting undeserved property might lessen, and the courts could liberalize the equitable adoption rules. The second change is to focus our attention, and the equity court's attention, on the living—the child who has performed her side of the bargain, and should not be barred from inheriting—and not on the dead. Despite the mantra of testamentary freedom, which excuses courts from not providing inheritance rights to functional and cut-off children, we should focus on the fact that, in many cases, limits on dead hand control to protect spouses come at the expense of the very children that adults care most about.

Legislatures intent on resolving the inequities of the inheritance penalty have many piecemeal fixes they can enact, as well as comprehensive inheritance law reforms they could undertake. In any reform, however, courts and legislatures need to consider two important points. First, just as family law codes have unhitched the parent-child relationship from the marital status of the parents, so too should the probate codes. Second, the reliance on adoption as a bright line indicating donative intent is contrary to most people's likely intent given the complex role of law in the modern family. People choose to adopt, or not adopt, for many reasons, only one of which is likely to be the cementing of inheritance rights. To properly address these complex inequities, we next need to examine how a variety of reform elements might work. Then we need to consider the policy changes that can be made to facilitate bringing inheritance equity to our modern families.

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<sup>113</sup> Even if the history of adoption showed that parents primarily adopted children in order to allow them to inherit, the practice today is far too diverse for such a simple correlation. Parents adopt (or fail to adopt) for many reasons, and as I have argued, allowing or foreclosing an inheritance seems to be one of the least common reasons.

### III. THE DETAILS: MARRIAGE EQUALITY, SECOND-PARENT ADOPTIONS, FUNCTIONAL PARENT/CHILD STATUTES, EQUITABLE ADOPTION, INTESTACY REFORM, AND DECEDENT-CONTROLLED REFORMS

There are a number of possible solutions to the diverse problems of the inheritance penalty and, given the state-by-state diversity of adoption, marriage, and probate laws, it is likely that individual solutions will consist of a variety of legal changes, some statutory and some judicial. Many of these proposals apply to intestacy and inheritance laws generally, suggesting formal and informal changes to probate codes. Others include suggested changes to adoption codes and the definition of family, as well as general legal changes to allow parents whose children are facing the inheritance penalty to draft around the penalty as best as they can. At the core of these proposals is a critique of the strict adherence to notions of biology and formalism in the definition of family in inheritance law.<sup>114</sup> In many ways, inheritance laws continue to reflect the nuclear family norm of the 1950s, as well as the elite landed family's priorities of the 1850s.<sup>115</sup> However, the nuclear family norm does not reflect the lives of most American families.<sup>116</sup> Yet, legislatures have not responded by expanding the definition of family for purposes of inheritance rights, even though they have expanded the definition of family in their family law codes.<sup>117</sup> As a result, many scholars have proposed different approaches for amending inheritance laws to mirror actual family structures.<sup>118</sup> In bringing these together to analyze their strengths and weaknesses for remedying the myriad inheritance penalty problems, I recognize that no single solution or legal change will solve the problem for all children. Comprehensive law reform will require many of these changes at different levels, and a failure to achieve change in one way may require change through a different channel. Even if these changes are not made, however, policy changes that reflect the structure and protect the needs of twenty-first century families will help decrease the impact of the inheritance penalty on some, if not all, children.

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<sup>114</sup> See, e.g., Gary, *supra* note 13, at 4–5. See generally Foster, *supra* note 80, at 204.

<sup>115</sup> Gary, *supra* note 13, at 5.

<sup>116</sup> Beekman, *supra* note 15, at 144 (“The 2000 Census reported that 34.3% of lesbian couples and 22.3% of gay male couples were raising children.”); Gary, *supra* note 13, at 31 (“[T]he limited data available for stepfamilies and for gay and lesbian families support the general perception that the structure of American families has changed from the nuclear norm and will continue to change in the future.”); Margaret Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917, 917 (1989) (“Many modern families do not take the form of the traditional nuclear family.”).

<sup>117</sup> Gary, *supra* note 13, at 4.

<sup>118</sup> See Beekman, *supra* note 15, at 141–42; Foster, *supra* note 80, at 205; Gary, *supra* note 13, at 3; Trast, *supra* note 10, at 864.

### A. *Marriage Equality*

One part of the solution that should rectify the problem for many children subject to the cut-off provision is the recent availability of same-sex marriage, with all of the rights and duties of marriage. Thus, since the Supreme Court's decision in *Obergefell v. Hodges*,<sup>119</sup> married same-sex couples now fit within the stepparent exception to the probate codes which then allow the children of married LGBTQ parents to inherit from both their biological and adoptive parents.

However, even though same-sex marriage is now available nationwide, important state-by-state changes still need to be undertaken to ensure that second-parent adoptions that were done by unmarried partners before they married will be treated as stepparent adoptions after the parents are deemed legally married. Many same-sex parents received marriage licenses in states that granted same-sex marriages, but lived in states that did not recognize them. If they have adopted children in a state that did not recognize the marriage, it is unclear what will happen now that the state has to recognize their marriage. It would seem obvious that second-parent adoptions that occurred before the marriage was deemed legal should be treated as step-parent adoptions once the marriage is legalized, but such common sense outcomes are by no means guaranteed, especially in those states that stringently opposed same-sex marriage or have imposed barriers to adoptions by LGBTQ parents.<sup>120</sup>

And, same-sex marriage will not solve the problem for children of parents who are unable or unwilling to marry. This can include persons already married to another who may be unable or unwilling to obtain a divorce, or persons who might not want to marry because of tax, debt, welfare, or insurance disadvantages. Marriage has a tremendous number of financial benefits, but it also carries with it certain disadvantages that people reasonably might wish to avoid. Telling someone that she must marry in order to be a parent connects parental status to marital status in a way that raises serious constitutional and ethical problems.<sup>121</sup> Thus, although marriage equality will provide relief to many children of same-

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<sup>119</sup> 135 S. Ct. 2071 (2015).

<sup>120</sup> See Ann Zimmerman & Ana Campoy, *Texas National Guard to Let Same-Sex Couples Register for Benefits*, WALL ST. J. (Nov. 27, 2013), <http://www.wsj.com/articles/SB10001424052702304017204579224473216479040> (discussing Texas and Mississippi's refusal to use state resources to register same-sex couples for federal military benefits).

<sup>121</sup> See Danaya C. Wright, "Well-Behaved Women Don't Make History": *Rethinking English Family, Law, and History*, 19 WIS. WOMEN'S L.J. 211 (2004) (exploring the multitude of ways in which nineteenth century women reformers sought to disconnect the parental and marital rights and responsibilities of women). The Supreme Court has rejected the idea that a child's inheritance rights are dependent on the marital status of their parents. *Trimble v. Gordon*, 430 U.S. 762, 769 (1977).

sex *married* parents, it does not solve the problem for adopted children of unmarried parents, whether same-sex or opposite-sex.

To the extent that the Constitution and federal and state laws prohibit disadvantaging nonmarital or illegitimate children, we already have a public policy and laws in place that have unhitched parental rights from the marital relationship.<sup>122</sup> The problem remains, however, that while *legitimacy* has been displaced as the primary issue for inheritance, *biology* has taken its place. The laws prohibiting discrimination against nonmarital children have turned to biology for its bright lines, and biological relationships are most definitely not an adequate substitute in our brave new world of assisted reproductive technologies and manufactured families.

Even though same-sex marriage will provide relief for many children, it is likely to further cement the divide between marital and functional children for the other children caught in the inheritance penalty web. Many same-sex and opposite-sex couples have sound reasons for eschewing marriage and it makes little sense to force them to marry in order to avoid the inheritance penalty. As one aspect of a comprehensive solution, marriage equality makes sense, but it is by no means the blanket salvo that some critics have claimed.<sup>123</sup>

### B. *Second-Parent Adoptions*

Another important part of any solution would be the legislating of second-parent adoptions with explicit recognition that the second parent, like a stepparent, does not cut off the child's inheritance rights from the biological co-parent. According to the Comments to the Uniform Adoption Act, the stepparent exception to the fresh start provision is "justified because in the typical stepparent adoption, the minor has been living with the stepparent and the stepparent's spouse."<sup>124</sup> The adoption then formalizes a *de facto* parental relationship and creates the bright line that

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<sup>122</sup> In *Trimble*, Justice Powell explained that no purpose is served when a state punishes a child for the sins of its parents, and that laws which do so do not pass constitutional muster. Justice Powell quoted *Weber v. Aetna Casualty & Surety Co.*, where the Court explained:

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.

406 U.S. 164, 175 (1972).

<sup>123</sup> See, e.g., SUZANNA DANUTA WALTERS, *THE TOLERANCE TRAP: HOW GOD, GENES, AND GOOD INTENTIONS ARE SABOTAGING GAY EQUALITY* 3 (2013) (arguing that the focus on tolerance and integration of gay life, especially through marriage, undermines the more important ways in which LGBTQ persons are discriminated against in daily life).

<sup>124</sup> UNIF. ADOPTION ACT art. 4 cmt. (1994).

judges and lawmakers prefer. The same reasoning holds true for an adoption by any adult involved in any intimate relationship with a biological parent, regardless of their marital status.

Second-parent adoption allows the partner of a biological parent or previously adoptive parent to adopt the partner's child.<sup>125</sup> Such an adoption does not terminate the parental rights of the biological parent or the inheritance rights of the child to inherit from her biological parent under the fresh start provision.<sup>126</sup> Colorado and Connecticut allow second-parent adoptions by statute.<sup>127</sup> Other states' courts have recognized them by analogy to stepparent adoptions.<sup>128</sup> But, courts in Kentucky, Nebraska, North Carolina, Ohio, and Wisconsin have foreclosed such adoptions.<sup>129</sup> Even when granted, second-parent adoptions do not always eliminate the inheritance penalty because of statutory preferences for married couples and laws that disallow adoptions by same-sex couples. Moreover, most states that have not expressly allowed or prohibited second-parent adoptions prevent unmarried couples from jointly adopting, allowing only single individuals or married couples to adopt.<sup>130</sup>

Adoption laws vary from state to state, but some merit brief discussion. In Arizona, any adult may adopt, but preference is given to married couples,<sup>131</sup> foreclosing same-sex couples from adopting together and limiting the adoption rights of unmarried couples. Even in Connecticut, a state that allows same-sex marriage, the sexual orientation of a potential adoptive parent may be considered.<sup>132</sup> North Carolina and Utah have

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<sup>125</sup> See *Parent-Child Relationship*, *supra* note 83, at 659.

<sup>126</sup> *Id.*

<sup>127</sup> COLO. REV. STAT. § 19-5-203 (2014); CONN. GEN. STAT. § 45a-724(3) (2013).

<sup>128</sup> See, e.g., *In re Hart*, 806 A.2d 1179, 1187 (Del. Fam. Ct. 2001).

<sup>129</sup> *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 828 (Ky. Ct. App. 2008) (noting in dicta that an unmarried couple cannot use the stepparent adoption procedures in Kentucky to establish legal parentage for both partners); *In re Adoption of Luke*, 640 N.W.2d 374, 376 (Neb. 2002) (holding that a lesbian could not adopt partner's biological child because biological parent had not relinquished parental rights); *Boseman v. Jarrell*, 704 S.E.2d 494, 505 (N.C. 2010) (holding that a lesbian partner's second-parent adoption was void because the issuing court did not terminate the parental rights of the biological mother, her partner, as required by statute); *In re Adoption of Jane Doe*, 17 N.E.2d 1071, 1072-73 (Ohio Ct. App. 1998) (denying the petition of a woman to adopt her partner's biological child, stating that the adoption by an adult who was not the child's stepparent would terminate the parental rights of the biological parent by operation of law because the unambiguous language and meaning of the statute required strict construction); *In re Angel Lace M.*, 516 N.W.2d 678, 686 (Wis. 1994) (denying a woman's single petition to adopt her partner's adopted child and holding that the child was not eligible to be adopted since one parent still retained full parental rights).

<sup>130</sup> See *infra* Appendix.

<sup>131</sup> ARIZ. REV. STAT. ANN. § 8-103 (2014).

<sup>132</sup> CONN. GEN. STAT. § 45a-726(a) (2013) (prohibiting the Commissioner of Children and Families or a child-placing agency from determining an adoption placement based solely on a prospective adoptive parent's race, color, or national origin).

statutes that preclude two unmarried individuals from jointly adopting.<sup>133</sup> Until 2010, Florida had a law that explicitly denied adoptions to homosexual petitioners.<sup>134</sup> The Florida Third District Court of Appeal held this law unconstitutional,<sup>135</sup> but it remains unclear whether same-sex couples, as opposed to single individuals, will be granted full adoption rights in Florida.<sup>136</sup> Mississippi explicitly prohibits adoption by couples of the same gender,<sup>137</sup> but it is unclear what would happen if a single co-parent adopted the biological children of her same-sex partner. Even facially neutral statutes with disparate results impliedly express judgment of LGBTQ families in the context of inheritance law, which only punishes the innocent child and does not affect their parents' behavior.<sup>138</sup>

Despite allowing second-parent adoptions, only a few states have made explicit provisions that the second-parent adoption functions like a stepparent adoption for inheritance purposes.<sup>139</sup> Thus, a two-pronged solution is needed with regard to second-parent adoptions. The first prong is to make second-parent adoptions available and applied equally in all the states and territories, in order to do away with the marriage preference.<sup>140</sup> This expands adoption options for parents that want to formalize relationships with the children in their lives. The second prong requires explicitly tying second-parent adoption rights to stepparent adoption rights within the state probate codes, so that second-parent adoption counts as an exception to the fresh start policy of stranger adoptions for inheritance purposes. This is necessary because although many states allow second-parent adoptions, the probate codes continue to provide an exception only for stepparent adoptions.

At least one scholar advocates the simultaneous adoption solution, which makes the cut-off provision discretionary, not mandatory.<sup>141</sup> This

<sup>133</sup> N.C. GEN. STAT. § 48-2-301(c) (2013); UTAH CODE ANN. §§ 78B-6-117(3)–(4) (2014).

<sup>134</sup> FLA. STAT. § 63.042(3) (2010).

<sup>135</sup> See *In re Adoption of X.X.G.*, 45 So. 3d 79, 79 (Fla. Dist. Ct. App. 2010).

<sup>136</sup> The Florida adoption code allows only married couples or single individuals to adopt, making it unclear whether an adoption by a second parent in an intimate relationship with a biological parent will cause the cut-off penalty to apply. See FLA. STAT. § 63.042 (2012).

<sup>137</sup> MISS. CODE ANN. § 93-17-3(5) (2014).

<sup>138</sup> Spitko, *supra* note 14, at 1064. Spitko explains that the typical intestacy statute does not distinguish on its face between the inheritance rights of heterosexual and LGBT persons and thus ignores an important distinction. *Id.* He argues that by ignoring such a distinction, such statutes discriminate against LGBT people by denying them donative freedom and devaluing their relationships. *Id.*

<sup>139</sup> See, e.g., COLO. REV. STAT. § 19-5-203 (2014).

<sup>140</sup> The lack of legal equity also has implications for the structure of family relationships. See Jonniann Butterfield & Irene Padavic, *The Impact of Legal Inequality on Relational Power in Planned Lesbian Families*, 28 GENDER & SOC'Y 752, 752, 762–66, 768 (2014) (illustrating the numerous ways a lesbian parent without legal parental rights engages in fear-induced strategies to avoid being deprived of access to children by the legal co-parent).

<sup>141</sup> See Beekman, *supra* note 15, at 165.

would allow a child to still inherit from a biological parent despite a second-parent adoption if the biological parent relinquishes her parental rights in the moment before the adoption, and then jointly adopts with her co-parent.<sup>142</sup> Though there is a fear that terminating one's parental rights, even for just a moment, may be asking for trouble, the benefit of the simultaneous adoption is that both parents become co-equal adoptive parents. But the simultaneous adoption solution works only in states that allow two unmarried individuals to jointly adopt a child. It is a way to get around the cut-off provision, but is permitted in only a few states.<sup>143</sup> And a parent must ensure that the states that allow it do not distinguish between adoptive and biological children for any inheritance purpose, especially inheriting through the adoptive parent.<sup>144</sup> If there are situations in which the parental rights of a biological and an adoptive child are different,<sup>145</sup> a biological parent may hesitate to change status from one to the other.

As more states allow second-parent adoptions, more parent-child relationships are likely to be granted full effect under inheritance schemes, regardless of marriage, so long as the state laws do not require that the adoption trigger the cut-off provision.<sup>146</sup> Thus, second-parent adoption laws need to be refined and brought into harmony with state inheritance laws. However, legalizing second-parent adoption will not be a solution for the inheritance penalty of children of all unmarried co-parents, because many co-parents may not realize the importance of adoption for securing inheritance rights and thereby forego adoption, fearing its cost or the public scrutiny of an adoption. Also, the probate codes and probate courts might not analogize the second-parent adoptions to stepparent adoptions.<sup>147</sup> Thus, laws allowing for inheritance when functional parent-child relations exist need to be implemented as well.

Another quick fix to the inheritance penalty would be to amend the probate codes to provide that a biological parent who does not relinquish parental rights with respect to a child will continue to be treated as a

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<sup>142</sup> *Id.*

<sup>143</sup> Massachusetts is one of these states. See *Adoption of Tammy*, 619 N.E.2d 315, 321 (Mass. 1993). California is another. See *Sharon S. v. Superior Court*, 73 P.3d 554, 562–64 (Cal. 2003).

<sup>144</sup> This refers to the “stranger to the adoption” rules that are mostly abolished but may have lingering traces in many state codes. The stranger to the adoption rule was a presumption that a testator would not intend for an adopted relative to inherit if the testator was not the adoptive parent. See Jay M. Zitter, Annotation, *Adopted Child as Within Class Named in Testamentary Gift*, 36 A.L.R. 5th 395 § 21 (1996).

<sup>145</sup> Differential treatment can occur in many instances, including application of antilapse provisions, class gift interpretations, or identification of who counts as children for representation purposes. See *id.* § 21.

<sup>146</sup> *Parent-Child Relationship*, *supra* note 83, at 680.

<sup>147</sup> See *Trast*, *supra* note 10, at 870–71.



parent, and the child as the parent's child, for purposes of intestacy.<sup>148</sup> Such a change would apply to second-parent adoptions where the probate code has not included the second-parent adoption within the stepparent exception of the intestacy provision. Such a simple statutory amendment would involve broadening the stepparent exception to apply to committed but nonmarital partners for all legal rights, even if the expansive definition exists only in the adoption code and not the probate code.<sup>149</sup> Thus, the cut-off provision would not apply whenever a parent-child relationship continues to exist with both the biological and adoptive parents. Another statutory amendment would be to simply create an exception to the cut-off provision for children adopted by their parent's partners, regardless of that partner's gender. Vermont has exactly this type of gender-neutral statute.<sup>150</sup>

Marriage is not a prerequisite to a parent-child relationship under family law codes and modern principles of family privacy.<sup>151</sup> Unmarried same-sex and opposite-sex partners may wish to adopt their partners' children, and a valid second-parent adoption would prevent these children from having their inheritance rights from, through, and by their biological parent severed. Second-parent adoptions also do not depend on biological status at all. Thus, a child who was adopted by a single individual should be allowed to have a second parent adopt her as well without terminating the first parent's rights.

Second-parent adoptions simply make good sense. If a biological or adoptive parent consents to share parental rights with another adult, there is absolutely no reason the inheritance rights cannot be shared as well. This is especially true when the second-parent adoption does not entail terminating another parent's parental rights. We need to jettison the fresh start policy for all adoptions where one parent continues as a par-

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<sup>148</sup> *Parent-Child Relationship*, *supra* note 83, at 662.

<sup>149</sup> This can be done through language stating that if a biological parent consents to a partner's adoption of her child, no legal parental or inheritance rights will be affected. Putting this language into a statute is necessary because, although the language is usually in the second-parent adoption judgment, the judgment cannot override the probate code's fresh start provision.

<sup>150</sup> VT. STAT. ANN. tit. 15A, § 1-102(b) (2014).

<sup>151</sup> The preface to the 2002 Uniform Parentage Act states:

The most important uniform act addressing the status of the nonmarital child was the Uniform Parentage Act approved in 1973 [hereinafter referred to as UPA (1973)]. As of December, 2000, UPA (1973) was in effect in 19 states stretching from Delaware to California; in addition, many other states have enacted significant portions of it. Among the many notable features of this landmark Act was the declaration that all children should be treated equally without regard to marital status of the parents. In addition, the Act established a set of rules for presumptions of parentage, shunned the term "illegitimate," and chose instead to employ the term "child with no presumed father."

UNIF. PARENTAGE ACT prefatory note (amended 2002).

ent, regardless of his or her marital status, and second-parent adoptions should be allowed in all states. It is always better for a child to have two loving and dedicated parents than one, and better for the child to inherit from two rather than one parent. While social policies in some states may prefer that married parents adopt children, it is better for children to have two parents rather than one, even if they are unmarried. The refusal to offer second-parent adoptions only punishes children for the behavior of their parents while doing nothing to discourage that behavior. Moreover, in many instances the decisions of parents to not marry are entirely rational.<sup>152</sup> We should not punish parents for choosing not to marry until we create a legal regime in which the costs of marriage are reduced.

### C. *Functional Parent/Child Relationship Statutes*

In an ideal world, same-sex marriage would prevent the disinheritance of the child from a biological parent who is adopted by a co-parent. More refined probate codes would allow second-parent adoptions to be treated like stepparent adoptions for non-married parents, and adoption could continue to provide the bright line that lawmakers and judges seek. But the solution for parents who simply do not go through the adoption process would still require complex judge-made rules giving functional parents the right to pass on their property to functional children. And revisions to probate codes, like that of UPC § 2-116, which create a parent-child relationship where parental intent exists, even if an adoption is not completed, would also be required. But focusing on the functional relationship, rather than on bright lines and default rules, is time consuming and difficult to codify and administer. Resting the change in the hands of equity judges is both comforting and dangerous. If judges have adequate policy grounds to expand the rights of functional children, they risk accusations of judicial activism and calls for reactionary legislation by short-sighted political interests. If they do not find an equitable adoption in compelling cases, they are shirking their equity duties and give the law its well-founded reputation as being unjust and inequitable.

The functional approach has been advocated by many scholars and includes defining “family” by what a family does, what functions family members perform, and the relationships between family members.<sup>153</sup>

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<sup>152</sup> See Wang, *supra* note 78 (discussing the marriage penalty).

<sup>153</sup> Gary, *supra* note 13, at 5 (citing Martha L. Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 270 (1991)) (stating that a group of people functions as a family when the people “share affection and resources, think of one another as family members, and present themselves as such to neighbors and others”); Mary Patricia Treuhart, *Adopting a More Realistic Definition of “Family,”* 26 GONZ. L. REV. 91, 99 (1990) (defining family as “a community, which: (1) provides financial and emotional support to the members, (2) involves interdependence and commitment, and (3) allows transcendence of self-interest to an unlimited degree” (footnote omitted)).

This approach focuses on the *quality* of the relationship between a decedent and a child heir,<sup>154</sup> and “recognizes that the human family is a social relationship, not an entity defined by nature.”<sup>155</sup> If intestacy schemes adopt a functional approach, then a court can remove the inheritance penalty if it is satisfied that a parent-child relationship existed. A functional approach would encompass all different types of families and allow legal recognition for more parent-child relationships, thus protecting inheritance rights for the people decedents have chosen to benefit with their care, love, and financial support during life.

Recognizing scholarly critiques, some courts have endorsed a functional approach to familial relationships.<sup>156</sup> The Massachusetts Supreme Judicial Court, in the case that legalized same-sex marriage within the state, stated that Massachusetts “affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual.”<sup>157</sup> The court essentially opened its arms to any functional family. But whether that court’s open arms can undercut the strict definitions of intestacy law is a different matter.<sup>158</sup>

While the functional approach has benefits, it is not without flaws. One critique of the functional approach is that it injects judicial discretion into the distribution of a decedent’s property.<sup>159</sup> This is problematic for families outside of the prevailing norms.<sup>160</sup> Judges can decide not to recognize a functional family when their religious or moral inclinations sway them. Another critique is that the functional child approach will require judicial administration to determine who qualifies as a functional child, and in most instances we can imagine that judicial proceedings will be necessary, which can be hotly contested and perhaps quite costly.

Despite these shortcomings, Professor Susan Gary proposes a functional approach in defining the parent-child relationship by adding a functional definition to existing formal definitions.<sup>161</sup> Her proposed statute provides a court with factors which indicate the existence of a parent-child relationship, factors which may give rise to a rebuttable presumption of a functional parent-child relationship and can only be overcome

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<sup>154</sup> Foster, *supra* note 80, at 232.

<sup>155</sup> Tritt, *supra* note 14, at 401.

<sup>156</sup> *Id.* at 403.

<sup>157</sup> Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 962 (Mass. 2003).

<sup>158</sup> See Padilla, *supra* note 15, at 228, 237 (discussing the ability of an adoption judgment to override a legislative provision).

<sup>159</sup> Gary, *supra* note 13, at 69.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 72.

by clear and convincing evidence to the contrary.<sup>162</sup> She explains that such an approach would necessitate a high standard of proof.<sup>163</sup> Discrete factors may eliminate judicial activism, but the statutory functional approach runs up against the same challenge as the formal approach in that it requires legislative action. And even if legislatures act, courts will have to closely monitor the application of the rule.

The UPC's functional parent-child relationship statute is a similar version of Gary's model statute but without the factors. It provides that "if a parent-child relationship exists or is established under this [subpart], the parent is a parent of the child and the child is a child of the parent for the purpose of intestate succession."<sup>164</sup> Legislatures that adopt this rule should also ensure that it applies to all probate and inheritance rights under state law because it is not clear that a functional child would receive wrongful death priorities or executorship rights simply by being declared a child for intestate succession purposes. "Functioned as a parent of the child" is also defined in UPC § 2-115 to mean "behaving toward a child in a manner consistent with being the child's parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual's child, materially participating in the child's upbringing, and residing with the child in the same household."<sup>165</sup>

Although I discuss this more fully below in Part V, it is important to shift the presumption from nonparentage to parentage. If a child shows

<sup>162</sup> *Id.* at 81–82.

<sup>163</sup> *Parent-Child Relationship*, *supra* note 83, at 670.

<sup>164</sup> See UNIF. PROB. CODE § 2-116 (amended 2010).

<sup>165</sup> See UNIF. PROB. CODE § 2-115; *see also* § 2-115 cmt. (outlining many of the elements a court should consider when deciding whether a person functioned as a parent. The phrase "functioned as a parent of the child" is derived from the *Restatement (Third) of Property: Wills and Other Donative Transfers*. The Reporter's comment to § 14.5 of the Restatement lists the following parental functions:

*Custodial responsibility* refers to physical custodianship and supervision of a child. It usually includes, but does not necessarily require, residential or overnight responsibility.

. . . *Decisionmaking responsibility* refers to authority for making significant life decisions on behalf of the child, including decisions about the child's education, spiritual guidance, and health care.

. . . *Caretaking functions* are tasks that involve interaction with the child or that direct, arrange, and supervise the interaction and care provided by others. Caretaking functions include but are not limited to all of the following:

- (a) satisfying the nutritional needs of the child, managing the child's bedtime and wake-up routines, caring for the child when sick or injured, being attentive to the child's personal hygiene needs including washing, grooming, and dressing, playing with the child and arranging for recreation, protecting the child's physical safety, and providing transportation;
- (b) directing the child's various developmental needs, including the acquisition of motor and language skills, toilet training, self-confidence, and maturation;

that a functional parent-child relationship existed, then it is likely that the child has performed many of the duties of a child, from caretaking to service, and it is likely that the parent has received significant benefits of parenthood, both emotional and economic. This includes tax deductions, dependent care credits, support payments, the child's labor, state-supported economic benefits, and the emotional rewards of parenthood. Creating a presumption of parenthood and inheritance rights from a parent claiming a child deduction on his income taxes, for instance, would protect the child's inheritance rights without unduly burdening other equitable claims, like those of other biological children.

Three states—Colorado, New Mexico, and North Dakota—plus the Virgin Islands, have adopted the 2008 amendment of UPC § 2-116, the

(c) providing discipline, giving instruction in manners, assigning and supervising chores, and performing other tasks that attend to the child's needs for behavioral control and self-restraint;

(d) arranging for the child's education, including remedial or special services appropriate to the child's needs and interests, communicating with teachers and counselors, and supervising homework;

(e) helping the child to develop and maintain appropriate interpersonal relationships with peers, siblings, and other family members;

(f) arranging for health-care providers, medical follow-up, and home health care;

(g) providing moral and ethical guidance;

(h) arranging alternative care by a family member, babysitter, or other child-care provider or facility, including investigation of alternatives, communication with providers, and supervision of care.

. . . *Parenting functions* are tasks that serve the needs of the child or the child's residential family. Parenting functions include caretaking functions, as defined [above], and all of the following additional functions:

(a) providing economic support;

(b) participating in decisionmaking regarding the child's welfare;

(c) maintaining or improving the family residence, including yard work, and house cleaning;

(d) doing and arranging for financial planning and organization, car repair and maintenance, food and clothing purchases, laundry and dry cleaning, and other tasks supporting the consumption and savings needs of the household;

(e) performing any other functions that are customarily performed by a parent or guardian and that are important to a child's welfare and development.

RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 14.5 cmt. e (2011). Ideally, a parent would perform all of the above functions throughout the child's minority. In cases falling short of the ideal, the trier of fact must balance both time and conduct. The question is, did the individual perform sufficient parenting functions over a sufficient period of time to justify concluding that the individual functioned as a parent of the child? Clearly, insubstantial conduct, such as an occasional gift or social contact, would be insufficient. Moreover, merely obeying a child support order would not, by itself, satisfy the requirement. Involuntarily providing support is inconsistent with functioning as a parent of the child. The context in which the question arises is also relevant. If the question is whether the individual claiming to have functioned as a parent of the child inherits from the child, the court might require more substantial conduct over a more substantial period of time than if the question is whether a child inherits from an individual whom the child claims functioned as his or her parent.

“functioned as a parent” provision.<sup>166</sup> Thus, the functional parent-child relationship is now protected in these states, but the cut-off provision was not amended to include the adoptive co-parent in any but Colorado.<sup>167</sup> Consequently, a child in these states whose functional parent did not adopt her may be able to inherit from that parent, but the child’s co-parent in a same-sex relationship or an unmarried opposite sex relationship with the child’s biological parent who does adopt, will terminate the child’s inheritance rights with the biological parent. Without both revisions, only one subset of children in nontraditional family settings will be protected.

#### D. *Expanding Equitable Adoption Doctrines*

Equitable adoption and other equitable remedies have provided only limited relief for children raised by parents who might have intended to adopt them, who treated those children as their own, but who failed to follow through with the legal requirements of adoption. It is notoriously difficult to succeed in court on the theories of equitable adoption and estoppel.<sup>168</sup> Usually it is based on contract doctrines, allowing the child to inherit as a third-party beneficiary to the contractual agreement between the child’s biological parent and the adoptive parent. But in many instances there is not adequate proof of a contract to adopt. In that case, some courts have used estoppel to allow the child to inherit, where the parent has raised expectations in the child that he will adopt, but then did not follow through. If the child has fully performed, it would be inequitable to allow the parent to avoid an agreement on which others have relied to their detriment.<sup>169</sup> But estoppel and equitable adoption often will not be used in cases involving testacy, antilapse, or class gift definitions. The doctrine provides limited remedies when a functional parent

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<sup>166</sup> COLO. REV. STAT. § 15-11-115 (2014); N.M. STAT. ANN. § 45-2-115 (West 2014); N.D. CENT. CODE § 30.1-04-14 (2013).

<sup>167</sup> Colorado allows second-parent adoptions for unmarried parents, and adoption by a co-parent does not terminate the biological parent’s relationship. COLO. REV. STAT. § 15-11-119. Since the UPC’s fresh start provision depends exclusively on marital status of the adopting parent, it is not affected by the functional parent statute.

<sup>168</sup> William G. Reeves, *Inheritance by Equitable Adoption: An Overview of Theory and Proof*, 57 J. MO. B. 130, 131 (2001) (noting that the burden of proof on the child is “onerous,” that it has been characterized as “highly rigorous,” and requiring evidence that is “clear, unequivocal and of a strong and compelling nature” (footnotes omitted)).

<sup>169</sup> See generally R. Brent Drake, *Status or Contract? A Comparative Analysis of Inheritance Rights Under Equitable Adoption and Domestic Partnership Doctrines*, 39 GA. L. REV. 675 (2005); Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 WAKE FOREST L. REV. 223 (2008); Irene D. Johnson, *A Suggested Solution to the Problem of Intestate Succession in Nontraditional Family Arrangements: Taking the “Adoption” (and the Inequity) Out of the Doctrine of “Equitable Adoption,”* 54 ST. LOUIS U. L.J. 271 (2009).

dies intestate, but virtually no remedy for the plethora of ancillary rights dependent upon the legal status of being a parent or a child.

Equitable adoption is a rarely invoked legal doctrine, and is even more rarely applied. Of a study of the most recent thirty appellate level cases involving equitable adoption since 1987, only six affirmed the inheritance rights by finding that the child should be treated as having been equitably adopted.<sup>170</sup> Of the many that did not find the elements of equitable adoption to have been met, the vast majority resulted in the decedent's property passing to distant collateral relatives. For instance, in *In re Estate of Hannifin*, a fourteen-year-old Navajo child was given up for adoption by his mother to an Episcopal priest.<sup>171</sup> The priest had no spouse or descendants, but failed to formalize the adoption, most likely because of the legal barriers to adoption of Native American children and because the child's parents were still alive.<sup>172</sup> Nineteen of the priest's collateral relatives contested the child's claim to the decedent's estate.<sup>173</sup> The trial court found plenty of evidence to support its finding of equitable adoption when the priest held out the child as his son, held the child's children out as his grandchildren, supported the child and provided a home for him throughout his adolescence and early adulthood, and even named the child his beneficiary on a variety of payable-on-death designations (PODs), his life insurance policy, and his bank accounts.<sup>174</sup> Over a strong dissent, the Utah Supreme Court reversed, refusing to find an equitable adoption, citing the passage of Utah's most recent probate code,

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<sup>170</sup> I undertook a search of the thirty most recent equitable adoption cases to determine how many cases involved putative parents with biological lineal descendants who would be displaced or partially displaced by the claims of an equitably adopted child. These would be the cases in which one would imagine the courts would be most protective of the inheritance rights of the lineal descendants and least willing to find an equitable adoption. The cases, however, showed the opposite. In 80% of those cases (twenty-four) the court refused to find an equitable adoption. The court found that the elements of equitable adoption were met in six cases. See *Williams v. Dorrell*, 714 So. 2d 574 (Fla. 1998); *Morgan v. Howard*, 678 S.E.2d 882 (Ga. 2009); *Goodman v. Hammonds*, 480 S.E.2d 397 (Ga. Ct. App. 1997); *Lankford v. Wright*, 489 S.E.2d 604 (N.C. 1997); *Spiers v. Maples*, 970 S.W.2d 166 (Tex. App. 1998); *Welch v. Wilson*, 516 S.E.2d 35 (W. Va. 1999). In only five of the thirty cases did the decedent have lineal descendants. Ironically, of the five cases where there were lineal descendants whose interests might have deserved greater protection, the court found an equitable adoption in two of them (40%), a much higher rate than in the twenty-four remaining cases where the decedent did not have lineal descendants and an equitable adoption was found (3/24, or 13%). Moreover, to find thirty cases, I had to search back to 1987, or nearly thirty years, which shows that equitable adoption is not being frequently used.

<sup>171</sup> 311 P.3d 1016, 1017 (Utah 2013).

<sup>172</sup> The Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901–1963 (1978), gave tribal courts exclusive jurisdiction over adoption and foster situations for Native American children residing within a tribe's lands, and concurrent jurisdiction over Native American children residing off of tribal lands. It is unknown if the ICWA would have made it more difficult for the priest to adopt in this case, but it was likely to have been an issue.

<sup>173</sup> *Hannifin*, 311 P.3d at 1018.

<sup>174</sup> *Id.* at 1018.

which defines a child for intestacy purposes as a *biological or adopted* child.<sup>175</sup> Because the code did not include the term “equitably adopted” child, the Utah Supreme Court held that equitable adoption had been preempted altogether in Utah by passage of the state’s probate code; the priest’s property all passed to his collateral relatives despite clear and convincing evidence that the priest wanted his foster son to inherit.<sup>176</sup>

Equitable adoption is notoriously difficult to prove in large part because courts require evidence that is so “clear, cogent and convincing as to leave no room for reasonable doubt.”<sup>177</sup> Concerned that a lesser standard would lead to a wave of “unfounded and trumped-up claims” against stepparents and foster parents, courts generally require that the evidence must be “inconsistent with any other reasonable hypothesis.”<sup>178</sup> And since equitable adoption cases are brought after the death of the putative parent, it is particularly difficult to find the kind of evidence that will show beyond all reasonable doubt either the existence of a contract or an agreement that was relied upon by the natural parent. Generally, the child’s own expectations, needs, or understanding of the nature of the parent-child relationship are deemed irrelevant.

A recent Iowa case reflects the customary presumption that equitable adoption would not be applied in the context of stepchildren. In *In re Estate of Thompson*, a child’s natural father married the child’s stepmother.<sup>179</sup> The couple had no children of their own, and the stepmother died intestate after the death of her husband.<sup>180</sup> Her collateral relatives in Germany inherited her estate over her stepdaughter, including property that the stepmother inherited from her husband’s estate.<sup>181</sup> The court acknowledged the inequity of such a result, but nonetheless held that in the absence of proof of an unexecuted contract to adopt, they could not apply equitable adoption.<sup>182</sup> This was a case in which a four-year-old child was raised by a stepmother, the parties met all requirements of holding each other out as mother and child, and there was no possibility that the child would be intercepting an inheritance that should go to more deserving relatives.<sup>183</sup> The relatives in Germany had no contact with the decedent for years and found themselves inheriting property, including that which had belonged to the child’s own natural father.<sup>184</sup>

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<sup>175</sup> *Id.* at 1023.

<sup>176</sup> *Id.* at 1018.

<sup>177</sup> Reeves, *supra* note 168, at 131.

<sup>178</sup> *Id.* at 131–32.

<sup>179</sup> No. 08-0120, 2008 WL 4877762, at \*1 (Iowa Ct. App. Nov. 13, 2008).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*



*In re Estate of Seader* is another case involving a stepparent who failed to adopt a child, presumably because he did not think he needed to since he had made a will treating his stepdaughter similarly to his two biological sons.<sup>185</sup> But the stepdaughter predeceased her stepfather by just a few months, and her children claimed her devise through application of the state's antilapse statute.<sup>186</sup> The court held that antilapse would not apply because the stepdaughter was not of the required degree of relationship as was required by the statute since she was neither the natural nor adopted daughter of the decedent.<sup>187</sup> The grandsons argued that she should be considered an equitably adopted child for purposes of the antilapse statute, but the court disagreed, stating that equitable adoption was an intestacy doctrine and would not be used when the decedent had made a will.<sup>188</sup> The irony in this, of course, is that the decedent had included his stepdaughter in his will precisely because he could not count on intestacy to protect her rights. Giving her a testamentary gift clearly indicated an intent to provide her an inheritance. But the narrowness of the equitable adoption doctrine and intestacy statute prohibited her sons from taking her bequest under an equally narrowly-defined antilapse statute.<sup>189</sup>

Even a summary review of the facts of most equitable adoption cases show that the presumptions—that putative parents did not adopt because they intended that the child not inherit and that more deserving relatives must be protected—are simply not true.<sup>190</sup> In *Seader* and *Han-*

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<sup>185</sup> 76 P.3d 1236, 1246 (Wyo. 2003).

<sup>186</sup> *Id.* at 1238.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 1238.

<sup>189</sup> *Id.* at 1246–49.

<sup>190</sup> In some cases the parent thought about adoption but resolved instead to write a will. See *Morgan v. Howard*, 678 S.E.2d 882, 885 (Ga. 2009) (noting that a will was drawn up but decedent died before execution); *Lankford v. Wright*, 489 S.E.2d 604, 606–07 (N.C. 1997); *Seader*, 76 P.3d at 1237–38. Or, there were living parents who still participated in the child's life and their presence may have led the decedent to believe that adoption was not appropriate even though the putative parent was acting as a functional parent for the child. See *Hulsey v. Carter*, 588 S.E.2d 717 (Ga. 2003); *Walden v. Burke*, 637 S.E.2d 859 (Ga. Ct. App. 2006); *In re Estate of Hannifin*, 311 P.3d 1016, 1019–20 (Utah 2013). In others, there were legal barriers to the adoption, often a prohibition against adult adoptions. See *Samek v. Sanders*, 788 So. 2d 872 (Ala. 2000); *Miller v. Paczier*, 591 So. 2d 321 (Fla. Dist. Ct. App. 1991); *In re Estate of Thompson*, 760 N.W.2d 208 (Iowa Ct. App. 2008). The most common, however, are the stepparent adoptions where the court refuses to recognize equitable adoption. See *Green v. Boyd*, 794 So. 2d 668 (Fla. Dist. Ct. App. 2001); *Urick v. McFarland*, 625 So. 2d 1253 (Fla. Dist. Ct. App. 1993); *Franklin v. Gilchrist*, 491 S.E.2d 361 (Ga. 1997); *Davis v. Bennett*, 438 S.E.2d 73 (Ga. 1994); *Smalley v. Parks*, 108 S.W.3d 138 (Mo. Ct. App. 2003); *Bellinger v. Boatmen's Nat'l Bank of St. Louis*, 779 S.W.2d 647 (Mo. Ct. App. 1989); *Acevedo v. Acevedo*, No. 03-03-00309-CV, 2004 WL 635321 (Tex. App. Apr. 1, 2004). And in cases involving adoptions by relatives, there seem to be a number of conflicts of interest, especially when the biological parents are still alive and intervene because the child's claim will defeat their own inheritance. See *Lee v. Gurley*, 389 S.E.2d 333 (Ga. 1990); *Walden v. Burke*, 637

*nifin*, there was ample evidence, including a validly executed will and POD designations, that the functional parent wanted the child to inherit. Thus, it is only reasonable to assume that the putative parents did not make an intentional decision to not adopt in order to foreclose an inheritance.<sup>191</sup> Secondly, *Hannifin* and *Thompson* illustrate the majority situation that functional children bringing claims of equitable adoption are not displacing biological children or other close relatives who would likely be the natural objects of the decedent's bounty; rather, they are displacing distant relatives and laughing heirs whose only connection to the decedent seems to be intervening in the lawsuit to gain an undeserved windfall.

Another common functional child scenario is the child taken in by close relatives: grandparents, aunts and uncles, or cousins. Because everyone is family, these cases may be particularly difficult for courts to delineate when equitable adoption should be found and when it should not. One can imagine that a court would hesitate to find that a grandparent equitably adopted a grandchild if doing so means that the grandchild would inherit a share of the grandparent's estate along with the child's parent.<sup>192</sup> But consider the case of *Walden v. Burke*, which involved a purported agreement that a child's natural parents entered into with the father's aunt that she would adopt their one-and-a-half-year-old daughter.<sup>193</sup> The court found no contract between the decedent great-aunt and the child's natural parents, crediting testimony by the child's father that he never agreed to any adoption. Since the decedent and her husband had no children, the decedent's heirs who would take the aunt's estate were her nieces and nephews, including the child's father. The court refused to credit the conflict of interest in the father's testimony despite the fact that he stood to gain an inheritance if the functional child's equi-

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S.E.2d 859 (Ga. Ct. App. 2006). And in other cases, there are financial reasons for not adopting, like the possibility of losing a stipend. See *Chambers v. Chambers*, 398 S.E.2d 200 (Ga. 1990). Or, the decedent died before the adoption was finalized. See *Kisamore v. Coakley*, 437 S.E.2d 585 (W. Va. 1993). What is important is that none of these cases appear to provide evidence that the decedent chose not to adopt because the decedent did not want the child to inherit.

<sup>191</sup> In both it seems there may have been mistaken assumptions about the necessity or possibility of an adoption. In *Hannifin*, the Indian Child Welfare Act most likely prohibited the child's adoption even though there was clear evidence that the elements of an equitable adoption were met. And in *Seader*, it appeared that the father consulted a lawyer about the adoption but was most likely told not to waste the money but rather simply execute a will to give his stepdaughter inheritance rights.

<sup>192</sup> See *In re Adoption of Holland*, 965 So. 2d 1213 (Fla. Dist. Ct. App. 2007) (noting situation in which a grandfather legally adopted his adult grandson in order for him to receive government veteran's benefits). It would be unlikely that a court would recognize an equitable adoption in such a case where the child would step between the decedent and the child's natural parents to receive an inheritance. See *Lee*, 389 S.E.2d 333; *Walden*, 637 S.E.2d 859.

<sup>193</sup> 637 S.E.2d 859.

table adoption claim were rejected. The child, however, produced significant evidence that the decedent and her husband had agreed to adopt and raise the child, that she lived with them from infancy, and that they supported her through college. One can certainly understand a hesitation by courts to credit claims by unadopted functional children to a share of an estate when the decedent has children or a spouse who would be the natural objects of his bounty. But there is no reason to limit equitable adoption in cases where the estate will pass to distant collateral relatives or, perhaps worse, to the parents who surrendered the child in the first place. The court should ask what the great-aunt would think of her nephew disputing his own daughter's claim to inherit from the only mother she ever knew after he had essentially abandoned her.

It does little good for the Uniform Probate Code or state statutes to declare that they are not altering or rejecting the doctrine of equitable estoppel as it has evolved in the common law of that state, if the doctrine is never applied in practice.<sup>194</sup> And in some states, as in Utah, the failure to include a statutory provision was interpreted to mean that equitable adoption was thereafter precluded altogether.<sup>195</sup> With the difficulty of proof and the judicial reluctance to open the door to what some believe are unfounded and trumped-up claims, it is no wonder that there have only been an average of one to two equitable adoption cases per year, and only a small fraction of those have been decided in favor of the child. Courts have been so stingy in their application of the doctrine that few lawyers would encourage their clients to bring such a claim.

One of the most cited reasons for applying equitable adoption rules narrowly is the assumption that testators did not formally adopt because they did not want the child to have inheritance rights. But the facts of these cases belie that assumption. In the vast majority of cases, the equitably adopted child does not displace some other person who would have otherwise been considered the natural object of the decedent's bounty. Most often, the persons displaced by a finding of equitable adoption are distant heirs, and that simple fact suggests that rejecting the child's claims was not what the decedent would have wanted or intended to have happen.<sup>196</sup>

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<sup>194</sup> See UNIF. PROB. CODE § 2-122 (amended 2010); CAL. PROB. CODE § 6455 (1993); COLO. REV. STAT. § 15-11-122 (2014); MINN. STAT. § 524.2-122 (2014); N.M. STAT. ANN. § 45-2-122 (West 2014).

<sup>195</sup> See generally *Hannifin*, 311 P.3d 1016.

<sup>196</sup> In many cases, the legal beneficiaries were distant relatives. *Samek*, 788 So. 2d 872 (distant heirs at law who had no relationship with the decedent); *In re Estate of Ford*, 82 P.3d 747 (Cal. 2004) (decedent's nephew and niece); *In re Estate of Chambers*, No. B223492, 2011 WL 711854 (Cal. Ct. App. 2011) (decedent's brother's adopted child); *In re Estate of Lucas*, No. ADM 1327-03, 2005 WL 674682 (D.C. Super. Ct. Mar. 22, 2005) (decedent's nephew); *In re Estate of Musil*, 965 So. 2d 1157 (Fla. Dist. Ct. App. 2007) (decedent's niece); *Miller*, 591 So. 2d 321 (decedent's collateral heirs); *Walden*, 637 S.E.2d 859 (decedent's nephew); *Hulsey*,

There is also a presumption that equitable adoption should not be liberally applied in the context of stepparent arrangements, for the purpose of not discouraging marriage and stepparenting. For instance, in *Franklin v. Gilchrist*, the Supreme Court of Georgia affirmed a lower court's rejection of an equitable adoption claim by stepchildren, quoting a common rule that "[w]hat might present a good case of equitable or virtual adoption against a person standing as a stranger to the child might not be so as against a person who, independently of the contract to adopt, assumed, by virtue of his marriage to the mother of the child, the very domestic relation which had been held in all other cases to give to the child an equitable status in reference to the adoption agreement."<sup>197</sup> Thus, precisely because stepparents act as parents, courts have held that such actions are insufficient to give rise to a claim of equitable adoption. In this case, the court held that because the stepfather did not attempt to get the permission of the natural father to an adoption before the natural father died, there was no adoption agreement that could form the basis for the equitable adoption claim. But how many stepfathers would reach out and have a discussion, sufficient to constitute an agreement to adopt, with their wife's previous husband? The legal requirements ignore the emotional upset of divorce and the fact that in many of these cases, the natural parent has moved far away.

The reliance on a purported contract to adopt between the natural parent and the adoptive parent leaves these children completely unprotected even though they very likely performed all of the duties of children, relied on their stepparent's assertions about being their true parents, and entered into relationships that were as close as most biological parent-child relationships. The requirement of a contract between the natural and adoptive parent subordinates the child's interests and devalues the

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588 S.E.2d 717 (decendent's nieces and nephews); *In re Estate of Thompson*, 760 N.W.2d 208 (Iowa Ct. App. 2008) (distant relatives in Germany); *In re Estate of Robbins*, 738 P.2d 458 (Kan. 1987) (two cousins of decedent); *Smalley*, 108 S.W.3d 138 (decedent's brother and two sisters); *Johnson v. Chandler*, No. 14-03-00123-CV, 2004 WL 1946077 (Tex. Ct. App. Sept. 2, 2004) (decedent's two sisters); *Spiers v. Maples*, 970 S.W.2d 166 (Tex. Ct. App. 1998) (decedent's siblings and nieces and nephews); *Hannifin*, 311 P.3d 1016 (collateral relatives of priest). Over the same time period, fewer cases involved children whose interests would have been shared by the application of equitable adoption to a non-child claimant. *Williams v. Estate of Pender*, 738 So. 2d 453 (Fla. Dist. Ct. App. 1999) (decedent had a daughter); *Williams v. Dorrell*, 714 So. 2d 574, 575-76 (Fla. Dist. Ct. App. 1998) (decedent had a son); *Chambers*, 398 S.E.2d 200 (decedent had two other children); *Bellinger*, 779 S.W.2d 647 (decedent had daughters); *Acevedo*, 2004 WL 635321 (decedent had four living descendants); *Welch v. Wilson*, 516 S.E.2d 35 (W. Va. 1999) (decedent had one natural child); *Kisamore*, 437 S.E.2d 585 (decedent had biological descendants). During this same time, there were many other cases in which it was not clear who would take in the absence of the equitably adopted child, but at odds of around 2 to 1, it would seem that a super majority of cases involve relatively distant heirs.

<sup>197</sup> 491 S.E.2d 361, 362 (Ga. 1997).

child's actions in reliance on the functional parent-child relationship in order to protect a parent's rights to be free of unfounded and trumped-up claims. When we consider that most of these putative parents in these equitable adoption cases probably claimed a tax deduction for supporting these children, received economic and emotional benefits from these children, and provided care and financial support to the children during their lives because they cared about the children, the strictness of the equitable adoption doctrine more likely frustrates their intentions rather than furthers them. To now deny the putative parents any right to continue their support in the absence of an expensive and intensive adoption or expensive estate planning truly jeopardizes their ability to care for the true natural objects of their bounty.<sup>198</sup>

*E. Reformed Intestacy Laws to Protect Against Disinheritance in the Stepchild Situation*

As discussed earlier, many stepsiblings become bitter enemies after the death of one parent when that parent's property passes to a stepparent by intestacy and moves entirely out of the family's control altogether upon the death of the surviving stepparent.<sup>199</sup> For hundreds of years, the English common law did not treat a spouse as a legal heir; only relatives by blood could inherit land or personal property.<sup>200</sup> The surviving spouse, usually the wife, was entitled to a life estate in one-third of the decedent husband's real estate (dower), and the surviving husband was entitled to a life estate in all of a decedent wife's real estate (curtesy). The husband acquired outright ownership of all of a wife's personal property upon marriage, so at her death, there was no change in the legal ownership of the personal property. But if the husband died first, the wife was entitled to a one-third or one-half share in the personal property of the husband.<sup>201</sup> Upon the death of the surviving spouse, however, the remaining real and personal property passed to the lineal descendants. In a world in which men and women were differently situated, both socially and legally, dower and curtesy made sense. It recognized that a husband who had managed his wife's real property throughout their marriage should continue to benefit from that land after her death. The surviving wife, however, who had not held or managed property during her marriage, needed just enough for support, and thus the profits off one-third

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<sup>198</sup> See Shelly Kreitzer-Levy, *The Mandatory Nature of Inheritance*, 53 AM. J. JURIS. 105, 106 (2008) (arguing that inheritance laws should be viewed as a way to build inter-generational bonds so that testamentary freedom is a tool and not the end in itself).

<sup>199</sup> See SCHOENBLUM, *supra* note 53; see also *supra* notes 54–56 and accompanying text.

<sup>200</sup> See MCGOVERN & KURTZ, *supra* note 93, § 2.1.

<sup>201</sup> This of course included all of the personal property that the wife had owned outright before the marriage and which became irrevocably vested in him upon the marriage under the doctrine of coverture. See *id.*

of the real estate was deemed sufficient to support her in her widowhood. The key aspect of the common law of intestacy was that the property ultimately descended to the children and grandchildren, and a remarriage would not jeopardize the rights of the children to take their familial inheritances.<sup>202</sup>

However, with the abolition of dower, curtesy, and primogeniture, all but two states have adopted intestacy rules to make the spouse the primary legal heir, entitled to an outright share of a decedent spouse's real and personal property, regardless of the existence of children from the marriage.<sup>203</sup> In the late nineteenth and early twentieth centuries, those laws generally gave the surviving spouse between one-third and one-half of a decedent spouse's estate and the remainder passed to children, parents in the absence of children, or other collateral heirs. This early change merely shifted the spousal share from a life interest to an outright share in fee simple, recognizing the disadvantages of legal life interests and supplying the surviving spouse with enough property to provide a sufficiently comfortable widowhood (or widowerhood).<sup>204</sup> By the mid-twentieth century, however, most states revised their intestacy statutes once again to recognize and protect the partnership of the marriage and the fact that in most marriages the couple worked together, saved together, amassed assets together, and that most decedents wanted the property to be used, first and foremost, to provide for the needs of the surviving spouse.<sup>205</sup> With increasing costs of end-of-life care, decreases in children working in family businesses at home or on the family farm (due to a mobile population), and desire by many for a more comfortable retirement, it made sense to postpone the shares of the children until the death of the surviving spouse.<sup>206</sup> This second set of changes gave to the surviving spouse a minimum of 50% and as much as 100% of the decedent spouse's estate outright, on the assumption that with the death of the surviving spouse, the couple's remaining property would pass to their children.<sup>207</sup>

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.* ARK. CODE ANN. § 28-9-204 (2014); KY. REV. STAT. ANN. § 391.010 (2012).

<sup>204</sup> Legal life estates are notoriously difficult to manage as the life tenant generally cannot make substantial improvements to the property, cannot mortgage the life estate in order to make improvements, and cannot sell a life estate except to the remaindermen. *See* MCGOVERN & KURTZ, *supra* note 93, § 2.1.

<sup>205</sup> These were based on studies from the late 1970s. *See* Waggoner, *supra* note 55.

<sup>206</sup> *Id.*

<sup>207</sup> The most common intestacy scheme gives the surviving spouse 100% of a decedent spouse's estate if there are no parents or children (forty-three states), and almost half of those give 100% to the surviving spouse even if there are children so long as the children are the children of both spouses and there are no children of either spouse by a different relationship (nineteen states). *See* SCHOENBLUM, *supra* note 53, at tbl.7.

But with the rate of remarriages and the growing divorce rate, states made a third set of revisions to their intestacy rules to recognize that the existence of second marriages and stepparents contradicted the assumption that the surviving spouse would leave all of the property to the couple's children. These small changes provided that the surviving spouse would only take a portion of a decedent spouse's estate when the decedent spouse has children by a prior relationship.<sup>208</sup> The UPC § 2-102(4) provides that a surviving spouse will take the first \$150,000 of the decedent's estate, plus half of the remainder, "if one or more of the decedent's surviving descendants are not descendants of the surviving spouse."<sup>209</sup> Thus, it was assumed that if a stepparent was the surviving spouse, up to one-half of the decedent spouse's estate would pass to his children upon his death and the other half would pass to the stepparent. The stepparent would either execute a will to distribute the property equally among the surviving spouse's children and stepchildren or, more likely, the surviving spouse would have consumed all of the decedent's property. It was no big deal that the children would only take half of a decedent spouse's property and the surviving spouse would take the rest because under the prior set of intestacy rules, the surviving spouse likely received half of the decedent's estate outright anyway. Only Indiana calculates the surviving spouse's share on whether it is a first marriage or subsequent marriage.<sup>210</sup>

The problem with the majority solution of slightly reducing the surviving spouse's share, however, lay in not recognizing the fundamental difference between the inheritance rights of marital children and the lack of inheritance rights of stepchildren. When marriages lasted until death, and remarriages were late in life and rarely included additional children, it could be assumed that the children would receive a minimum of half of their deceased parent's estate. But with the rate of serial marriage, the tremendous number of children currently being born out of wedlock, and the complete lack of protection for stepchildren's inheritance rights, the increased shares for surviving spouses come at the direct expense of children, and often to the real benefit of stepsiblings.

Unfortunately, the intestacy laws have created a profound and bitter rivalry between stepparents and stepchildren. By privileging the spouse, the children lose out. By privileging the children, the spouse loses out. Currently, the law privileges the spouse in most states so that upon the death of the surviving spouse intestate, the first spouse's children will

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<sup>208</sup> See, e.g., UNIF. PROB. CODE § 2-102 (amended 2010); ALA. CODE § 43-8-41 (2014); IND. CODE § 29-1-2-1 (2014); ME. REV. STAT. tit. 18-A, § 2-102 (2014); N.H. REV. STAT. ANN. § 561:1 (2014); OHIO REV. CODE ANN. § 2105.06 (West 2014).

<sup>209</sup> UNIF. PROB. CODE § 2-102(4).

<sup>210</sup> See IND. CODE § 20-1-2-1(c).

inherit little or nothing.<sup>211</sup> And if the surviving spouse remarries and takes whatever property she inherited from the decedent with her, her stepchildren are even less likely to see that property again. Her children, new spouse, or even collateral relatives will take to the exclusion of the decedent's children, even if most of her estate came from the decedent.

For a small estate, the surviving stepparent's spouse takes the entire estate, leaving nothing for the decedent's children.<sup>212</sup> In a modest estate, the surviving spouse takes well over half of the decedent's estate. Only in relatively large estates will the decedent's children take a sizable amount, yet it always will be less than half of a parent's estate if that parent has remarried without a prenuptial agreement.<sup>213</sup> Moreover, large estates are more likely to be distributed by testate plans or the couple is more likely to have prenuptial agreements to protect the interests of the decedent's children, so the children of the wealthy are not the most likely to suffer the inheritance penalty under typical intestacy statutes. Thus, in the estates where the odds are that the stepparent will inherit by intestacy—usually the more modest estates—any amount passing to the decedent's children is likely to be small or even nonexistent.

This cumulative effect of disinheritance through intestacy is the result of numerous aspects of the intestacy statutes. One is that we no longer attempt to separate out the property the stepparent inherited from her deceased spouse—which should perhaps go back to his children—from the surviving spouse's own property, which should rightfully pass to her children and not her stepchildren. This notion of ancestral property, property that should remain in the family, was the rule for hundreds of years, but has been jettisoned in the twentieth century in favor of protecting the marital unit over the family of origin. A second cause is the protection of the spouse as a priority over the children, regardless of the length of the marriage, the spouse's equitable claims on the decedent's property, and the spouse's own property. A third cause is the strict legal distinction between stepchildren and natural children, which entirely precludes inheritance by stepchildren.

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<sup>211</sup> Arkansas and Kentucky are the exceptions, providing for children before a spouse. See ARK. CODE ANN. § 28-9-204 (2014); KY. REV. STAT. ANN. § 391.010 (2012).

<sup>212</sup> Under the UPC, the surviving spouse takes “the first \$150,000, plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.” UNIF. PROB. CODE § 2-102(4). In a \$200,000 estate, the decedent's children would be entitled to share a total of \$25,000, or a little over 10% of their parent's estate.

<sup>213</sup> The surviving spouse will be entitled to at least half, and possibly some amount like the UPC's \$150,000 plus half. Notably, the Florida legislature had a provision giving the surviving spouse the first \$60,000 plus half when there were children of the surviving spouse that were not the children of the decedent, but amended that rule to limit the surviving spouse to half in all cases where there were children by either spouse from a previous relationship. See FLA. STAT. §§ 732.102(2)–(3) (2014).



California has tackled the problem of the disinherited stepchild. The state allows a stepchild to inherit by intestacy from a stepparent if the parent-child relationship began when the child was a minor and the stepchild establishes by clear and convincing evidence that the stepparent would have adopted but for a legal barrier.<sup>214</sup> However, California courts have been strict in their interpretation of a legal barrier, making it difficult for stepchildren to establish the elements. And of course, the statute makes it impossible for a stepchild to inherit if she were an adult at the time her biological parent and stepparent met. The statute attempts to protect the stepparent relationship when it functions like a parent-child relationship with no concern for equity issues such as the title to ancestral property or the gradual development of a parent-child relationship. Other states have begun to allow for stepchildren inheritance, but usually only as a last resort to prevent an escheat.<sup>215</sup> Thus, only after going through all legally acceptable biological relationships, looking for third cousins thrice removed for instance, do we turn to stepchildren. These statutes do not address the inequity between the rights of biological children and stepchildren because the stepchildren take only in the absence of biological children.

A number of commentators have argued that stepchildren should not be treated as legal strangers for purposes of intestacy.<sup>216</sup> Recognizing the inequity and randomness of receiving an inheritance dependent on which parent died first in these blended families, Susan Gary and Terin Cremer both suggest modifications to intestacy laws that would allow certain stepchildren to take a share of the surviving spouse's estate. Cremer, for instance, argues that stepchildren should be considered legal heirs if their parent and stepparent were married for a long time, the stepparent functioned as a parent during the child's minority, the character of the stepparent-stepchild relationship was parental, the stepchild referred to the stepparent as "mom" or "dad," and the stepchild and stepparent continued to have a relationship after the child reached adulthood.<sup>217</sup> Susan Gary argues for a discretion-based intestacy law that would allow probate judges to reduce certain presumptive shares such as the spousal share in marriages of short duration, and increase shares for stepchildren who functioned as children, close family members who pro-

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<sup>214</sup> CAL. PROB. CODE § 6454 (2012).

<sup>215</sup> ARK. CODE ANN. § 28-9-215(2) (2014); CONN. GEN. STAT. § 45a-439(a)(4) (2013); IOWA CODE § 633.219(6) (2014); KY. REV. STAT. ANN. § 391.010 (2012); MONT. CODE ANN. § 474.010(3) (2014); OHIO REV. CODE ANN. § 2106.06 (West 2014); S.C. CODE ANN. § 62-2-103(6) (2013).

<sup>216</sup> Terin Barbas Cremer, *Reforming Intestate Inheritance for Stepchildren and Stepparents*, 18 CARDOZO J.L. & GENDER 89, 90-92 (2011); Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 U. MICH. J.L. REFORM 787, 816-17 (2010) [hereinafter *The Probate Definition of Family*]; Gary, *supra* note 13, at 58-59.

<sup>217</sup> Cremer, *supra* note 216, at 97-98.

vided uncompensated care, and domestic partners who would not otherwise be entitled to any share under intestacy codes that privilege only legal marriage.

Both of these ideas are valuable and would alleviate the inheritance penalty for those children who have formed close parent-child relationships with a stepparent. And these changes would provide some flexibility in the most inflexible part of the inheritance penalty: the intestacy statute. By protecting functional children under intestacy, it would be much easier to protect them in matters involving antilapse, class gifts, representation, executorships, standing, Social Security benefits, and the plethora of derivative disabilities that are imposed on stepchildren.

I argue, however, that these solutions remedy only one aspect of the multiple disabilities facing stepchildren. Susan Gary's discretion approach would allow judges to reduce presumptive shares for spouses in marriages of short duration or, presumably, wealthier spouses who do not need the decedent spouse's estate. However, it would not remedy the ancestral property issue that I believe requires immediate attention. The rights of stepchildren should not depend on whether they formed a functional parent-child relationship with their stepparent. Rather, their rights to inherit property from their natural parent should be protected, especially when the remarriage to the stepparent occurred late in life, the children were grown, and they had little opportunity to form a strong bond with their stepparent. If they had formed a strong bond, it is more likely that the surviving stepparent would execute a will or make *inter vivos* gifts to the stepchildren. It is precisely in the situation of the marriage late in life where the children are grown and do not form a strong bond with their new stepparent that some protections should exist.<sup>218</sup>

Consider the hypothetical case of Herman and Wilma who are married for fifty years and have three adult children they raised together. Wilma predeceases Herman, dying intestate, and Herman takes 100% of Wilma's property, including many family heirlooms that Wilma inherited from her parents.<sup>219</sup> This result is understandable because it is assumed that upon Herman's death the children will inherit everything that Herman does not consume. But Herman remarries Winifred in the last few years of his life. Winifred has two adult children from her marriage with Howard, which ended in divorce many years ago. Herman dies intestate two years after marrying and Winifred inherits the first

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<sup>218</sup> MCGOVERN & KURTZ, *supra* note 93, § 2.1, at 48 (noting the inexplicable disparity between the UPC's elective share reducing the spousal share based on length of marriage, and the complete lack of such adjustment under intestacy, which of course results in reducing the amount of property the natural children will inherit).

<sup>219</sup> Under the UPC § 2-102(1)(B), Herman would take 100% of Wilma's estate because the children are the children of both. UNIF. PROB. CODE § 2-102(1)(B) (amended 2010).

\$150,000 plus half of Herman's remaining estate, including property that can be traced back to Wilma's family.<sup>220</sup> At Winifred's death intestate, her two children inherit her entire estate, and Herman's three children take nothing. If Winifred had significant property from before her marriage with Herman, she would not need any of Herman's property. If Winifred dies shortly after Herman, she will not have had time to consume much of his property. In both events, her children receive everything, including Wilma's property. If Winifred predeceased Herman intestate, Herman's children would take everything to the exclusion of Winifred's children. Neither length of marriage, wealth of the surviving spouse, origins of the property, nor surviving spouse's needs are considered in these formalistic outcomes of which only one result is certain: that Winifred's and Herman's children will resent one another.

One solution would be to impose a trust on any of the decedent's property that passes by intestacy to a stepparent, subject to a remainder in the decedent's children. The trust would treat intestacy involving a stepparent (or perhaps all spousal provisions) like dower and curtesy, a mere life interest for the support of the survivor without any proprietary claims on the decedent's property. Although few people would argue in favor of the support theory in the case of a first marriage, especially where the spouses worked together for a lifetime to accumulate assets that are titled primarily in the deceased spouse's name, it may make more sense in the context of short marriages, later-in-life marriages, remarriages, or other circumstances in which there is a risk that family property will pass to strangers.<sup>221</sup> If a trust were imposed on all the

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<sup>220</sup> See UNIF. PROB. CODE § 2-102(4).

<sup>221</sup> Lawrence Waggoner, the reporter for the UPC, actually suggests that a trust would be a more equitable way to distribute the property, but deems it offensive. He states:

[The UPC's current] approach is admittedly a crude solution to the survivor's divided-loyalties problem. If the purpose is to strike a reasonable balance between the objective of granting the surviving spouse an adequate share and the objective of assuring that the surviving spouse does not later deprive the decedent's children of the unconsumed portion of the decedent's property, a more responsive solution might be to reinvoke the idea of common-law dower. When stepchildren are involved, the law might give the surviving spouse the use of the property for life, but upon the death of the surviving spouse force a return of the unconsumed portion of that property to the decedent's own biological children. Strictly speaking, no one would suggest reinvoking true common-law dower, under which the surviving spouse would be entitled to a life estate in one-third of the decedent's land. Instead, the device would create a statutory trust for the benefit of the surviving spouse in all the decedent's property, land, and personalty. The trust could take a variety of forms. One approach would give the surviving spouse the right to all of the income generated by the trust for life, coupled with a power in the spouse or the statutory trustee to invade the corpus of the trust to the extent other sources of income prove inadequate for the spouse's support and maintenance in accordance with the spouse's accustomed standard of living. However such a trust might be structured during the surviving spouse's lifetime, the trust would provide that upon the survi-

property that Winifred inherited from Herman so that Winifred would have a life estate, but Herman's children would ultimately take the property upon her death, then Herman's and Winifred's remarriage would not jeopardize Herman's property, and Wilma's family heirlooms would stay in the family to pass to her children.

Another possible solution is to mandate that stepchildren take equal shares as lineal descendants of a stepparent if that stepparent inherits any property from a deceased spouse. This would mean that in the situation described above, Herman's three children and Winifred's two children would take one-fifth each of Winifred's estate. Treating stepchildren and biological children equally when the stepparent survives the biological parent and inherits property from the biological parent may be too formalistic, especially if the stepparent inherits just a small amount of property from the biological parent and equal distribution risks giving the stepchildren property that more appropriately should be distributed to the stepparent's biological children. But it is no more formulaic than the current rule and has the benefit of likely according with the intentions of most testators, especially the intentions of the first spouse to die. The most likely testamentary intent is that all property be available to provide support and care for a surviving spouse, even a second or third spouse, but at that spouse's death (or remarriage), most testators want at least some part of their estate to pass to their own children and not entirely to their stepchildren. If their surviving spouse remarries a person with children of his own and predeceases that new spouse, there is even a risk that all of the property will pass to those strangers and not to the known stepchildren.

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vor's death, any remaining income and corpus would go to the decedent's own biological children and not stepchildren unless adopted by the decedent.

The statutory-trust approach responds to another troublesome feature of conventional intestate-succession law. As the statutes are currently constituted, the decision as to how much to award the surviving spouse must be made on the basis of the facts existing at the decedent's death. This does not take account of the possibility that a surviving spouse who had no children by a prior marriage at the decedent's death might subsequently remarry and have children. Conventional intestate-succession schemes provide no mechanism for adjustment where a surviving spouse's moral conflict arises after the decedent's death. The statutory-trust approach, on the other hand, if applied in all intestacy cases in which the decedent leaves a surviving spouse and one or more children, and not just in cases in which the moral conflict is known to exist at the decedent's death, provides a solution to this problem.

The statutory-trust approach, therefore, is commendable, except for the fact that its compulsion by a state would likely be considered offensive by many surviving spouses and it makes little practical sense. Putting aside the potential offensiveness, the strength of which would be difficult to predict, it is simply not practical to compel a statutory trust in every intestacy case with a surviving spouse and one or more children, with respect to mainly small estates of, say, \$15,000 to \$25,000.

Under inheritance laws in Sweden during the seventeenth and eighteenth centuries, married couples who inherited or acquired property from their families of origin and did not have children together found their estates subject to claims from kin groups and collateral relatives upon their deaths.<sup>222</sup> Courts in the United States have rejected the idea of tracing property through the hands of spouses, but for hundreds of years this disinheritance did not occur because spouses were not deemed legal heirs.<sup>223</sup> They had dower and curtesy claims on certain property for their lifetimes, but the property of a decedent spouse passed ultimately to his or her children and usually not to later spouses or stepchildren through the hands of a surviving spouse. If we do not wish to return to the days of dower, we could achieve far more equitable results in this age of blended families by treating children and stepchildren alike or imposing a trust on the property inherited by a surviving spouse from a decedent spouse, with a remainder interest in the decedent spouse's children. Since it was the marriage of the parents that cut off the stepchildren's inheritance rights, giving stepchildren an intestate share would only return their property rights to the status quo before the remarriage.

Another approach would be to prorate intestate shares for surviving spouses along the lines of the prorated elective share.<sup>224</sup> This could account for both the length of marriage and the surviving spouse's own wealth. The UPC's graduated elective share tables recognize the lesser claims of surviving spouses who were married for a relatively short period of time, thus lessening the claims of surviving spouses on property that would more naturally pass to a decedent's children. But very few states have adopted the graduated rules for elective shares, and none have applied these rules to their intestacy scheme. Even the UPC does not apply its graduated percentage table to the intestate share. It is ironic that if Herman had made a will, and even if he left Winifred nothing in the will, she would only be able to take an elective share amount of 1.5% of Herman's estate if they were married for less than a year, and only 3% if they were married for less than two years.<sup>225</sup> But if Herman dies intestate,

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<sup>222</sup> See MARIA AGREN, *DOMESTIC SECRETS: WOMEN AND PROPERTY IN SWEDEN, 1600–1857*, at 27 (2009).

<sup>223</sup> An argument for the recognition of ancestral property was rejected by a court. See *In re Estate of Brewington*, 568 P.2d 133, 134–36 (Mont. 1977).

<sup>224</sup> Indiana has a crude version of this, giving the surviving spouse only a life estate in 25% of the real property owned by the decedent spouse at death with an absolutely vested remainder in the decedent's descendants. See IND. CODE § 29-1-2-1(c) (2014). However, the surviving spouse receives the same share of personal property regardless of whether the marriage is a first marriage or a subsequent marriage. *Id.*

<sup>225</sup> UPC § 2-203 gives the surviving spouse 50% of the marital property portion of the decedent spouse's estate as an elective share, and the marital property portion is pro-rated by length of marriage from 3% of the decedent's estate if the marriage is less than one year, up to 100% of the decedent's estate for marriages longer than fifteen years. Admittedly, the elective

tate, Winifred would take the first \$150,000 plus half of the remainder of his probate estate even if they had been married only for a few days.

Another possibility would be to simply correlate the intestacy shares of a surviving spouse with elective shares, adopting more gradations and refinements to account for length of marriage, remarriage, and the surviving spouse's own wealth. Many states amended their elective share statutes to ensure that a surviving spouse was not disinherited through the use of will substitutes, leaving just a small fraction of the decedent's estate to pass through probate and by will. The probate estate in these cases was dramatically smaller than the augmented estate, which consists of property that passes at death through the decedent's will and that passes at death through a will substitute such as a trust, POD designation, or joint tenancy. The elective share is often based on all of the property that passes at death (the augmented estate) while intestacy governs the distribution only of the probate estate. But bringing these two estates into better alignment and providing similar-sized shares for a surviving spouse, regardless of whether the decedent died testate or intestate, is understandable for many reasons, not just because intestacy creates an inheritance penalty for children, which can be avoided only through expensive estate planning.

There are major factors that should guide states seeking to bring inheritance equity to children in nontraditional families. The first is to make the surviving spousal elective share amounts consistent with intestacy shares and to build flexibility into those shares to accommodate different types of marriages. While it is true that a surviving spouse is only entitled to intestacy shares on probate property (and not on property that passes outside of probate, which, for many states, is included in elective share calculations), most of the decedents who die intestate are unlikely to have significant property passing outside of probate to their children or other beneficiaries. Thus, for the over 50% of decedents who die without a will, the freedom to plan around the intestacy shares by making *inter vivos* gifts or using will substitutes is unlikely to be widely exercised. This means that for the very group of people that are most likely to default to intestacy as an estate plan, the ability to plan around the default rules has little meaning.

Second, states should legislate alternative distributions for the step-parent situation to provide a more appropriate distribution when stepchildren are in the equation, either by reducing the surviving spouse's share,

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estate consists of property passing outside probate through non-probate transfers and may often be a much larger estate than the probate estate from which the intestate share is taken. Nonetheless, in the majority of cases of people who die intestate, their estates tend toward the smaller side of the scale, which is consistent with fewer non-probate transfers. UNIF. PROB. CODE § 2-203.

imposing a trust to protect ancestral property, reinvigorating the support theory of marriage in certain circumstances, or simply tracing family property to prevent a first spouse's property from passing to a second spouse or her children. Just as the UPC's elective share sensibly takes into account the wealth of a surviving spouse by denying a share to the survivor if the survivor has more wealth than the deceased spouse, the intestate shares also should be reduced when the marriage is short in duration or if the survivor is wealthier than the decedent spouse. One could easily have the same rate tables and share amounts under intestacy as currently exist in some states for the elective share. And under such statutory changes, there would be no need to argue that intestacy should go back to the support theory of dower and curtesy. Intestate shares would be outright gifts in fee simple absolute, but the size of such shares would be subject to more refined adjustments in order to recognize the lesser claims of surviving spouses of short-term marriages who have children and property from prior marriages. There is no reason why statutes cannot treat the surviving spouse of a long-term first marriage, with children, differently from the short-term remarriage, with stepchildren.

Third, what seems to create the most conflict among stepchildren is when they see particular items of property, like family heirlooms, the house they grew up in, or a family portrait, pass entirely outside of their family to their stepsiblings because of the inheritance penalty. When a handmade tablecloth or sterling silverware belonging to a child's grandmother passes to a stepsibling who has no ties to the family, she is understandably bitter. Although it may seem illiberal to resurrect the support theory of marriage and to trace property back to different families of origin, that was the model for hundreds of years precisely because it respected the personal family meaning of certain property. And although the laws do not continue to recognize expectations about family property, people very much continue to recognize them and value certain items of personal property.<sup>226</sup> Losing the 64" flat screen TV may not be particularly upsetting to many stepsiblings, but losing their deceased mother's china, old photograph albums, or the house she inherited from her parents because of the heavy-handed intestacy laws is a real problem.

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<sup>226</sup> Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959–60 (1982) (arguing that the law should recognize that certain items of property, like wedding rings or the family home, have different values to certain people). Although the wedding ring has a mere market value to the jeweler who is selling it, it has much more meaning to the person whose wedding it represents. Radin suggests different ways in which the law can take account of this differential meaning in property, just as I argue it can treat property differently in the context of inheritance either when it has certain sentimental meaning or when its origins are linked to certain persons.

The case of *In re Estate of Brewington* illustrates this problem and the lack of flexibility or concern that plagues current succession law.<sup>227</sup> In *Brewington*, Raymond Brewington died intestate, leaving his wife, Helen Brewington, as a survivor. The couple had no children, but Raymond had numerous brothers and sisters. Helen, having never remarried, had several cousins who inherited her estate when she died twenty-five years later. One of Raymond's brothers petitioned for an intestate share of Helen's estate on the theory that he should be able to inherit under the common law doctrine of ancestral succession for that portion of her estate, which came to her from her husband. Under the doctrine of "ancestral succession," property reverts back to the family from which the property descended or was devised, if the deceased leaves no lineal descendants. The Montana Supreme Court made short shrift of the brother's argument, explaining that the current state probate code abrogated the doctrine of ancestral succession, and that if Raymond did not like the outcome, he could have made a will.<sup>228</sup> Despite the brother's argument that less distant relatives by marriage should take priority over more distant relatives by blood, the court ruled that Helen's cousins were entitled to her entire estate, including all the property she inherited from Raymond.<sup>229</sup> The court claimed that because the probate code was so clear, its hands were tied and it could not muddy the rules through application of equity principles.

The idea of tracing intestate property through a surviving spouse and then back to the family of origin goes against both the partnership theory of marriage and the administrative efficiency of intestate succession rules. Nonetheless, with the advent of nifty computers and calculators, and the ubiquity of trusts and trust companies, there is no reason why the law could not be more nuanced to better balance the claims of surviving spouses with children or collateral kin. It is unreasonable to expect the millions of people who will die intestate to understand the effects of remarriage, spousal claims, and the biological determinism of modern intestacy laws when solutions are readily available. Certainly, graduated rates for surviving second spousal shares or tracing ancestral property will not solve all of the problems that stepchildren face under intestacy. Nonetheless, if more nuance is already being provided with elective shares, it can be done with intestacy as well. And, both leave the decedent and the surviving stepparent free to plan around the default rules if they do not reflect his or her intentions. These changes would not undermine the social values of intestacy, including support for close family members and dependents, avoiding complex property titles and

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<sup>227</sup> 568 P.2d at 134–36.

<sup>228</sup> See *id.* at 136.

<sup>229</sup> See *id.* at 135–36.



fractionation of property, encouraging the accumulation of wealth, or providing for ease of administration,<sup>230</sup> but these solutions would avoid much of the bitterness that remains in stepfamilies after the dust has cleared and the property has been distributed.

*F. Decedent-Controlled Reforms: Expansive Testamentary Freedom*

Besides the formal legislative and judicial changes noted above, some scholars and reformers have suggested even more radical proposals to recognize the rights of parents to dictate their heirs, regardless of default rules or the execution of a formal will. Called “decedent-controlled reforms,” these mechanisms “base[ ] inheritance rights on the decedent’s own definition of her ‘family of choice.’”<sup>231</sup> Even where no record of a decedent’s preferences exist, courts could be given the flexibility to adjust intestate shares to reflect “the reasonable expectations or probable desires of the decedent.”<sup>232</sup> This proposal requires few statutory changes, but opens the door to judicial discretion. Judges can turn a blind eye to a decedent’s clear intent in approximating his likely desires if the judge disapproves of the decedent’s lifestyle choices. Or a judge may feel tempted to make decisions about property distributions based on minimizing friction and maximizing equal treatment among the living. Even though its application may be intermittent, this approach is more favorable than current intestacy rules whose lines in the sand preclude testamentary freedom for many nontraditional decedents.

At least one scholar has advocated for a complete reconceptualization of inheritance law, one that is divorced entirely from the family paradigm.<sup>233</sup> Frances Foster rejects the less radical reforms just mentioned because they continue to rely on “family” as their point of reference.<sup>234</sup> A nonfamily approach would allow property to pass to any individuals who have a relationship with the decedent—familial or otherwise. Such a proposal may sidestep the inheritance penalty because a child would not need legal recognition to inherit from a parent. While this approach probably most accurately respects testamentary freedom, it may lead to a litany of other problems for probate courts.<sup>235</sup> Additionally, such a monumental paradigm shift may not be conceivable in light of our current

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<sup>230</sup> Gary, *supra* note 13, at 9.

<sup>231</sup> Foster, *supra* note 80, at 232 (citing Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971, 1017 (1999)).

<sup>232</sup> Foster, *supra* note 80, at 233 (quoting John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 559–60 (1977)).

<sup>233</sup> Foster, *supra* note 80, at 204.

<sup>234</sup> *Id.* at 233.

<sup>235</sup> For example, what would happen if the decedent did not leave adequate evidence of intent, or if a will or other testamentary document is voided? There are also significant potential administrative costs of such an individualized approach.

highly formalistic rules. At the same time, many nontraditional couples may want recognition of their family relationships broadly defined and not an absence of the concept all together. This approach does not provide equal rights; it simply eliminates the need for those rights by taking away the privileges for children of traditional parents. We could call this the “no inheritance rights” proposal.

Another change would be to strengthen the power of parents to enter into contractually binding agreements to care for children and provide for their inheritances.<sup>236</sup> These kinds of parentage agreements are beginning to be used in situations involving assisted reproductive technologies (ART), where a nonbiological parent has agreed that a co-parent undergoing ART will share parental rights and responsibilities with the nonbiological co-parent.<sup>237</sup> The contractual approach to determining parentage would ensure “uniform and equitable results,” because it does not distinguish between opposite sex or same-sex parents and it respects the intentions of parents.<sup>238</sup> Such an approach protects the privacy rights of parents to create their family of choice,<sup>239</sup> but it may not always serve the best interests of children, especially if contracts can be used to defeat a child’s rights to support, maintenance, or inheritance rights. Although most parents would only make contracts that benefit their children, courts would need supervisory power to deny the enforcement of such a contract if the child’s interests were harmed.

A contractual approach to family creation and definition could eliminate the inheritance penalty and honor testamentary freedom. However, families who cannot afford to hire an attorney to draft their contract, or families who simply fail to create one, would still find themselves subjected to strict intestacy rules unless the probate codes were radically reformed to allow for functional child rights or contract norms.

### G. *Final Thoughts*

It is certainly understandable that many state legislatures will hesitate to enact these important revisions if they appear to be promoting homosexuality or out-of-wedlock childbearing.<sup>240</sup> Despite political barriers, however, some of these reforms can be undertaken by state courts exercising equity jurisdiction. Second-parent adoptions can be judicially interpreted as analogous to stepparent adoptions, and equitable adoption

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<sup>236</sup> See Sarah Abramowicz, *Childhood and the Limits of Contract*, 21 *YALE J.L. & HUMAN.* 37, 89–92 (2009); see also Drake, *supra* note 169.

<sup>237</sup> See Abramowicz, *supra* note 236.

<sup>238</sup> O’Byran, *supra* note 11, at 1118.

<sup>239</sup> *Id.*

<sup>240</sup> Policies such as the legal status of same-sex marriage are in flux because the lower federal courts are routinely striking down state constitutional or statutory bans on same-sex marriage under the Equal Protection Clause of the U.S. Constitution.

doctrines could be liberalized without legislative intervention. The inheritance penalty for stepchildren may be hard to overcome by judicial fiat, but policy preferences and a liberalization of equitable adoption to include stepchildren could go a long way in preventing the disinheritation of many children. Recognizing ancestral property and imposing constructive trusts on second spouses could prevent the complete disinheritation some children experience when their parents remarry, but these adjustments may require legislative action.

Courts can also create or shift the presumptions in favor of functional children, allowing for disinheritation only if a functional parent expressly indicated a desire that the child take nothing. The standard of evidence in equitable adoption could be changed from “clear and convincing” to a “preponderance of the evidence” to facilitate likely donor intent without much difficulty at all. And while courts are generally bound to follow the intestacy rules strictly, they have far more room to protect functional children in how they interpret lapse, class gifts, and representation doctrines. But courts are unlikely to make significant changes unless the policy arguments support the change. Thus, I now return to the two important policy changes I think would help motivate courts to be more attentive to the inheritance problems created by non-traditional family structures and less enamored of the bright-line rules that adoption and intestacy provide. Revisiting the history of adoption and our commitment to testamentary freedom provides compelling justifications for changing our reliance on biology and adoption.

#### IV. PARADIGM SHIFT: RETHINKING THE HISTORY OF ADOPTION AND FURTHER LIMITING THE DEAD HAND

One way to address part of the inheritance penalty problem is to revisit and reprioritize the history of adoption law and to understand the multi-faceted motivations that many adults have for caring for nonbiological children. By unlinking adoption from inheritance in its historical context, we can unlink adoption from inheritance in the public imagination and in legal doctrine. We also need to think critically about inheritance and its function in society and in families. For the past few centuries the law has placed testamentary freedom at the center of succession law, denying most heirs and beneficiaries any legally enforceable rights to an inheritance. Only surviving spouses are recognized as having legally binding claims on a spouse's estate.<sup>241</sup> But since everyone will die, we should have a system of inheritance that explicitly furthers the needs of the living. The interests of the living should not be left to

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<sup>241</sup> The forced share for dependent children mandated under the Louisiana Civil Code is the exception. *See* LA. CIV. CODE art. 1493–1495 (1996).

the biases of judges searching for some hypothetical testator's intent or enforcement of traditional norms about the natural objects of one's bounty. This is not to suggest that we should revive forced shares for children. Rather, we should return to the historical foundations of property law, to the idea that property should serve the needs of the living, not the ill-fated wishes of the dead. If we look to functional relationships rather than strict formal categories, we make the law more equitable and create a legal order that assigns property rights in a way that can promote socially beneficial behavior.<sup>242</sup>

#### A. *Rethinking the Role of Adoption in History*

The history of adoption law shows that formal legal adoption provided a legal solution to two complex social issues. First, there were many children throughout history whose parents died before they reached an age where they could provide for themselves, whose parents were unable to provide for them, or whose parents simply wanted to transfer responsibility for raising and educating their children to someone else.<sup>243</sup> Societies have had to grapple with dependent children for centuries, but most have used some form of extended family to perform this function. Other than the unusual case of Sparta, which removed children into military camps, it was only with the rise of religious institutions in the medieval period that dependent children might be moved out of informal family-based living arrangements and into formal or state-sponsored institutional facilities.<sup>244</sup> Orphanages, religious institutions, apprenticeships, and even boarding schools provided options for more children than the informal family networks, and they came into common

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<sup>242</sup> Shelly Krecizer-Levy's article, *The Mandatory Nature of Inheritance*, argues that we should rethink inheritance as a duty to achieve intergenerational bonds that serve important social and cultural purposes. It is not socially productive when laughing heirs or even the state through an escheat takes an inheritance. Laughing heirs have not formed a bond with the decedent, nor have they benefitted from a relationship with the deceased. The decedent has not benefitted from caretaking or emotional support from distant relatives who are preferred over functional children or even stepchildren. Allowing people to receive property that just falls out of the sky in their laps serves no social purpose. It is economically and emotionally more efficient to establish a legal regime in which the people who receive the decedent's property are those who provide care, comfort, and support for the decedent, or those whose presence in the decedent's life brought emotional or economic benefit. See Krecizer-Levy, *supra* note 198, at 106.

<sup>243</sup> See generally PHILIPPE ARIES, *CENTURIES OF CHILDHOOD* (1963); Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 *DUKE L.J.* 1077, 1091 (2003); Amanda C. Pustilnik, Note, *Private Ordering, Legal Ordering, and the Getting of Children: A Counterhistory of Adoption Law*, 20 *YALE L. & POL'Y REV.* 263, 268 (2002); see also Abramowicz, *supra* note 236.

<sup>244</sup> JACK GOODY, *THE DEVELOPMENT OF THE FAMILY AND MARRIAGE IN EUROPE* 72, 100 (Cambridge Univ. Press 1983); Catherine J. Ross, *Families Without Paradigms: Child Poverty and Out-of-Home Placement in Historical Perspective*, 60 *OHIO ST. L.J.* 1249, 1260–65 (1999).

usage only in medieval Europe following the social and familial disruptions of various plagues and wars.<sup>245</sup> But even with the advent of orphanages, less formal options involving moving the children into the homes of relatives or neighbors continued to operate alongside the institutional options.

Importantly, it was with the rise of formal institutions that children were likely to be transferred into living arrangements where they had no family ties and the prospect of a new family, or a surrogate family to replace the natal family, became a matter of legal importance.<sup>246</sup> Many orphans, too, had property from their natal families, and there were plenty of relatives and strangers willing to take those children in order to get control over the property. The Court of Orphans in late medieval London placed children in families that agreed to raise the child and protect the child's estate, but most families did so only if they had control over the child's property and could use it to maintain the child.<sup>247</sup> For propertyless children, courts did not generally get involved, and the children were placed into homes as servants or taken in by religious institutions until a suitable placement could be found. If none appeared, the child would generally remain in the religious institution and take vows or simply work there until the child reached adulthood and could become self-sufficient, either through learning a skill or through marriage. Unfortunately, many of these propertyless children were neglected or overworked and died in childhood.

Officers in these institutions sought out new families to provide the care and rearing of children who did not have a family network on which to depend. And in the nineteenth century, as these institutions branched out from the traditional religious orders that often integrated these children as adults into their order, moving children in and out to new families became a social and institutional goal.<sup>248</sup> Permanent legal adoption

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<sup>245</sup> Cahn, *supra* note 243, at 1107–10.

<sup>246</sup> Jack Goody talks about the Greco-Roman practice of adopting a child if a couple has no male heir, but the adoptee was usually a relative, which was also true in early modern France. GOODY, *supra* note 244, at 72; *see also* KRISTIN ELIZABETH GAGER, BLOOD TIES AND FICTIVE TIES: ADOPTION AND FAMILY LIFE IN EARLY MODERN FRANCE 38 (1996) (discussing instances in which children were adopted into a family that replaces their biological family).

<sup>247</sup> *See generally* CHARLES CARLTON, THE COURT OF ORPHANS (1974).

<sup>248</sup> *See* Cahn, *supra* note 243, at 1090. Naomi Cahn has explored how the different social trends within the children's welfare movement of the nineteenth century shifted from a policy of removing children from unacceptable family situations to attempting to fix the poor or dysfunctional family so that children did not have to be removed from their biological parents around the same time that states were passing general adoption statutes. Even still, there were fears by adoptive parents that adopted children would turn out like their biological parents: drunk, feeble-minded, or prone to illicit sexuality. But as adoption became legally available through legislative processes in the middle of the nineteenth century, popular culture reflected the tension between a laudable desire to help unfortunate children and a fear that they carried some indelible mark of failure or inadequacy, a fear that remains very much alive today. *Id.*

became the express goal in order to free up institutional resources to provide for the seemingly endless supply of needy children. But adoption often was not feasible, either because the child's status and prospects did not warrant adoption, or because the child already had property held in a guardianship and was not seen as needing the formality of a legal adoption and the new family and resources that would come with it. There have always been needy children, and whether they are provided for through informal family or village networks, institutions, foster care, or other state-organized mechanisms, it is only in a subset of these situations that adoption was the purported or even an appropriate goal.

Adoption is the *legal* substitution of one family for another.<sup>249</sup> But for children sent to convents, apprenticed by their parents, living with relatives, boarded out, or reared by others to acquire a certain skill, a formal adoption was not expected or desirable. For many child advocates, simply getting children to adulthood was all that mattered. If the child was not adopted before reaching adulthood, there was no further need to change the child's legal status. And while adoption of certain parentless children became an important goal of these institutions, legal adoption took backstage to the more important goal of providing for the child's basic needs.

In this context of child-saving institutions and the reality of child dependency, the inheritance prospects of adoption simply were not a primary concern. Inheritance rights may have been an added bonus to the benefits of legal adoptions for orphaned children, but the immediate needs of providing food and shelter for helpless children in the present, and not hypothetical inheritances in the future, clearly dominated the decisions of institutional actors.

However, inheritance became of greater significance between the parent and the adoptive child once a child was placed and a relationship developed; the immediate caregiving needs of the child gradually were replaced by the child's caregiving of the parent, and the institution was no longer in the picture. But as noted above, once the parent-child rela-

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<sup>249</sup> Pustilnik, *supra* note 243, at 268. Amanda Pustilnik explored a lengthy history of adoptions and quasi-adoptions that took place throughout medieval France and England. By the early-modern period, English law may have discouraged formal adoption practices, but the binding out of vagrant children was common. Apprenticeships, which were lengthy contracts in which parents agreed that their children would reside in the homes of other adults to be trained in a marketable skill in exchange for the child's labor, were legion in England, America, and the continent. But, as she notes, not all apprenticeship contracts were what we would consider to be adoptions per se. Many anticipated their termination when the child reached a particular age and all legal and personal responsibilities for the parent to the child, and vice versa, terminated. But many apprenticeships evolved into something more, into lifetime relationships that may have resulted in the adults adopting the child, or at least bringing that child into the adult's home as more than just a servant, even if less than a family member.

*Id.*

tionship reached that level, many parents did not feel it was necessary to formalize the adoption, especially in light of the significant number of states that prohibited adult adoptions. The same inertia that has resulted in such low will writing rates can also explain the same inertia in failing to formalize functional parent-child relationships through formal legal adoptions, especially when assuming that writing a will could eliminate the need for an expensive and intrusive adoption.

Thus, the history of adoption and child protection services throughout the past few hundred years shows that adoption played a very different role than merely providing for an heir, despite the literary and social myths surrounding adoption by the wealthy as depicted in the great Victorian novels. Adoption was not often part of the conversation about taking in a child, nor was it expected by biological parents, dependent children, potential adoptive parents, or institutional actors. Since adoption was a small part of taking care of needy children, and inheritance was a small part of the adoption decision, it seems illogical that we have made the linkages between adoption and inheritance so indelible in our law. This is especially true since those linkages do not reflect the benefits parents receive of having children in their lives.

The second social issue concerns the needs of the substitute parent. Religious orders needed new members, childless adults often needed help on their farms or in their businesses,<sup>250</sup> and many foster parents today find satisfaction in helping dependent children, which the financial support of the state allows them to do. Before the institutionalization of the elderly in nursing homes, there was the cultural expectation that at least one child, usually a spinster daughter, would remain living at home to care for parents as they aged, sacrificing her life and happiness to support theirs. If there were no spinster daughter, many aging adults took in nieces or nephews or, in extreme cases, unrelated children to provide this type of support. Adults receive numerous benefits from having members of a younger generation in their lives, from income tax deductions to state financial support to the physical and emotional benefits of caretaking as the adults age and become dependent themselves. This reciprocal relationship, caretaking at one stage of life in exchange for caretaking at another stage, underlies our cultural reliance on and protection for family bonds. And again, history shows that formal legal adoption is appropriate in only a small subset of the situations in which adults choose to care for children and receive the valuable benefits of

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<sup>250</sup> It is true, however, that one of the motives and effects of providing statutory mechanisms for formalizing adoptions was to provide some state oversight into the adoption process in order to provide for the interests of these children. By leaving matters to contracts or informal arrangements, the crass motives of those who simply wanted cheap child labor could operate both in charitable and personal adoptions.

doing so. Inheritance rights, however, should take account of all of these relationships, not just those for which formal adoption is a logical or desired goal.

If we consider the multitude of reasons that adults take children into their lives and form relationships with them, it makes little sense to limit inheritance rights to only those adults who have the desire, wherewithal, and opportunity to formally adopt. In a large percentage of situations, adults do not formalize the parent-child relationship through adoption because they cannot afford to, the bond is not fully formed until the child reaches adulthood and adoption is not then available, or living biological parents may not consent and the adoptive parent does not want to go through the process of terminating parental rights.<sup>251</sup> Adults may care for children in their professional or paid capacities (as foster parents or religious professionals) and do not want to create expectations of adoption in all the children they care for, even if they have developed special relationships with one or a few of them. Many adults do not want to sever the ties children have with their biological families, and others simply do not want the state's involvement in their private family arrangements. All of these are legitimate reasons for not legally adopting, and yet none indicate a rejection of the child's equitable claim for inheritance considerations. An adult may decide not to adopt a child but may plan to execute a will giving the child her entire estate; but she may die before doing so,<sup>252</sup> or the will may be ruled invalid for a variety of reasons unrelated to her intent to benefit that child through an inheritance. There must be a better way than formal legal adoption to determine which children should have inheritance rights because, as we have seen in countless cases, the parent often desires it, the child has performed as a child, and the child has an equitable claim on the parent's estate. Perhaps more importantly, social benefits flow from protecting the interests of dependents and rewarding the intergenerational caregiving that families undertake.

Rejecting the centrality of adoption and biology in defining inheritance rights allows us to break down two particularly entrenched myths about family and succession to property. The first is that formal adoption marks the bright line identifying true testamentary intent from general benevolence toward dependency. It is often assumed that the adult who fails to adopt a child in his life does so precisely with the intent of precluding inheritance rights by the child. The adult is altruistic and wants to help care for the child but does not want to raise expectations in

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<sup>251</sup> These are the reasons that are most identified in the equitable adoption cases as to why a formal adoption was not consummated. See Weisbord, *supra* note 60, at 889; see also *De-bunking the Myths*, *supra* note 37.

<sup>252</sup> E.g., *Kisamore v. Coakley*, 437 S.E.2d 585, 585 (W. Va. 1993).



the child or limit his own testamentary freedom.<sup>253</sup> But life is rarely so clear-cut, and evidence of intent is hard to glean from actions alone. In fact, the equitable adoption cases show a stunning number of situations in which the adult did not formally adopt the child but clearly had donative intent that the child inherit. *Seader* and *Hannifin* were both cases in which the adult did not adopt but made explicit efforts to have the child inherit property, and the courts refused to validate the decedent's donative intentions. The decision not to adopt, or the failure to adopt, is more often based on other factors than an explicit desire to preclude inheritance rights, especially when children do not have statutory forced shares. A testator who wants to pass his property to a favorite charity, friends, or even closer family members can easily execute a will to accomplish his testamentary wishes. But the person who fails to adopt because of the cost, the invasion of privacy, or legal barriers is also likely to be the person who fails to make a will, and inaction should not be deemed proof of a desire to preclude inheritance.

Additionally, rejecting the centrality of adoption and biology in defining inheritance rights allows us to break down the myth that the unadopted child is undeserving, flawed, unnatural, or deceitfully trying to step in between an aged decedent and his more deserving family. As we saw above in the many equitable adoption cases,<sup>254</sup> the majority of these children are being raised by adults who do not have children of their own who could qualify as *more deserving*. In most of these cases, remote relatives challenged the rights of the child to inherit for what certainly appeared to be motives of greed, and not a concern for the memory or intentions of the decedent. Where children or even more remote relatives provided care to the aged decedent and maintained a strong supportive relationship, those decedents usually left their property to those caregivers and not random children in their lives. But where remote relatives are truly laughing heirs, living far away, the person the adult would most likely want to have inherit his property is the child who maintains close ties, cares for and visits the adult, and tends to the adult's physical or emotional needs.

Our modern laws place too much weight on the existence of a formal legal adoption, in large part because we continue to rely on the cultural myths suggesting that foster or stepchildren are undeserving or less authentic, and that failure to adopt indicates an intent by the decedent that the child in an adult's life not have inheritance rights. These two

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<sup>253</sup> This is the justification for the stepparent exception to equitable adoption – courts do not want to discourage parental care-taking of minor dependents. See *In re Estate of Seader*, 76 P.3d 1236, 1246 (Wyo. 2003).

<sup>254</sup> See *In re Estate of Hannifin*, 311 P.3d 1016 (Utah 2013); see also *Debunking the Myths*, *supra* note 37; Weisbord, *supra* note 60, at 889.

myths, and our misplaced reliance on the bright-line rule that a legal adoption indicates donative intent, not only frustrates a decedent's intent in many cases, but injures the very children that the adult took pains to care for. One of the important reasons adults take children into their homes is that they care for them, love them, and value their relationships with them. Providing an inheritance is simply a continuation after death of the care that they have shown during life. Placing such a barrier between the donor and the donee after death, especially when the donor has evidenced so much care prior to death, not only harms the donor by rejecting his intent, but also sours the memory and devalues the relationship that the child had with his functional parent.

### *B. Rethinking the Role of Property and Inheritance*

Just as recognizing that adoption law history reveals a much more textured portrait of motives and intentions around adoption that is glazed over by modern inheritance law, the narrow focus of the law on some hypothetical intentions of the typical decedent ignores the very tangible needs and expectations of functional and cut-off children. Property serves the needs of the living, or so the mantra goes.<sup>255</sup> And of course, the living will acquire the property of the deceased who cannot take it to the grave with him. So does it further or hinder donative freedom, public policy, or the equitable claims of the living, to privilege the biological tie at the expense of functional and cut-off children? Should distant relatives have priority over unrelated persons who have lived with the decedent and formed emotional ties?

There is no question that inheritance law has shifted from very little testamentary freedom prior to the Statute of Wills in 1540 to an almost obsession with facilitating a testator's gifting intentions regardless of social and personal impact. Only the resilient elective (or forced) share for a surviving spouse remains from the extensive limitations on dead hand control that were prevalent in the eighteenth and nineteenth centuries. Dower, curtesy, forced heirship, and primogeniture have gone the way of the prison hulks to be replaced by nearly indestructible testamentary trusts that can last almost in perpetuity, extending the dead hand potentially for centuries. By allowing testators to pick and choose their heirs

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<sup>255</sup> This phrase has occurred repeatedly in case law and in scholarship. It refers to the idea that property laws should be interpreted to protect the interests of the living and the doctrine underlies the rule against perpetuities and rules against unreasonable restraints on alienation. See, e.g., JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 597, 629 (5th ed. 2010); see also LEWIS MALLALIEU SIMES & ALLAN F. SMITH, THE LAW OF FUTURE INTERESTS § 1117, at 13 (2d ed. 1956) (“[O]ther things being equal, society is better off, if property is controlled by its living members than if controlled by the dead. Thus, one policy back of the rule against perpetuities is to prevent too much dead hand control of property.”).

through testamentary devises, the law recognizes that statutory priorities and mandated heirs may not represent every testator's desires or satisfy the needs of every situation. By granting broad freedom to decedents to dictate where their property would pass, the law assumes that people will exercise their power to deviate from the default rules of kinship by consanguinity and affinity whenever they do not wish that outcome.

But in our haste to promote testamentary freedom, we often lose sight of the needs or claims of the living. It's not just the dependent widow and minor children who will be left penniless if we do not protect their claims to the decedent's property; it also affects the claims of functional and cut-off children whose emotional investment and labor in their relationships with their parents will be soured and frustrated if we pass family heirlooms or the house in which they were raised to more distant relatives or stepfamilies. Since the law of succession cannot rely on biology to define modern family relationships anymore (and I'm not sure it ever should have), it is a small step to recognize and prioritize the interests of the child rather than the parent at death. The estate plans of most decedents reflect a desire to protect and reward their loved ones, with loved ones identified on the basis of personal interactions and not necessarily biology. But when the laws of intestacy and equitable adoption are so rigid that the majority of decedents cannot protect and reward their loved ones, the laws are no longer equitable. Simply shifting the presumption from no inheritance in the absence of an estate plan or a formal adoption, to a right to inherit unless the decedent provides otherwise, would better reflect most decedent's wishes. There is no reason not to shift the default rule and require decedents who want to deny inheritance to their functional children or stepchildren to write down their intentions, rather than require them to write down their intentions if they do wish them to inherit.

The disinherited stepchild is a classic and relatively simple problem that can only be partially planned around by astute testators and their lawyers. The average person is unlikely to even realize that such an "unnatural" result is likely to occur in the basic case of the simple stepparent scenario, and the living are very likely to be hurt, upset, and bitter at their stepsiblings after the estates are administered. There is no reason for the law to work such inequities in cases that are happening by the thousands every day. Most estates aren't valuable enough to justify lengthy and expensive litigation over equitable adoption, pre-contract interference, tortious interference with an expectancy, or some other relatively exceptional remedy. Instead, some people will receive windfalls and others will receive little or nothing. The result for the living will be bitterness and even more criticism and distrust of the legal system.

In most blended families, the parties probably do not intend the disinheritance of one set of children, and if they understood what would happen, they probably would have taken steps to avoid the outcome. The bitterness among the survivors and the law's lack of concern for true donative intent justify our rethinking of the traditional assumption that adults want children to inherit only when they have gone through the formal legal channels of an adoption or are related by blood. By focusing on the inheritance penalty and how it frustrates expectations, inequitably disadvantages a majority of children, and reveals the ineffectiveness of the supposed opt-out mechanisms, we can begin to chart a new path for succession law that bases inheritance on lived or functional rather than biological or formal legal relationships.

Just as the "best interests of the child" standard has become the norm in custodial decision-making, the best interests of the living should become the norm in succession law, especially when the status of functional children is at issue and the testator has not left clear instructions otherwise. We cannot say that it is inherently better for collateral heirs, laughing heirs, or remote relatives to take an inheritance at the cost of functional children's welfare. Nor can we say that it is inherently better for biological children to take all of a parent's property to the exclusion of stepchildren, foster children, or adopted-out children. The living will always acquire the property of the dead, so at one level it matters not who ultimately takes an inheritance. However, protecting and rewarding functional children who do provide the care, labor, and devotion of children is a valid justification for changing the norms of inheritance law, just as promoting equity within families to reflect actual and not biological relationships is a valid legal goal.

Furthermore, protecting the likely intentions of most functional parents, and certainly all biological parents of cut-off children, promotes both the ideas of donative freedom embedded in succession law and protecting the living, thus better serving the multiple goals of succession and property law. The law's obsession with, and jealous protection of, inheritance rights does not correspond to the intentions of most functional parents. As society has accepted the affective model of caretaking, and as most adults agree that the best interests of children (and not inheritance, child labor, or even reducing welfare rolls) should be at the heart of the decision to parent, there is no reason for the law to remain the jealous guardian of the property interests of deceased parents, whose actions during life speak louder than their silence at death.

## V. A MODEL STATUTE

Recognizing that model statutes usually cannot be dropped unchanged into each and every state's probate code, this model statute pro-

vides many of the pieces that could be adopted together, or separately, to improve the inheritance protections for children of nontraditional parents.

Preamble: All children are entitled to the care and support of at least two parents during their minority, and they are entitled to a presumption of inheritance rights from, through, and by those parents unless the parent clearly and explicitly provides otherwise.

#### 1A. Amendments to the Fresh Start Provisions

No child who is adopted shall lose inheritance rights from, through, or by a genetic parent who continues to care for the child, houses the child, is financially responsible for, or who maintains a parent-child relationship with the child:

- a) regardless of the marital relationship, or lack of a marital relationship between the genetic parent and the adoptive parent, or
- b) so long as the genetic parent's parental rights have not been surrendered or terminated by a voluntary or judicial proceeding.

#### 1B. Alternative Revisions to the Fresh Start Provision

Adoption of a child by the intimate partner of a genetic parent shall not terminate that child's rights to inherit from, through, or by any genetic parent, or that genetic parent's relatives, regardless of the marital status of the child's genetic parents and/or adoptive parents.

Commentary: Amendments to the fresh start provision are designed to deal with the penalty faced by the cut-off child whose inheritance is jeopardized if she is adopted by a co-parent. This provision would normally appear in the probate code that identifies the rights of adoptive children in the context of inheritances. But it is also important to make similar changes to the family law or adoption codes to ensure that the fresh start does not cut off the biological parent's parental rights as well. Alternative 1A provides language that is more inclusive, thus preventing the cut off for children of both genetic parents if the child is adopted by a third co-parent. Most probate codes allow the child to inherit from her genetic parent or her genetic parent's spouse who adopts the child, but not the genetic parent who was replaced by the stepparent. The UPC, however, allows the child to inherit from all three, that is both genetic parents and a stepparent. There is no reason, in states that permit inheritance by and through all three adults, that the child could only inherit from the stepparent but not the unmarried partner or co-parent. This amendment would therefore bring parity between married stepparents and their adoptive children, and unmarried same-sex or opposite-sex co-parents and their adoptive children.

## 2A. Intestate Succession: Spousal Shares

a) A surviving spouse is entitled to one-half of the marital estate of a decedent spouse.

b) The marital estate consists of the proportional value of the net probate estate (or augmented estate)<sup>256</sup> of a decedent spouse calculated by multiplying the decedent's total net probate estate (or augmented estate) by the following percentages:

If the decedent and the spouse were married to each other: The percentage is:

|                                 |      |
|---------------------------------|------|
| Less than 1 year                | 3%   |
| 1 year but less than 2 years    | 6%   |
| 2 years but less than 3 years   | 12%  |
| 3 years but less than 4 years   | 18%  |
| 4 years but less than 5 years   | 24%  |
| 5 years but less than 6 years   | 30%  |
| 6 years but less than 7 years   | 36%  |
| 7 years but less than 8 years   | 42%  |
| 8 years but less than 9 years   | 48%  |
| 9 years but less than 10 years  | 54%  |
| 10 years but less than 11 years | 60%  |
| 11 years but less than 12 years | 68%  |
| 12 years but less than 13 years | 76%  |
| 13 years but less than 14 years | 84%  |
| 14 years but less than 15 years | 92%  |
| 15 years or more                | 100% |

## 2B. Alternative Intestate Succession: Spousal Share

a) A surviving spouse is entitled to a life estate in one-half of a decedent spouse's net probate estate if the decedent had children with someone other than the surviving spouse.<sup>257</sup> The surviving spouse shall have the power to consume the entirety of the property subject to the life estate in order to provide for the health, education, maintenance, or support of the

<sup>256</sup> This provision allows for the creation of parity between the intestacy and elective share statutes by making the surviving spouse's claim applicable to the same property.

<sup>257</sup> This provision ensures that all of a decedent spouse's property will pass to his or her children, and not permanently to a surviving spouse or the surviving spouse's later spouse or children. The life estate in one-half, however, ensures that the surviving spouse has adequate property for support until death but will have no dispositive testamentary power over that property. If an estate is distributed under this provision, the decedent's children will be entitled to one-half of the decedent's estate immediately upon the decedent's death and a remainder in the other half that will become possessory at the death of the surviving spouse.

surviving spouse and his or her dependents, including functional children or stepchildren.<sup>258</sup>

b) A surviving spouse is entitled to a life estate in 100% of a decedent spouse's net probate estate if the decedent's children are also the children of the surviving spouse.

c) A surviving spouse is entitled to an absolute share of 50% of a decedent spouse's net probate estate if the decedent leaves no children or lineal descendants, but leaves at least one surviving parent.

d) A surviving spouse is entitled to an absolute share of 100% of a decedent spouse's net probate estate if the decedent leaves no children, lineal descendants, or parent.

Commentary: These intestacy provisions for the surviving spouse can be made as complex or as simple as the state's elective share provisions. The key to these alternatives is to correlate the spousal intestacy share to length of marriage, wealth of the surviving spouse, and whether the intestate share includes property from an earlier deceased spouse of the decedent spouse. The alternative provision uses a trust form or life estate to protect the shares of the genetic children in cases involving stepparents. Since one of the primary goals of today's estate plans is to give the surviving spouse control if needed during life over the property, but have final disposition pass according to the first spouse's will or trust, the life estate coupled with the power to consume effectively gives basic good estate planning to all married couples without the need for expensive estate plans. Of course, the question of whether the surviving spouse's interest will be in trust or a legal life estate should be provided for, and if the trust is used (which is the preferred mechanism), there should be a statutory preference for the trustee—beginning with the surviving spouse and then the children.

### 3. Functional Child Provision

Any child who functions as a child to any parent who functions as a parent shall be deemed a child for all inheritance purposes unless the parent explicitly provides otherwise, in writing, that the child is not to be recognized as a child for purposes of inheritance.

a) Functioning as a child can be shown by evidence that the child lived in the parent's home for a majority of his or her first 20 years of life, identified the parent as a parent, looked to and treated the parent as a parent, continued to have a relationship with the parent after the child reached the age of majority, performed services for the parent such as caretaking

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<sup>258</sup> One might want to limit the use of the property for stepchildren to only those instances when the surviving spouse's intestate share includes property acquired from the estate of the stepchildren's genetic parent.

or household labor, was given the parent's last name, received economic or emotional support from the parent, had a parent-child relationship that was sufficiently long enough to form a parent-child bond, or any other evidence that shows by a preponderance that a parent-child relationship was formed.

b) Functioning as a parent can be shown by evidence that the parent supported or housed the child during his or her minority, took applicable tax deductions or obtained relevant tax credits as a result of supporting the child, made relevant educational or medical decisions for the child, received care and assistance in later years from the child, called the child by the term "son" or "daughter" or otherwise held the child out to be a child of the parent, gave the child his or her last name, received other emotional or economic benefits from the child, named the child as a beneficiary on non-probate instruments including (but not limited to) life insurance, joint bank accounts, or employee benefit plans, or any other evidence that shows by a preponderance that a parent-child relationship was formed.<sup>259</sup>

c) Evidence of intent to deny inheritance rights to a functional child must be in writing.

d) Any functional parent-child relationship recognized under this State's family law or adoption code, including any determination that it is in the child's best interests to be deemed a child for any purpose, is a determination that a functional parent-child relationship exists for all inheritance and probate purposes.

e) Any child adopted by the legal spouse, legal domestic partner, or intimate unmarried, co-resident partner of a genetic parent shall be treated as a stepparent adoption for all purposes of the probate and family law codes and the child's inheritance rights from, through, and by the biological co-parent will not be terminated.

Commentary: The functional child provision draws from the scholarship on functional child relationships in family law and equitable adoption, as well as recent scholarship on importing these considerations into the context of inheritance. It should be noted that in many instances, functional parent-child relationships do not become fully formed until the child reaches adulthood, so it is unwise to require that the bond be formed during the child's minority. Even in cases where the child was already an adult when he or she began a relationship with a functional parent,

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<sup>259</sup> UPC § 2-115(4) defines "functioned as a parent of the child" to mean "behaving toward a child in a manner consistent with being the child's parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual's child, materially participating in the child's upbringing, and residing with the child in the same household as a regular member of that household." UNIF. PROB. CODE § 2-115(4) (amended 2010).



that relationship could meet the requirements of a functional parent-child relationship for inheritance purposes if there is evidence that the parent viewed the child in a way similar to the way parents view their adult children.

#### 4. Second-Parent Adoption Provision

In the adoption of any child in this State, a single person may adopt, a married couple may adopt, two unmarried adults may adopt, and the spouse or intimate partner of a genetic parent may adopt a child. In all adoptions in this State, the adoption shall not serve to terminate a child's rights to inherit from, through, or by a genetic or adoptive parent who continues to have a parent-child relationship with the adopted child, regardless of the marital status of the adoptive and genetic parents.

Commentary: This provision should be used to amend a State's family law or adoption code, and it would expressly link the definition of parent and child in the family code to inheritance rights in the probate code. One of the critiques of the 2008 amendments to the UPC is that the probate code definitions of parent and child are independent of the family code definitions.<sup>260</sup> This dissonance permits the kind of penalties to apply that dramatically affect children in nontraditional families. And to the extent that family codes are more open to functional parent-child relationships and to undertaking "best interests of the child" analyses, the family code definitions should prevail.

### CONCLUSION

The vast majority of children today will face some form of an inheritance penalty in the next few decades when their parents die unless courts and legislators do something now. Every day children are essentially disinherited not by their loved ones, the people who cared for them and want them to have a better life, but by courts following strict legal rules that leave little room for discretion or equity in determining and honoring the decedent's most likely intent. The penalty will hit stepchildren in blended families, children adopted by a co-parent, and millions of children being raised by relatives, neighbors, friends, foster parents, or siblings. The reason these children will be unable to claim a share of property left by a decedent functioning as a parent is that the law prioritizes the rights of the dead over the needs and claims of the living. Protecting some abstract theory of donative freedom has become the excuse for not protecting the rights of functional children to an inheritance, even when not doing so clearly frustrates actual donative intentions of real parents. The argument that failure to formally adopt indicates an intent

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<sup>260</sup> See Tritt, *supra* note 14.

that a functional child should not inherit property is based on a discredited myth that people make decisions about the children in their lives primarily because of some far-removed concern about claims to property in the future, and not about a desire to care for and protect children today. The shibboleth of equating adoption with inheritance demeans the parent-child relationship that people form and dramatically hinders the ability of functional parents to provide for their loved ones after they have passed away. When the law bases people's claims to valuable property rights on an abstract theory of intent that does not represent the actual intent of a majority of the population, the law needs to change.

I have argued in this Article for a variety of legal changes, from increased discretion for judges to use equitable considerations in evaluating the claims of functional children, to technical revisions to probate codes to modernize the intestate shares of surviving spouses and children. The truly bizarre cut-off penalty facing many children who have been adopted by a co-parent requires a simple revision to state probate codes to add a co-parent exception to the fresh start provision. Some of the changes I advocate may be politically sensitive, particularly the question of same-sex marriage. But same-sex marriage is not a requisite. My underlying argument is that the marital status of the parents should not determine inheritance rights, just as it no longer determines parental rights. More and more people are having children out of wedlock, and those children deserve to be treated at least as well by the law as those born in traditional married households. The Supreme Court has held that laws treating illegitimate children differently from legitimate children are inherently suspect and should be subject to heightened judicial scrutiny. I posit that administrative ease and bright-line rules, which have been used to justify inheritance rights based solely on biology and legal adoption, can no longer pass that higher level of scrutiny. With a majority of children being raised in nontraditional family situations, biology and legal adoption simply do not rationally correlate to inheritance claims. Protecting the inheritance claims of the living child over the dead not only effectuates decedents' intent, but goes a long way toward restoring the human affections and values that underlie our law of inheritance.

APPENDIX  
A STATE-BY-STATE RESOURCE OF PROBATE AND  
ADOPTION LAWS

| STATE             | SECOND PARENT ADOPTION?   | RELEVANT PROBATE CODE   | OTHER NOTES |
|-------------------|---|---|-------------|
| <i>Alabama</i>    | Not explicitly (though trial courts have granted); any adult person may adopt, husband and wife may adopt, and stepparent may adopt spouse's child. ALA. CODE § 26-10A-5 (West 2014).   | Exception for stepparent; otherwise, adopted child is child of adopting parent and not the natural parent for purposes of intestacy. ALA. CODE § 43-8-48 (1991).  |             |
| <i>Alaska</i>     | Not explicitly (though trial courts have granted); husband and wife may adopt, unmarried adult may adopt, and stepparent may adopt. ALASKA STAT. § 25.23.020 (LexisNexis 2012).   | Stepparent exception; otherwise, child of adopting parents for intestacy; inheritance from or through child by natural parents is precluded. ALASKA STAT. § 13.12.114 (LexisNexis 2012).  |             |
| <i>Arizona</i>    | Unclear; Any adult may adopt; husband and wife may jointly adopt; preference for married couples; no stepparent section. ARIZ. REV. STAT. ANN. § 8-103 (West 2014).   | Child of adopting parents; stepparent/spousal exception. ARIZ. REV. STAT. ANN. § 14-2114 (West 2012).   |             |
| <i>Arkansas</i>   | Unclear in light of 2012 case. Dep't of Human Servs. v. Cole, 394 S.W.3d 318 (Ark. Ct. App. 2012). Unmarried adults, husband and wife, and spouse/stepparent may adopt. ARK. CODE ANN. § 9-9-204 (LexisNexis 2009).   | "Descendants" defined to include adopted children. ARK. CODE ANN. § 28-9-202 (LexisNexis 2012). Adoption renders child stranger to birth parents and child descendant of adopting parent. ARK. CODE ANN. § 9-9-215 (LexisNexis 2009).   |             |
| <i>California</i> | Stepparents and domestic partners may adopt child of spouse/partner. CAL. FAM. CODE § 9000 (West 2013). Also, in <i>Sharon S. v. Superior Court</i> , the Supreme Court extended second-parent adoptions to non-domestic partners. 73 P.3d 554 (Cal. 2003). | Adoption creates legal relationship of parent and child. CAL. FAM. CODE § 8616 (West 2013). Adoption severs relationship with natural parent but there is a spousal exception (although not clear if this contemplates domestic partners). CAL. PROB. CODE § 6451 (West 2009). Can inherit through stepparents even without adoption (although not clear if this applies to domestic partners). CAL. PROB. CODE § 6454. |             |

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|--------------------|---|---|---|
| <i>Colorado</i>    | Any person may adopt. COLO. REV. STAT. § 19-5-202 (2013). Explicitly allows second-parent adoptions. COLO. REV. STAT. § 19-5-203 (LexisNexis 2013).   | No relationship between adoptee and genetic parents; parent-child relationship exists between an individual who is adopted by a second parent and a genetic parent who consented or another genetic parent who is not donor. COLO. REV. STAT. § 15-11-118–119 (LexisNexis 2013).  | No relationship with third party donor. COLO. REV. STAT. § 15-11-120 (LexisNexis 2013). |
| <i>Connecticut</i> | Explicitly allowed for. CONN. GEN. STAT. § 45a-724(3) (2013).   | Relationship with biological parents terminated and all rights to adopting parents except for stepparents and second parent adoptions. CONN. GEN. STAT. § 45a-731 (2013).   |   |
| <i>D.C.</i>        | Yes. <i>In re M.M.D.</i> , 662 A.2d 837 (1995). Any person may petition for adoption but spouse must join unless adoption is by a stepparent. D.C. CODE § 16-302 (West 2012). Court may dispense with investigation report when petitioner is spouse or domestic partner of natural parent of adoptee and natural parent consent. D.C. CODE § 16-308. | Final decree of adoption establishes the relationship of natural parent and natural child between the adopter and adoptee for all purposes, including mutual rights of inheritance and succession as if adoptee were born to the adopter; inheritance between adoptee and natural parents is cut off with spousal exception. D.C. CODE § 16-312 (West 2012).      |   |
| <i>Delaware</i>    | Unmarried person or husband and wife jointly may adopt. DEL. CODE ANN. tit. 13, § 903 (LexisNexis 2009). Second-parent adoption allowed by trial courts. <i>In re Hart</i> , 806 A.2d 1179 (Del. Fam. Ct. 2001).  | Stepparent adoption does not alter relationship to natural parent. DEL. CODE ANN. tit. 13, § 919 (LexisNexis 2009). Nothing in inheritance altered by stepparent adoption. DEL. CODE ANN. tit. 13, § 920; <i>see also</i> DEL. CODE ANN. tit. 12, § 508 (indicating that adoption cuts off inheritance with natural parents except when adopted by a stepparent). |   |
| <i>Florida</i>     | Homosexuals cannot adopt under FLA. STAT. ANN. § 63.042(3) (West 2010), but the Florida District Court of Appeal has held this unconstitutional. <i>In re Adoption of X.X.G.</i> , 45 So. 3d 79 (Fla. Dist. Ct. App. 2010). It is unclear whether second-parent adoptions will be allowed now.  | Relationship with natural parent severed except when spouse. FLA. STAT. ANN. § 732.108 (West 2010).   |   |

|                 |   |  |  |
|-----------------|---|--|--|
| <i>Georgia</i>  | Any adult person but husband and wife must file jointly unless stepparent. GA. CODE ANN. § 19-8-3 (2010). Natural parent must surrender rights. GA. CODE ANN. § 19-8-6. No appellate decision addressing same-sex adoptions, but permitted at trial court level. <i>Wheeler v. Wheeler</i> , 642 S.E.2d 103 (Ga. 2007). | Adoption terminates all legal relationships (including inheritance) of birth relatives. GA. CODE ANN. § 19-8-19 (2011). Inheritance rights for adoptive parents and child. GA. CODE ANN. § 53-1-8.                               |  |
| <i>Hawaii</i>   | Any unmarried adult, stepparent, or husband and wife jointly may adopt. HAW. REV. STAT. ANN. § 578-1 (LexisNexis 2010).   | Child considered natural child of adopting parent and natural parent is not considered a relative. HAW. REV. STAT. ANN. § 578-16 (LexisNexis 2010). But there is a spousal exception. HAW. REV. STAT. ANN. § 560:2-114.          |  |
| <i>Idaho</i>    | Unclear.  | Child of adopting parents and not natural parents, with spousal exception. IDAHO CODE ANN. § 15-2-109 (West 1996); <i>see also</i> IDAHO CODE ANN. §§ 16-1508 to -1509.  |  |
| <i>Illinois</i> | The Illinois Appellate Court, First District, held that unmarried same-sex cohabitants have standing to jointly petition for adoption. <i>In re K.M.</i> , 653 N.E.2d 888 (Ill. App. Ct. 1995). Stepparent/civil union adoption by statute. 750 ILL. COMP. STAT. 50/2 (West 2009).                                      | Child is descendant of adopted parent and not natural parent, with spousal exception. 755 ILL. COMP. STAT. 5/2-4 (West 2007).  |  |
| <i>Indiana</i>  | Yes; appellate courts have allowed. <i>In re Infant Girl W.</i> , 845 N.E.2d 229 (Ind. Ct. App. 2006).  | Treated as natural child of adopting parents and cease to be treated as child of natural child. IND. CODE § 29-1-2-8 (LexisNexis 2011).  |  |
| <i>Iowa</i>     | Some counties allow second-parent adoption; stepparent adoption is allowed. IOWA CODE § 600.4 (West 2001).  | Lawful adoption extinguishes the right of intestate succession of an adopted person from and through biological parents, with spousal exception. IOWA CODE § 633.223 (West 1992).  |  |
| <i>Kansas</i>   | Any adult may adopt or husband and wife jointly (one spouse needs consent of other). KAN. STAT. ANN. § 59-2113 (2005). It is unclear whether second-parent adoption is allowed.   | Adoption terminates right of birth parent to inherit through and from adoptee (with spousal exception) but adoption does not terminate right of child to inherit from or through birth parent. KAN. STAT. ANN. § 59-2118 (2005). |  |

|                      |  |  |  |
|----------------------|--|--|--|
| <i>Kentucky</i>      | Probably not. <i>S.J.L.S. v. T.L.S.</i> , 265 S.W.3d 804 (Ky. Ct. App. 2008) (noting in dicta that an unmarried couple cannot use the stepparent adoption procedures in Kentucky to establish legal parentage for both partners).  | Considered natural child of adoptive parents and all relationships with biological parent terminated except when spouse. KY. REV. STAT. ANN. § 199.520 (West 2006).  |  |
| <i>Louisiana</i>     | Some counties have allowed (Orleans Parish); state attorney general said in a 2007 advisory opinion said that there is no provision allowing for two unmarried persons to adopt a child jointly, and refusing to accept out of state adoption does not violate the Full Faith and Credit Clause.             | Upon adoption, adopting parent becomes parent of the child and filiation between child and legal parent is terminated; adopted child and descendants retain right to inherit from former legal parent, with stepparent exception. LA. CIV. CODE ANN. art. 199 (West 2007). |  |
| <i>Maine</i>         | <i>In re Adoption of M.A.</i> , 930 A.2d 1088 (Me. 2007) (holding that Maine's adoption statute does not bar an unmarried same-sex couple from jointly petitioning for adoption). It appears that domestic partners are allowed to jointly adopt as well. <i>Adoption of J.S.S.</i> , 2 A.3d 281 (Me. 2010). | Adopted person child of adopting parent except can inherit from natural parents if the adoption decree provides; also adoption by spouse has no effect. ME. REV. STAT. ANN. tit. 18A § 2-109 (West 2012); <i>see also</i> ME. REV. STAT. ANN. tit. 18A § 9-105.            |  |
| <i>Maryland</i>      | Any adult may petition. MD. CODE ANN., FAM. LAW § 5-3A-29 (LexisNexis 2012). Trial courts have allowed. <i>In re</i> Petition of D.L.G., No. 95179001/CAD (Md. Cir. Ct., Baltimore City June 27, 1996).  | Child includes adopted child, though not stepchild. MD. CODE ANN., FAM. LAW § 1-205 (LexisNexis 2012). Spousal exception but otherwise not considered child of natural parents. MD. CODE ANN., EST. & TRUSTS § 1-207 (LexisNexis 2012).                                    |  |
| <i>Massachusetts</i> | Yes. <i>In re Adoption of Tammy</i> , 619 N.E.2d 315 (Mass. 1993).   | Adopted child is child of adopting parents and not natural parents, with spousal exception. MASS. GEN. LAWS ch. 190B, § 2-114 (LexisNexis 2011).   |  |
| <i>Michigan</i>      | Unclear, though some counties allow.   | Adopted child considered heir of adoptive parents and not heir at law of a parent whose rights have been terminated. MICH. COMP. LAWS § 710.60 (West 2012). Spousal exception. MICH. COMP. LAWS § 700.2114 (West 2003).  |  |

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| <i>Minnesota</i>   | Appellate court in 2010 did not rule directly on whether Minnesota law allows, but said that it was not a frivolous argument to contend that Minnesota law does not allow; some counties allow (Aitkin and Hennepin).  | Adopted child is legal child of adopting parents and shall not inherit from birth parents, with spousal exception. MINN. STAT. ANN. § 259.59 (2007).   |  |
| <i>Mississippi</i> | Adoption by couples of the same gender is prohibited. MISS. CODE ANN. § 93-17-3 (West 2007).   | Child shall inherit from and through adopting parents and natural parents shall not inherit by or through child, with spousal exception. MISS. CODE ANN. § 93-17-13 (West 2007).   |  |
| <i>Missouri</i>    | Unclear but <i>White v. White</i> suggests not because trial court dismissed non-biological mother's petition for custody from ex-partner and biological mother. 293 S.W.3d 1 (Mo. Ct. App. 2009).   | All legal relationships and all rights and duties between adopted child and natural parents (other than natural parent who joins in petition) cease. MO. REV. STAT. § 453.090 (2014). Spousal exception. MO. REV. STAT. § 474.060.   |  |
| <i>Montana</i>     | Unclear, but the Montana Supreme Court in <i>Kulstad v. Maniaci</i> affirmed trial court's granting of parental interest to former partner of adoptive parent. 220 P.3d 595 (Mont. 2009).  | Relationship of parent and child between adopted child and adoptive parents, and not with former parents unless spouse. MONT. CODE ANN. § 42-5-202 (2013). Adoption by spouse has no effect on intestate succession, and inheritance from or through child by natural parent is precluded unless parent openly treated as child and has not refused to support child. MONT. CODE ANN. § 72-2-124; <i>see also</i> MONT. CODE ANN. § 42-4-311 (re-stepparent adoption). |  |
| <i>Nebraska</i>    | No. <i>In re Luke</i> , 640 N.W.2d 374 (Neb. 2002). Court held that lesbian partner could not adopt partner's biological child because partner had not relinquished parental rights. The dissent points out that this is really about prohibiting second-parent adoptions. | Natural parents of adopted child have no rights over adopted child's property by descent and distribution. NEB. REV. STAT. § 43-111 (2011). Adopted person is child of adopting parent except for spouse. NEB. REV. STAT. § 30-2309 (2010).  |  |

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| <i>Nevada</i>         | Any adult person or two married persons (mandatory to join). NEV. REV. STAT. ANN. § 127.030 (LexisNexis 2010). Domestic partners are allowed. NEV. REV. STAT. ANN. § 127.045.   | Child is legal child of adopting parents; natural parents cannot inherit from adopted child and adopted child shall not inherit from natural parents with stepparent exception. NEV. REV. STAT. ANN. § 127.160 (LexisNexis 2010).  |   |
| <i>New Hampshire</i>  | Any husband and wife together, unmarried adult, or stepparent can adopt. N.H. REV. STAT. ANN. § 170-B:4 (West 2014).  | Stepparent exception, but otherwise upon adoption all reciprocal rights of inheritance with birth parents shall cease. N.H. REV. STAT. ANN. § 170-B:25 (West 2014). But no alteration if agreement.  |   |
| <i>New Jersey</i>     | Second parent adoption. <i>In re</i> Adoption of Two Children, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995). Stepparent/civil union adoption. N.J. REV. STAT. § 9:3-50 (West 2013).  | Adopted child treated as though born to adopting parent and terminates rights and responsibilities of natural parent except spouse; terminates inheritance rights both ways. N.J. REV. STAT. § 9:3-50 (West 2013); <i>see also</i> N.J. REV. STAT. § 2A:22-3 (2010).                             |   |
| <i>New Mexico</i>     | Trial courts have granted; any individual or stepparent may adopt. N.M. STAT. ANN. § 32A-5-11 (LexisNexis 2009).  | Parent barred from inheriting from or through child if parent's parental rights were terminated. N.M. STAT. ANN. § 45-2-114 (LexisNexis 2012). Upon adoption, adoptee has all rights including inheritance through adopting parent and vice versa. N.M. STAT. ANN. § 32A-5-37 (LexisNexis 2009). |   |
| <i>New York</i>       | Yes. <i>In re</i> Jacob, 660 N.E.2d 397 (N.Y. 1995); N.Y. DOM. REL. LAW § 110 (2010) (noting "two unmarried adult intimate partners").  | After adoption, birth parents have no right to descent or succession and adopted child cannot inherit through birth parents, with stepparent exception. N.Y. DOM. REL. LAW § 117 (2002).   | Second-parent adoption. <i>In re</i> Jacob, 660 N.E.2d 397 (N.Y. 1995). Stepparent adoption. N.Y. DOM. REL. LAW § 110 (2010). |
| <i>North Carolina</i> | <i>Boseman v. Jarrell</i> , 704 S.E.2d 494 (N.C. 2010) (holding that a lesbian partner's second-parent adoption was void because the issuing court did not terminate the parental rights of the biological mother, her partner, as required by statute). Two unmarried individuals cannot adopt jointly. N.C. GEN. STAT. § 48-2-301 (2013). | Adoption severs relationship with former parents but adoption by stepparent has no effect and adoptive parents are parents for purposes of intestate succession. N.C. GEN. STAT. § 48-1-106 (2013).  |   |



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| <i>North Dakota</i> | Unclear. Husband and wife or unmarried adult or stepparent may adopt. N.D. CENT. CODE § 14-15-03 (2003).  | Adoptee becomes stranger to biological parents but treated as legitimate blood descendant of adopting parents. N.D. CENT. CODE § 14-15-14 (2003).   |  |
| <i>Ohio</i>         | No. <i>In re</i> Adoption of Doe, 719 N.E.2d 1071 (Ohio Ct. App. 1998) (denying the petition of woman to adopt her partner's biological child, stating that the adoption by an adult who was not the child's stepparent would terminate the parental rights of the biological parent by operation of law because the unambiguous language and meaning of the statute required strict construction).   | OHIO REV. CODE ANN. § 3101.01 (2004). The final adoption decree terminates all legal relationships between the adopted person and the adopted person's birth parents, with spousal exception. Adoption decree creates the relationship of parent and child between the petitioner and the adopted person, as if the adopted person were a birth descendant of the petitioner, for all purposes including inheritance. |  |
| <i>Oklahoma</i>     | 10 OKL. ST. ANN. § 7503-1.1 (1998). Husband and wife, married person if other spouse is parent or relative, or unmarried person may adopt.  | Child entitled to inherit from and through adoptive parents (and vice versa) but biological parents have no rights to descent or distribution, unless spouse. 10 OKL. ST. ANN. § 7505-6.5 (1998).   |  |
| <i>Oregon</i>       | "Any person" may adopt. OR. REV. STAT. § 109.309 (2013). Stepparent adoption. <i>Id.</i> ; <i>In re</i> Adoption of M.M.S.A., No. D8503-61930 (Or. Cir. Ct., Multnomah County Sept. 4, 1985) (granting the joint petition of a lesbian couple for one woman to adopt the biological child of the other). Domestic partners given same rights as married individuals. OR. REV. STAT. § 106.340 (2008). | Treated as child of adoptive parents for intestate succession and ceases to be treated as child of natural parents except for stepparent. OR. REV. STAT. § 112.175 (1969).  |  |

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| <i>Pennsylvania</i>   | Any individual may adopt. 23 PA. CONS. STAT. § 2312 (2014); <i>In re</i> Adoption of R.B.F., 803 A.2d 1195 (2002) (allowing adoption to take place without relinquishment of parental rights when cause is shown that such relinquishment is unnecessary under the particular circumstances of the case.) The court in <i>R.B.F.</i> noted that it would be absurd to allow same-sex couples to adopt jointly—which the statutes already permit—but not allow one of the partners to adopt the child of the other. | Adopted person considered issue of adopting parents; not considered issue of natural parent except for inheriting from natural kin (other than parents) if maintained family relationship with adoptee; spousal exception. 21 PA. CONS. STAT. ANN. § 2108 (2014).   |  |
| <i>Rhode Island</i>   | Any person may adopt, though married persons have to petition jointly. R.I. GEN. LAWS § 15-7-4 (2014).   | A child lawfully adopted shall be deemed the child of the adoptive parent(s) for the purpose of inheritance by and from the child. R.I. GEN. LAWS § 15-7-16 (2014). The birth parents of the adopted child shall be deprived of all legal rights respecting the child, and the child shall be freed from all obligations of maintenance and obedience respecting his or her birth parents; spousal exception. R.I. GEN. LAWS § 15-7-17. |  |
| <i>South Carolina</i> | Any South Carolina resident may petition the court to adopt a child. S.C. CODE ANN. § 63-9-60 (2013). Unclear whether this allows second-parent adoptions.   | After decree, parent and child relationship between adoptee and adoptive parent and biological parents relieved of all rights and responsibilities; does not change rights of biological parent who is not expressly affected by final decree. S.C. CODE ANN. § 63-9-760 (2013). Spousal exception. S.C. CODE ANN. § 62-2-109.  |  |
| <i>South Dakota</i>   | Unclear; any minor child may be adopted by any adult person. S.D. CODIFIED LAWS § 25-6-2 (2014).   | Adopted individual is child of adoptive parents and not birth parents, with spousal exception. S.D. CODIFIED LAWS § 29A-2-114 (2014).   |  |
| <i>Tennessee</i>      | Unclear; any person over 18 may petition but spouse must join. TENN. CODE ANN. § 36-1-115 (2014).  | Adoption establishes legal relationship of parent and child between adoptive parent and adoptee; adopted child shall not inherit from biological parent if relationship terminated by adoption. TENN. CODE ANN. § 36-1-121 (2014).  |  |

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| <i>Texas</i>    | An “adult” may petition for adoption but child can only be adopted if parental rights terminated, with spousal/ stepparent exception; but if relationship terminated with one parent, and person seeking to adopt has had actual care, control, and possession of child for a period of one year, then child may be adopted. TEX. FAM. CODE ANN. § 162.001(b)(4) (West 2004). | Adoption creates parent-child relationship between adoptive parent and child for all purposes, including inheritance. TEX. FAM. CODE ANN. § 162.017 (West 2005). Natural parents shall not inherit from or through adoptee but child shall inherit from and through natural parents. TEX. ESTATES CODE § 201.054 (LexisNexis 2014).  | <i>In re M.K.S.-V.</i> , 301 S.W.3d 460 (Tex. Ct. App. 2009) (noting that partner could not adopt absent birth mother’s consent though she had standing to sue for conservatorship). |
| <i>Utah</i>     | No; child may not be adopted by a person cohabiting in a relationship that is not a legally valid and binding marriage under the laws of Utah. UTAH CODE ANN. § 78B-6-117(3) (West 2008).   | Adopted child is child of adopting parents and not natural parents, with spousal exception; inheritance from or through a child by either natural parent is precluded. UTAH CODE ANN. § 75-2-114 (West 2014).  |  |
| <i>Vermont</i>  | Yes; any person may adopt and if a family unit consists of a parent and the parent’s partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent’s parental rights is unnecessary. VT. STAT. ANN. tit. 15A, § 1-102 (West 2014).   | When decree of adoption becomes final, adoptive parent and adoptee have legal relation of parent and child and have right of inheritance. VT. STAT. ANN. tit. 15A, § 1-104 (West 2014). When adoption decree becomes final, all parental rights and duties of each former parent terminate, including inheritance both ways. VT. STAT. ANN. tit. 15A, § 1-105. Stepparent exception. VT. STAT. ANN. tit. 15A, § 1-102. | <i>See also</i> Adoptions of B.L.V.B. & E.L.V.B., 628 A.2d 1271 (1993) (recognizing second-parent adoptions).  |
| <i>Virginia</i> | Unclear; however, under settlement of case, no absolute barriers to adoption for LGBT individuals. Prashad v. Copeland, 685 S.E.2d 199 (Va. Ct. App. 2009); Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330 (Va. Ct. App. 2006).   | Adopted person is child of an adopting parent and not of the biological parents, with spousal exception. VA. CODE ANN. § 64.2-102 (2014).  |  |

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| <p><i>Washington</i></p>    | <p>There is a presumption of legal parentage for any child born during a registered domestic partnership or for adults acting as parents during the first two years of a child’s life. WASH. REV. CODE ANN. §26.26.051, .101, .106 (LexisNexis 2014). Additionally, some counties in Washington have granted second-parent adoptions; also, any person who is legally competent and 18 may adopt. WASH. REV. CODE ANN. § 26.33.140.</p>   | <p>A lawfully adopted child shall not be considered an “heir” of his or her natural parents. WASH. REV. CODE ANN. § 11.04.085 (LexisNexis 2014). Adopted individual is lineal descendant of each of his or her adoptive parents. WASH. REV. CODE ANN. §11.02.005(8).</p>   |  |
| <p><i>West Virginia</i></p> | <p>Some trial courts have granted; any person not married, any person with spousal consent, or any husband and wife jointly may petition for adoption. W. VA. CODE § 48-22-201 (2001).</p>  | <p>Upon order of adoption, any person previously entitled to parental rights is divested of all legal rights, with spousal exception. For descent and distribution, after order of adoption, legally adopted child shall inherit from and through the adopting parent or parents, with spousal exception. W. VA. CODE § 48-22-703 (2001).</p>  |  |
| <p><i>Wisconsin</i></p>     | <p>No. <i>In re Angel Lace M.</i>, 516 N.W.2d 678 (1994) (denying single petition of woman to adopt her partner’s adopted child and petition of mother to allow her partner to adopt the child upon termination of her ex-husband’s parental rights). The court held that while the petitioner met eligibility requirements to adopt, the child was not eligible to be adopted because one parent still retained parental rights, and further that the parent’s rights would be automatically terminated if the petitioner were allowed to adopt the child. The court also found no constitutional violation to the child’s or petitioner’s rights.</p> | <p>A legally adopted person is treated as a birth child of person’s adoptive parents and adoptive parents are treated as birth parents of adopted person for purposes of transfers at death, to, through, and from the adopted person; this only applies if at least one of the following applies:<br/>         (1) The deceased person is the adoptive parent or adopted child.<br/>         (2) The adopted person was a minor at the time of adoption.<br/>         (3) The adoptive parent raised the adopted person in a parent-like relationship beginning on or before the child’s 15th birthday and lasting for a substantial period or until adulthood.<br/>         WIS. STAT. § 854.20 (2014). A legally adopted person ceases to be treated as child of person’s birth parents except when relationship to one birth parent is not replaced.<br/> <i>Id.</i></p> |  |

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| <i>Wyoming</i> | Unclear | An adopted person is child of an adopting parent for inheritance purposes; adoption by spouse of natural parent has no effect. An adopted person shall inherit from all other relatives of an adoptive parent as though he or she were a child who was born to the adoptive parent, and the relatives shall inherit from the adoptive person's estate as if they were his or her relatives. WYO. STAT. ANN. § 2-4-107 (2015). |  |
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