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NOTE

THE CHANGING FAMILY STRUCTURE: CHALLENGING STEPCHILDREN'S LACK OF INHERITANCE RIGHTS

INTRODUCTION

Today "the large majority of people die intestate," and thus, state law, rather than a will, determines who inherits a decedent's estate.¹ Consequently, unadopted stepchildren often do not inherit from their stepparents because most intestacy schemes limit distribution of a decedent's estate to individuals who were either related to a decedent by blood or were legally adopted by a decedent.² In fact, nearly one-third of our states have ratified laws that are substantially similar to the Uniform Probate Code (the "UPC"), which does not pass stepparents' estates to their unadopted stepchildren.³ Thus,

¹ JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 71-72 (6th ed. 2000). See BLACK'S LAW DICTIONARY 827 (7th ed. 1999) (defining people who die intestate as individuals who die without a will). See also Margorie Engel, *Pockets of Poverty: The Second Wives Club—Examining the Financial [In]security of Women in Remarriages*, 5 WM. & MARY J. OF WOMEN & L. 309, 350 (1999) (citing Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 243 (1963)); Jaki K. Samuelson & Dennis Thorson, *Contemporary Studies Project: A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1043 (1978).

² See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 2000) (prohibiting stepchildren from inheriting from stepparents who die intestate).

³ Section 2-103 of the UPC reads as follows:

Any part of the intestate estate not passing to the decedent's surviving spouse under Section 2-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals designated below who survive the decedent:

- (1) to the decedent's descendants by representation;
- (2) if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent;
- (3) if there is no surviving descendant or parent, to the descendants of

unadopted stepchildren, notwithstanding potentially close relationships with their stepparents, have no inheritance rights because they are not legal descendants of their deceased stepparents.⁴ Instead, a "laughing heir," someone who is not closely linked to a decedent and suffers no loss from a decedent's absence, often inherits a decedent's estate.⁵

the decedent's parents or either of them by representation;

(4) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half of the estate passes to the decedent's paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and the other half passes to the decedent's maternal relatives in the same manner; but if there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent's relatives on the other side in the same manner as the half.

DUKEMINIER & JOHANSON, *supra* note 1, at 73-74 (quoting UNIF. PROBATE CODE § 2-103 (amended 1975)). See also Robert A. Weems & Katherine L. Evans, *Mississippi Law of Intestate Succession, Wills, and Administration and the Proposed Mississippi Uniform Probate Code: A Comparative Analysis*, 62 MISS. L.J. 1, 5-6 (1992) (citing 8 U.L.A. 1 (West Supp. 1992) (stating that Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, New Mexico, Nebraska, North Dakota, South Carolina, and Utah have adopted the UPC)).

⁴ But see *Estate of Joseph*, 949 P.2d 472, 473 (Cal. 1998) (holding that unadopted stepchildren may inherit from their stepparent's estate when stepparents would have adopted their stepchildren but for a legal barrier which existed until the stepparent's death).

⁵ Cristy G. Lomenzo, Note, *A Goal-Based Approach to Drafting Intestacy Provisions for Heirs Other than Surviving Spouses*, 46 HASTINGS L.J. 941, 949 (1995) (citing David F. Cavers, *Change in the American Family and the "Laughing Heir,"* 20 IOWA L. REV. 203, 208 (1935) (arguing that the rate at which laughing heirs claim inheritance rights is likely to increase)).

In some states, one may use either the degree-of-relationship system or the parentelic system to determine which relative inherits a decedent's estate when that decedent's first-line collaterals (siblings) are deceased. See DUKEMINIER & JOHANSON, *supra* note 1, at 91. According to the degree of relationship system, one counts "degrees of kinship" to determine which person is "the closest of kin" with inheritance rights. DUKEMINIER & JOHANSON, *supra* note 1, at 93. One counts the number of steps for each generation up from the intestate decedent to the decedent's closest common ancestor, and then one counts the number of steps down from that common ancestor to the claimant to figure out the degree-of-relationship between the claimant and the decedent. See DUKEMINIER & JOHANSON, *supra* note 1, at 93. The combined numbers of steps up and down constitute "the degree of relationship." DUKEMINIER & JOHANSON, *supra* note 1, at 93. Under that system, distant relatives, such as third cousins thrice removed, may have inheritance rights. See DUKEMINIER & JOHANSON, *supra* note 1, at 92.

Furthermore, the parentelic system transfers the estate "to grandparents and their descendants, and if none to great-grandparents and their descendants, and if

Furthermore, according to Section 2-105 of the UPC, "[i]f there is no taker . . . the intestate estate passes to the [state]."⁶ Thus, the UPC does not even provide stepchildren with inheritance rights when all of a decedent's relatives are deceased. By comparison, several intestacy statutes give inheritance rights to a decedent's stepchildren when all of that decedent's relatives are deceased and the property would otherwise pass to the state.⁷ However, it is reasonable to believe that a decedent's estate passes to relatives more often than it passes to the state, and consequently, stepchildren are often left without inheritance rights.

Hence, the purpose of this Note is to emphasize the importance of stepfamilies in today's society and to stress the need to provide stepchildren with inheritance rights. Part I examines California's intestacy statute, which appears to provide stepchildren with more inheritance rights than do other intestacy statutes.⁸ Part I also discusses the recent California Su-

none to great-great-grandparents and their descendants, and so on down each line (*parentela*) descended from an ancestor until an heir is found." DUKEMINIER & JOHANSON, *supra* note 1, at 91-93.

However, by contrast, the UPC approaches the "laughing heir" issue differently than does the degree-of-relationship or parentelic system. DUKEMINIER & JOHANSON, *supra* note 1, at 73-74. Under Section 2-103 of the UPC, grandparents and their descendants are the last generation permitted to inherit from an intestate decedent. *See* DUKEMINIER & JOHANSON, *supra* note 1, at 73-74. Thus, according to Section 2-103 of the UPC, distant relatives may not inherit from an intestate decedent's estate. *See* DUKEMINIER & JOHANSON, *supra* note 1, at 73-74.

⁶ DUKEMINIER & JOHANSON, *supra* note 1, at 74.

⁷ *See* Engel, *supra* note 1, at 354 (citing Sol Lovas, *When is a Family Not a Family? Inheritance and the Taxation of Inheritance Within the Non-traditional Family*, 24 IDAHO L. REV. 353, 377 (1988)). *See also* Lovas, *supra*, at 367 (citing OHIO REV. CODE ANN. § 2105.06(I) (West 1999) (providing stepchildren with inheritance rights when no legal relatives are alive and the property would pass to the State by default)); Lovas, *supra*, at 377 (citing CAL. PROB. CODE § 6402(e) (West 2000) (expressly providing inheritance rights for stepchildren "[i]f there is no surviving issue, parent or issue of a parent, grandparent or issue of a grandparent" regardless of whether property would pass to the state)). *See also* Margaret M. Mahoney, *Symposium: The Changing Role of the Family in the Law: Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917, 920-21 (1989) (citing CONN. GEN. STAT. ANN. § 45-276(a)(5) (West Supp. 1988) currently known as CONN. GEN. STAT. ANN. § 45a-439(a)(4) (West 2000); MD. CODE ANN., EST. & TRUSTS § 3-104(e) (1999); S.C. CODE ANN. REGS. § 62-2-103(6) (1999) (providing stepchildren with inheritance rights when the property would otherwise pass to the state)).

⁸ *See* CAL. PROB. CODE § 6454 (West Supp. 2000).

preme Court decision, *Estate of Joseph*,⁹ which limited the application of California's intestacy statute.¹⁰ Consequently, California's intestacy statute does not provide the majority of stepchildren with inheritance rights. Part II reviews sociological data regarding stepfamily relationships and uses that data to assess California's intestacy statute as well as the majority of other intestacy statutes. Sociological studies are likely to lead one to conclude that the California intestacy statute, as well as other intestacy statutes, does not satisfy the modern stepfamily's needs. Part III evaluates existing proposals that claim to remedy stepchildren's inheritance problems. Part IV argues that state legislatures should amend existing intestacy statutes to reflect the sociological changes that have affected the modern family. Part IV also proposes a more suitable intestacy statute that better reflects sociological findings than do the California intestacy statute and other existing reform proposals.

I. CALIFORNIA'S INTESTACY STATUTE AND CASE LAW

In contrast to both the UPC's intestacy provision and the majority of other state intestacy statutes, stepchildren appear to have greater inheritance rights under California's intestacy statute.¹¹ Specifically, Section 6454 of the California Probate Code provides that stepchildren may inherit from stepparents who die intestate when the following three requirements are satisfied.¹² First, the stepfamily relationship must begin during the stepchild's minority.¹³ Second, the stepfamily relationship must continue during the stepchild's and stepparent's joint lifetimes.¹⁴ Third, clear and convincing evidence must establish that the "stepparent would have adopted the person but for a legal barrier."¹⁵

⁹ 949 P.2d 472 (Cal. 1998).

¹⁰ See *Estate of Joseph*, 949 P.2d at 473.

¹¹ See generally CAL. PROB. CODE § 6454 (West Supp. 2000).

¹² See *id.*

¹³ See *id.* "A minor is an individual who is under 18 years of age." CAL. FAM. CODE § 6500 (West Supp. 2000).

¹⁴ See CAL. PROB. CODE § 6454 (West Supp. 2000).

¹⁵ *Id.*

There was much debate about the meaning of Section 6454's third requirement¹⁶ prior to the California Supreme Court's decision in *Estate of Joseph*.¹⁷ Specifically, the Sixth District of the Court of Appeals in *In re the Estate of Stevenson*¹⁸ and the Second District of the Court of Appeals in *Estate of Cleveland*¹⁹ disagreed as to whether Section 6454 required one to prove that stepparents would have adopted but for a legal barrier that existed *until the stepparents' deaths*,²⁰ or whether Section 6454 required one to prove that stepparents would have adopted but for a legal barrier that only existed *during the stepchildren's minority*.²¹ In both cases, the natural parent refused to consent to the only adoption attempt that was made during the children's minority.²² However, despite similar fact patterns, the courts' holdings differed.

In *In re the Estate of Stevenson*, the court held that the legal barrier to adoption just had to exist during the stepchildren's minority.²³ In other words, the stepchildren did not have to prove that the legal barrier existed until their stepparent's death.²⁴ Consequently, in *In re the Estate of Stevenson*, the court awarded inheritance rights to the stepchildren because their stepparent's adoption attempt during the stepchildren's minority was barred by the natural parent's refusal.²⁵

By contrast, in *Estate of Cleveland*, the court held that the legal barrier to adoption had to exist until the foster parent's death.²⁶ In other words, the foster child did not obtain inheritance rights even though the foster parent's adoption attempt during the child's minority was prevented by the natural

¹⁶ Section 6454's third requirement refers to Section 6454(b) of the California Probate Code.

¹⁷ See *Estate of Joseph*, 949 P.2d at 473 (discussing the meaning of Section 6454 of the California Probate Code).

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

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

²⁰ See generally *Estate of Stevenson*, 14 Cal. Rptr. 2d 250.

²¹ See generally *Estate of Cleveland*, 22 Cal. Rptr. 2d 590.

²² See *Estate of Cleveland*, 22 Cal. Rptr. 2d at 596; *Estate of Stevenson*, 14 Cal. Rptr. 2d at 255.

²³ See *Estate of Stevenson*, 14 Cal. Rptr. 2d at 257.

²⁴ See *id.*

²⁵ See *id.*

²⁶ See *Estate of Cleveland*, 22 Cal. Rptr. 2d at 599-600 (finding that Section 6454 applies to foster parents as well as to stepparents).

parent's refusal. The foster parent was required to attempt adoption again during the foster child's majority,²⁷ when the natural parent's consent was no longer needed.²⁸ Had such an adoption attempt failed due to a legal barrier, then the foster child would have received inheritance rights.²⁹ Consequently, in *Estate of Cleveland*, the foster child was not entitled to any inheritance right because his foster parent was not prevented from adopting the child during the child's majority.³⁰

In *Estate of Joseph*, the California Supreme Court resolved the dispute between the Court of Appeals' Second and Sixth Districts by agreeing with the *Cleveland* decision.³¹ The California Supreme Court reaffirmed *Cleveland's* decision, which required stepchildren to prove that a stepparent would have adopted them but for a legal barrier that existed until their stepparent's death.³² Thus, a stepchild does not inherit from a stepparent's estate even when the following requirements are satisfied: (1) the stepchild-stepparent relationship began during the stepchild's minority; (2) the stepfamily relationship continued throughout both individuals' lives; and (3) the stepparent would have adopted the stepchild during the stepchild's minority but for a legal adoption barrier.³³ In other words, stepchildren will not inherit a stepparent's estate unless the deceased stepparent tried to adopt the stepchildren during the stepchildren's majority, when the natural parent's consent was no longer necessary for adoption.³⁴

²⁷ "An adult [person of majority age] is an individual who is 18 years of age or older." CAL. FAM. CODE § 6501 (West 2000).

²⁸ See *Estate of Cleveland* 22 Cal. Rptr. 2d at 599-600.

²⁹ Legal barriers may exist during stepchildren's majority. For instance, some legal barriers include the lack of consent by the adoptee, the adoptee's spouse, or the spouse of the adopting person. In addition, the law prohibits the adoption of more than one unrelated adult each year unless the adoptee is physically handicapped or disabled or unless the adoptee is the biological brother or sister of an individual already adopted. It is also essential that adult adoption be in the public interest as well as in the interest of the individual petitioning for adoption. See *Estate of Joseph*, 949 P.2d at 479 (citing CAL. FAM. CODE §§ 9301-9303, 9328 (West 1999)); Lovas, *supra* note 7, at 373 (citing *Doby v. Carroll*, 147 So.2d 803 (Ala. 1962)). See generally Appeal of Ritchie, 53 N.W.2d 753 (Neb. 1952) (discussing the prohibition of adult adoptions).

³⁰ See *Estate of Cleveland*, 22 Cal. Rptr. 2d at 599-600.

³¹ See *Estate of Joseph*, 949 P.2d at 473.

³² See *id.*

³³ See *id.* at 477.

³⁴ See *id.* at 481 (intending to preserve the decedent's intent).

Stepchildren will not have inheritance rights if natural parents prevent stepparents from adopting the children during their minority, except in the rare situation where stepchildren are still minors when their stepparents die.³⁵ Thus, the California intestacy statute prevents almost all adult stepchildren from inheriting their stepparents' estates.³⁶ Indeed, California's intestacy statute does not provide many stepchildren with inheritance rights because it appears unlikely that many stepparents will try to adopt their stepchildren during the stepchildren's majority.³⁷ Such a statute practically disregards the stepfamily relationship, and in actuality, does not provide stepchildren with much more of an inheritance right than do the majority of other intestacy statutes. Consequently, both California's intestacy statute and other intestacy statutes should be examined closely, especially considering that as the number of stepfamilies increases, there is a greater possibility that intestacy statutes can frequently affect stepchildren in a harsh manner.

In fact, according to the Bureau of the Census, "more Americans will be living in stepfamilies than [in traditional families] by the year 2000."³⁸ Consequently, in the United States, "more than one-half of today's [youth will become stepchildren] by the year 2000."³⁹ In addition, other staggering

³⁵ See *Estate of Joseph*, 949 P.2d at 486 (Chin, Assoc. J., dissenting). For example, a stepchild would receive inheritance rights if the natural parent refused to consent to the stepparent's adoption attempt during the stepchild's minority and the stepparent died before the stepchild was eighteen years old.

³⁶ See *id.* at 486 (Chin, Assoc. J., dissenting) (citing *Recommendation: Inheritance by Foster Child or Stepchild* (Oct. 1997) 27 CAL. LAW REVISION COM. REP. (1997) p. x6 [preprint copy]).

³⁷ Individuals often view adoption in the context of stepparents adopting minor rather than adult children. See, e.g., *Stepparent Adoptions* (last modified 1998) <<http://www.homes4kids.org/steppar.htm>> (stating that custodial parents and stepparents should really think about the child's best interests prior to adoption). Adopting a minor child may require more consideration than adopting an adult because a minor child most likely requires more care and supervision than an adult. A minor child not only needs food and shelter but also needs guidance and nurturing. Hence, it is logical to conclude that the "child" referred to above is a minor rather than an adult child.

³⁸ *Stepfamily Foundation: The Statistics are Staggering* (visited Jan. 5, 2000) <<http://www.stepfam.org/statistics.html>> [hereinafter, *Stepfamily Foundation*].

³⁹ Engel, *supra* note 1, at 323 (citing Paul C. Glick, *Remarried Families, Stepfamilies, and Stepchildren: A Brief Demographic Profile*, 38 FAM. REL. 24, 26 (1989)).

statistics indicate that 40% "of all marriages today are remarriages for at least one [spouse]," and children from previous marriages are involved in nearly 65% of those remarriages.⁴⁰ Thus, one must question whether state legislatures need to amend existing state intestacy laws to reflect changes in family composition, and, if so, one must determine whether California's intestacy statute is a proper role model for other states to follow. If the California intestacy statute does not satisfy the needs of the modern stepfamily, then one must design a more suitable proposal.

II. ANALYSIS OF INTESTACY STATUTES

A. *General Background Concerning Intestacy Statutes*

The goal of intestacy statutes is to carry out the testamentary intent of the majority of decedents.⁴¹ Thus, one must determine how the majority of stepparents want their property to be distributed upon death. The following questions should be asked when making that determination: Do the majority of stepparents want their stepchildren to attain parity with biological children and thus, inherit as if they were biological children? Do the majority of stepparents want to pass their estates to blood relatives and leave their stepchildren with nothing? Do the majority of stepparents want to distribute the bulk of their estates to blood relatives, while providing stepchildren with a smaller share based on other criteria, such as the number of years that the stepfamily relationship existed and the age of the stepchildren when the stepfamily relationship began?

B. *Sociological Data Regarding Stepfamily Relationships*

Even though some individuals argue that intestacy statutes should be amended to give stepchildren inheritance rights to keep apace with the increasing number of stepfamilies and

⁴⁰ *NebFacts: Supporting Stepfamilies* (last modified Apr. 1995) <<http://www.ianr.unl.edu/pubs/family/nf212.htm>>.

⁴¹ See DUKEMINIER & JOHANSON, *supra* note 1, at 74 (stating that one must determine the intent of the typical intestate decedent).

the changes in family composition,⁴² it is not necessarily accurate to assume that stepparents want their entire estates to pass to stepchildren. In fact, granting stepchildren broad inheritance rights might not be the best solution considering the following factors: (1) 60% of remarriages end in divorce,⁴³ (2) some stepparents claim that they participate in fewer activities with their stepchildren and treat such children less affectionately than natural parents treat their children,⁴⁴ and (3) time is needed for stepfamilies to develop family closeness.⁴⁵

Other sociological data also prevents one from equating the stepfamily relationship with the traditional family unit. For instance, children in stepfamilies may receive less assistance and support with their homework than do children who live with two natural parents.⁴⁶ Furthermore, stepparents may be more detached in raising their stepchildren than in raising their biological children.⁴⁷ In addition, "financial commitment to a new wife or new husband comes slowly; and still more slowly, if at all, comes financial commitment to stepchildren."⁴⁸ Thus, one should not necessarily assume that stepparents want their entire estates to pass to stepchildren.

Stepparents might even want to protect their biological children's interests from those of their stepchildren.⁴⁹ In fact,

⁴² In fact, if recent marital trends continue, approximately "4 out of 10 first marriages" will "end in divorce" and alternatively, if there is a return to the divorce trends of the late 1970s, then "5 out of 10 first marriages may eventually end in divorce." Arthur J. Norton & Louisa F. Miller, *Marriage, Divorce, and Remarriage in the 1990s*, in CURRENT POPULATION REPORTS P23-180, 5 (1992).

⁴³ See *Stepfamily Foundation*, *supra* note 38. See also Norton & Miller, *supra* note 42, at 1 ("Large proportions of the population will continue to be affected by divorce and its consequences.").

⁴⁴ See Marilyn Ihinger-Tallman & Kay Pasley, *Stepfamilies in 1984 and Today—A Scholarly Perspective*, in STEPFAMILIES: HISTORY, RESEARCH AND POLICY 19, 22 (Irene Levin & Marvin B. Sussman eds., 1997).

⁴⁵ See Ihinger-Tallman & Pasley, *supra* note 44, at 22 (citing J. H. Bray, *Children's Development in Early Remarriage*, in THE IMPACT OF DIVORCE, SINGLE PARENTING, AND STEPPARENTING ON CHILDREN 279-98 (E.M. Hetherington & J.D. Arasteh eds., 1988); E.M. Hetherington, *The Role of Individual Differences and Family Relationships in Children's Coping with Divorce & Remarriage*, in FAMILY TRANSITIONS 165-94 (P. Cowan & E. M. Hetherington eds., 1991)).

⁴⁶ See Chandler Arnold, *Children and Stepfamilies: A Snapshot* (last modified Nov. 1998)

<<http://www.clasp.org/pubs/familyformation/stepfamiliesfinal.BK1.htm>>.

⁴⁷ See *id.*

⁴⁸ Engel, *supra* note 1, at 317 (citing Barbara Fishman, *The Economic Behavior of Stepfamilies*, 32 FAM. REL. 359, 366 (1982)).

⁴⁹ See MERRY BLOCH JONES & JO ANN SCHILLER, STEPMOTHERS: KEEPING IT

women who bring biological children to a marriage often want to separate assets that pass to their biological children from the assets that pass to their stepchildren, especially if such assets are personal or sentimental items.⁵⁰ Stepmothers usually do not believe that their biological children and stepchildren should receive equivalent amounts of assets.⁵¹ Stepparents may not even like their stepchildren and thus, may resent them. Hence, conflicts in such stepfamilies are common.⁵²

Stepparents often have feelings of anger, jealousy, and rejection as they adjust to stepfamily relationships. One author recounted her stepfamily problems, stating that she once yelled to her stepdaughter not to "ever call me Mom again. Never."⁵³ Another stepmother said that thoughts of her stepchildren disturbed her so much that her stomach ached when she saw them.⁵⁴

However, stepfamily relationships vary from family to family just as traditional families vary.⁵⁵ Some traditional families are comprised of closely-knit people, who enjoy spending time with other family members and who exhibit positive feelings toward one another. However, other traditional families are merely comprised of people related by blood, who experience friction when interacting with other family members. Moreover, stepfamily relationships vary. That is, even though one stepmother may become ill when thinking about her step

TOGETHER WITH YOUR HUSBAND AND HIS KIDS 67 (1992).

⁵⁰ See *id.*

⁵¹ See *id.* at 70-71.

⁵² See ELIZABETH EINSTEIN, *THE STEPFAMILY: LIVING, LOVING & LEARNING* 63 (1982) (discussing conflict among stepfamily members). See also LESLIE ALDRIDGE WESTOFF, *THE SECOND TIME AROUND: REMARRIAGE IN AMERICA* 72 (1977) (stating that problems are magnified by remarriage). "The raising of children is not easy in any family, but for stepparents it is doubly difficult. Because of the complicated nature of stepfamilies, numerous challenges and questions arise which are not talked about in the thousands of books written about child-rearing. There is no Dr. Spock for stepparents and remarried parents." See EMILY VISHER & JOHN VISHER, *HOW TO WIN AS A STEPFAMILY* 1 (1982).

⁵³ EINSTEIN, *supra* note 52, at 3.

⁵⁴ See JONES & SCHILLER, *supra* note 49, at 43.

⁵⁵ See Engel, *supra* note 1, at 322 (citing Judith Zucker Anderson & Geoffrey D. White, *An Empirical Investigation of Interaction and Relationship Patterns in Functional and Dysfunctional Nuclear Families and Stepfamilies*, 25 *FAM. PROCESS* 407 (1986)).

children, other stepmothers feel the same way about their stepchildren as they do about their biological children.⁵⁶

Furthermore, some sociological findings demonstrate that stepparents not only view their stepchildren in a favorable light but also that stepparents develop close ties with their stepchildren. Stepfamilies may be tightly knit and see themselves as one unit rather than as separate groups.⁵⁷ In fact, Lucile Duberman's study of 88 stepfamilies revealed that 82% of the stepfamilies' relationships were rated "Excellent" or "Good," as compared with the 18% that were rated "Poor."⁵⁸

Furthermore, case law and other sociological studies indicate that many stepparents think of their stepchildren as their own biological children, and they treat them accordingly.⁵⁹ Specifically, studies demonstrate that stepfathers treat their stepchildren nearly as well as natural fathers treat their biological children.⁶⁰ In addition, stepchildren no longer view their stepmothers in the same way that Cinderella viewed her wicked stepmother.⁶¹ For instance, one teenage stepchild considers the stepfamily structure a positive part of her life.⁶²

⁵⁶ See EINHORN, *supra* note 52, at 51.

⁵⁷ See LUCILE DUBERMAN, *THE RECONSTITUTED FAMILY: A STUDY OF REMARRIED COUPLES AND THEIR CHILDREN* 63 (1975). *But see id.* at 63-64 (revealing that some stepfamilies do not want to do things as a group); WESTOFF, *supra* note 52, at 75 (revealing that stepparents and children may exhibit feelings of jealousy, hostility and competition towards one another).

⁵⁸ DUBERMAN, *supra* note 57, at 9, 50.

⁵⁹ See, e.g., *Estate of Joseph*, 949 P.2d at 474 (demonstrating that the deceased foster parent treated his foster child as his own daughter by giving her away on her wedding day); *Estate of Crossman*, 377 N.W.2d 850, 852 (Mich. Ct. App. 1985) (demonstrating that deceased stepparent viewed his stepchildren as his biological children by referring to them "as his children" and treating them accordingly); *In re Berge's Estate*, 47 N.W.2d 428, 429-30 (Minn. 1951) (demonstrating that the stepfather viewed his stepchildren as his biological children by financially supporting them and expressing a desire that the word "father" be written on his tombstone).

⁶⁰ See NORMAN GOODMAN, *MARRIAGE AND THE FAMILY* 295 (1993). However, stepfathers view themselves as having a lesser impact than do natural fathers because stepfathers consider themselves to be outsiders who disturb the regular family routine. *See id.* at 295-96.

⁶¹ See Rosie Vroman, *The Second Wives Club: Wicked Stepmothers, Fact or Fiction?* (last modified 1999) <<http://www.secondwivesclub.com/fairytales1.htm>> (discussing how fairytales depict stepmothers).

⁶² See EINHORN, *supra* note 52, at 187.

She enjoys having more than one mother because she can ask them both the same question and receive advice from two people that care for her.⁶³

Stepparents perceive themselves as caring individuals who want to be good parents,⁶⁴ and, "[a]t the very least, [stepmothers] intend to develop caring relationships with their stepchildren."⁶⁵ One stepparent said that she loves her stepdaughter so much that it is difficult to believe that they share an emotional rather than a biological link.⁶⁶ Similarly, other stepmothers believe that stepchildren have enriched their lives.⁶⁷ A biological parent even stated that her second husband refers to her daughter "as his daughter rather than as his stepdaughter,"⁶⁸ and he "is more her father than her real father ever was or is now."⁶⁹ Finally, another stepmother's positive attitude toward the stepfamily relationship is demonstrated by her fond recollection of the warm embrace that she received from her stepchild who was returning home from summer camp.⁷⁰

Adult stepchildren also remember the positive ways in which their stepparents influenced their lives.⁷¹ One stepdaughter recounted that she often stayed at home before her mother's remarriage, after which her stepfather exposed her to traveling, camping, and fishing outings.⁷² Another adult stepchild recalled that referring to her stepfather as "Dad" made her feel more similar to her friends who were raised in traditional families.⁷³

Thus, stepfamilies may positively influence stepchildren because "[e]xtra parental figures offer new places and experi-

⁶³ See EINSTEIN, *supra* note 52, at 187.

⁶⁴ See MALA BURT, STEPFAMILIES STEPPING AHEAD: AN EIGHT-STEP PROGRAM FOR SUCCESSFUL FAMILY LIVING 7 (Mala Burt ed., 3rd ed. 1989).

⁶⁵ JONES & SCHILLER, *supra* note 49, at 181.

⁶⁶ See EINSTEIN, *supra* note 52, at 189.

⁶⁷ See WESTOFF, *supra* note 52, at 161.

⁶⁸ DUBERMAN, *supra* note 57, at 53.

⁶⁹ DUBERMAN, *supra* note 57, at 53.

⁷⁰ See WESTOFF, *supra* note 52, at 161.

⁷¹ See EINSTEIN, *supra* note 52, at 185.

⁷² See EINSTEIN, *supra* note 52, at 185-86. One adult stepchild recounted how her urban stepmother taught her about hospitality and social etiquette. See EINSTEIN, *supra* note 52, at 186. Another stepchild recalled that her stepfather reinforced positive values, such as perseverance, self-discipline and hard work. See EINSTEIN, *supra* note 52, at 186.

⁷³ See EINSTEIN, *supra* note 52, at 186.

ences" to their stepchildren.⁷⁴ Some studies even suggest that children in such families are as academically and socially successful and as happy as children in traditional families.⁷⁵ Thus, the stepfamily relationship may even provide stepchildren with the best of two worlds.⁷⁶

However, regardless of the type of relationship that stepfamilies form, stepparents have the option to write wills, in which they can specifically provide their unadopted stepchildren with inheritance rights. Nevertheless, stepparents may not write wills due to the following factors: (1) their fears of confronting death,⁷⁷ (2) their beliefs about the expense of will execution,⁷⁸ or (3) their lack of awareness concerning the absence of stepchildren's inheritance rights.⁷⁹

C. *An Assessment of California's Intestacy Statute and Other Intestacy Statutes*

To determine whether California's intestacy statute is a proper role model for other states to follow, one must examine the statute and sociological data regarding stepparents' testamentary intent. As presently interpreted, the California intestacy statute requires that stepparents try to adopt stepchildren during the stepchildren's majority, even if stepparents' adoption attempts during the stepchildren's minority were thwarted by a legal barrier.⁸⁰

⁷⁴ EINSTEIN, *supra* note 52, at 187. See also Marilyn Coleman & Lawrence H. Ganong, *Stepfamilies from the Stepfamily's Perspective*, in STEPFAMILIES: HISTORY, RESEARCH, AND POLICY, *supra* note 44, at 107, 118 (stating that some stepchildren believe that stepparents have broadened their horizons through exposure to new sports, hobbies and various interests).

⁷⁵ See Barbara J. Wurzel, C.H.E., *Ohio State University Extension Fact Sheet: Growing Up With Yours, Mine And Ours In Stepfamilies* (visited Jan. 5, 2000) <<http://www.ag.ohio-state.edu/~ohioline/hyg-fact/5000/5292.htm>>.

⁷⁶ See EINSTEIN, *supra* note 52, at 187. However, one must realize that both worlds may produce values that conflict with one another and consequently, the stepfamily relationship may confuse stepchildren. See EINSTEIN, *supra* note 52, at 188.

⁷⁷ See DUKEMINIER & JOHANSON, *supra* note 1, at 71 ("[M]ost people cannot accept and plan for the fact of their own death.").

⁷⁸ See DUKEMINIER & JOHANSON, *supra* note 1, at 67.

⁷⁹ If stepparents were aware of this situation, then they would simply accord inheritance rights to their stepchildren in wills and no controversy or case law would surround this area of law.

⁸⁰ See *Estate of Joseph*, 949 P.2d at 473; CAL. PROB. CODE § 6454 (West 2000).

Such a requirement does not always satisfy, and may even conflict with, stepparents' desires. Stepparents may simply decide that adoption is not important once stepchildren become adults even though such stepparents want their stepchildren to have inheritance rights.⁸¹ One stepparent stated that "[a]dopting her [stepdaughter] at nineteen would have added nothing to our love and commitment."⁸² Adult stepchildren may also be parents themselves and consequently, stepparents may believe that it is not necessary to formally adopt such stepchildren, who already have families of their own. Thus, one might argue in favor of stepchildren's inheritance rights, even when adoption has not occurred, because a close stepfamily relationship may form regardless of whether stepparents adopt their stepchildren.⁸³ Such stepparents may want their stepchildren to have inheritance rights, even though there was no formal adoption proceeding.

Furthermore, one should not assume that stepparents avoid the subject of adoption to limit their stepchildren's inheritance rights. Rather, stepparents may not broach the subject of adoption because stepparents may want to avoid placing children in an uncomfortable position in which stepchildren would have to reject non-custodial biological parents. "[S]evering a biological" link may not be easy.⁸⁴ Even if a biological parent is deceased, the subject of adoption may create psychological dilemmas for stepchildren who will not want to reject their deceased biological parents or offend their stepparents.⁸⁵ Hence, it is difficult to discuss inheritance, which results in a phenomenon called "passive neglect."⁸⁶

Stepparents may also not attempt adoption to avoid what they believe will be an expensive,⁸⁷ tedious, and lengthy process. In fact, such beliefs are not necessarily wrong because stepparents may need to hire an attorney to adopt their step-

⁸¹ See *Estate of Stevenson*, 14 Cal. Rptr. 2d at 257.

⁸² EINSTEIN, *supra* note 52, at 163.

⁸³ See VISHNER & VISHNER, *supra* note 52, at 20 (indicating that emotional bonds may still develop between unadopted stepchildren and their stepparents).

⁸⁴ EINSTEIN, *supra* note 51, at 163 (indicating that stepchildren may not consent to adoption by their stepparents due to stepchildren's fears of hurting biological parents).

⁸⁵ See VISHNER & VISHNER, *supra* note 51, at 142.

⁸⁶ Engel, *supra* note 1, at 343.

⁸⁷ See RENATO ESPINOZA & YVONNE NEWMAN, STEPPARENTING 33 (1979).

children.⁸⁸ Attorneys may be necessary to clarify the legal meanings of support and abandonment, which differ among the states.⁸⁹ Similarly, stepparents might also avoid writing a will, which could give stepchildren inheritance rights, due to analogous beliefs that drafting a will is a time-consuming and expensive process.⁹⁰

Moreover, California's intestacy statute is not significantly more equitable than other state intestacy statutes that simply deny inheritance rights to stepchildren.⁹¹ In many cases, an inequity would result regardless of whether a particular case was decided according to Section 6454 of the California Probate Code or another state's intestacy statute.

For instance, in *In re Estate of Crossman*,⁹² the intestate decedent died with stepchildren, whom he referred to as his own children and treated accordingly.⁹³ One stepchild's wedding invitation even indicated that she was the decedent's daughter.⁹⁴ However, regardless of the strong stepfamily relationship, and the Michigan Court of Appeals' belief that the decedent wanted to pass his estate to his stepchildren, the court did not award any inheritance rights to the stepchildren.⁹⁵ The court reasoned that there was no discussion of adoption when the stepparent was alive.⁹⁶ Furthermore, it does not appear that a legal barrier to adoption was present.⁹⁷ Thus, like the Michigan Court of Appeals, a California court, applying California's broader intestacy statute, would still most likely deny inheritance rights to the stepchildren in *Crossman*.

Similarly, in *In re Berge's Estate*, the Minnesota Supreme Court prevented stepchildren from inheriting their stepfather's estate even though he clearly wanted them to have inheritance rights.⁹⁸ The intestate decedent sometimes referred to his

⁸⁸ See *Stepparent Adoptions*, *supra* note 37.

⁸⁹ See *id.*

⁹⁰ See *DUKEMINIER & JOHANSON*, *supra* note 1, at 71.

⁹¹ See CAL. PROB. CODE § 6454 (West 2000).

⁹² 377 N.W.2d 850, 852 (Mich. Ct. App. 1985).

⁹³ See *Estate of Crossman*, 377 N.W.2d at 852.

⁹⁴ See *id.*

⁹⁵ See *id.* at 852-53.

⁹⁶ See *id.*

⁹⁷ See generally *Estate of Crossman*, 377 N.W.2d 850.

⁹⁸ See *In re Berge's Estate*, 47 N.W.2d at 430-31.

stepchildren as his "girls," and he told them that they would inherit his estate.⁹⁹ Under the California test, the decedent's stepchildren would not be given any inheritance rights because there was no legal barrier to adoption.

In contrast to *Estate of Crossman* and *Berge's Estate*, there may occasionally be a difference between the way in which the California Probate Code and other intestacy statutes apply to a particular case's facts. For instance, in *Estate of Lind*,¹⁰⁰ Robert Lincoln and Henrietta Haughey (the "Haugheys") treated their foster child as their biological child and supported him with life's necessities. The foster relationship began during the foster child's minority and was maintained throughout the foster child's and foster parents' life together.¹⁰¹ The Haugheys referred to the foster child as their son and had adoption papers prepared in 1942, when the army drafted the then twenty-two year old child.¹⁰² The Haugheys even requested that the name on their foster child's birth certificate be changed to "Warren Harding Haughey."¹⁰³ Unfortunately, despite the Haughey's efforts, the state did not comply with their requests and they never legally adopted their foster child.¹⁰⁴ Consequently, the foster child had no time "to take any legal action" because both of his foster parents were deceased when he learned that they had never legally adopted him.¹⁰⁵

Eventually, the California Court of Appeals reversed the lower court's dismissal and granted the foster child an evidentiary hearing regarding "his standing to contest probate of the purported will."¹⁰⁶ Although it is not clear, the following three reasons would lead one to conclude that a California court would grant such a foster child inheritance rights, disregarding the foster child's standing and issues related to the will. First, the relationship between the Haugheys and their foster child

⁹⁹ See *id.* at 430.

¹⁰⁰ See *Estate of Lind*, 209 Cal. App. 3d 1424, 1429 (Cal. Ct. App. 1989).

¹⁰¹ See *id.*

¹⁰² See *id.*

¹⁰³ *Id.*

¹⁰⁴ See *id.*

¹⁰⁵ See *Estate of Lind*, 209 Cal. App. 3d at 1429.

¹⁰⁶ *Id.* at 1437.

began during the foster child's minority.¹⁰⁷ Second, the foster family relationship continued during the foster child's and foster parents' joint lifetime.¹⁰⁸ Third, the California law, which prohibited adult adoptions prior to 1951, provided the court with clear and convincing evidence that a legal barrier prevented the Haugheys from adopting their foster child.¹⁰⁹ By contrast, the majority of other states would not grant inheritance rights to such a foster child. Most intestacy statutes do not grant stepchildren inheritance rights even if a legal barrier prevented stepparents from successfully adopting stepchildren.¹¹⁰ Such an analysis indicates that there may occasionally be a difference between the application of Section 6454 of the California Probate Code and the majority of other intestacy statutes. However, on the whole, both California's intestacy statute and other intestacy statutes appear to produce inequitable results¹¹¹ in the realm of stepfamily inheritance rights.¹¹²

¹⁰⁷ See *id.* at 1429.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.* at 1434.

¹¹⁰ See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 1999).

¹¹¹ Similarly, inequity has often resulted in other sectors of estate law, such as will executions. Just as it appears unfair to deprive stepchildren of inheritance rights when a close family relationship existed between stepchildren and their stepparents, it is also unjust to deprive an intended beneficiary of his inheritance rights merely because every will execution formality was not satisfied. See *DUKEMINIER & JOHANSON, supra* note 1, at 234 (citing *In re Estate of Wait*, 306 S.W.2d 345 (Tenn. Ct. App. 1957) (denying probate when elderly testator's shaking hand prevented her from signing her name until the witnesses had left)).

¹¹² However, one could still make several arguments in favor of California's intestacy statute, which does not award inheritance rights to stepchildren when their stepparents unsuccessfully attempted to adopt them during their minority. See *Estate of Joseph*, 949 P.2d at 473; CAL. PROB. CODE § 6454 (West Supp. 2000). In many situations, stepparents might not want stepchildren to have inheritance rights even though such stepparents attempted to adopt the stepchildren during their minority. For example, stepparents may have tried to adopt such stepchildren during their minority simply to give them familial stability. See *Estate of Cleveland*, 22 Cal. Rptr. 2d at 597 (suggesting that the decedent may have attempted to adopt the foster child to provide financial and emotional support during the child's minority). Stepfathers may also have attempted adoption to make the biological mothers happy.

III. EVALUATION OF EXISTING REFORM PROPOSALS

Several individuals have recommended proposals to rectify stepfamily problems. For instance, Thomas Hanson suggests that the California legislature amend California's intestacy statute to require "proof of the existence of a legitimate family relationship" between stepchildren and stepparents.¹¹³ He suggests that courts use their discretion to evaluate each case's facts.¹¹⁴ Moreover, Professor Margaret Mahoney recommends that courts use their discretion when determining stepchildren's inheritance rights.¹¹⁵ She advocates the use of the *in loco parentis* concept, among other criteria, to determine whether to grant stepchildren inheritance rights.¹¹⁶ Finally, Marjorie Engel proposes that couples seek premarital counseling to deal with financial concerns, that attorneys provide a forum to remarried women to increase their knowledge of legal issues confronting stepfamily relationships, and that the community develop strategies to advance stepfamilies' welfare.¹¹⁷ While all of these proposals promote fairness, this Note will demonstrate that it is better for the community and the legislature to adopt statutes and policies that not only consider issues of fairness but also balance fairness with certainty and judicial efficiency.

A. *Thomas Hanson's Proposal*

Thomas Hanson suggests that courts evaluate several factors when determining whether to grant stepchildren inheritance rights. First, a court should determine whether stepchildren have proven that a genuine stepfamily relationship existed.¹¹⁸ Specifically, Hanson recommends that courts adopt "a

¹¹³ Thomas M. Hanson, Note, *Intestate Succession For Stepchildren: California Leads The Way, But Has It Gone Far Enough?*, 47 HASTINGS L.J. 257, 284 (1995).

¹¹⁴ See *id.* at 285.

¹¹⁵ See Mahoney, *supra* note 7, at 938.

¹¹⁶ See Mahoney, *supra* note 7, at 931.

¹¹⁷ See Engel, *supra* note 1, at 370-71.

¹¹⁸ Hanson's proposal was suggested prior to the California Supreme Court's decision in *Estate of Joseph*. At that time, there was a split among the California circuit courts regarding whether Section 6454 of the California Probate Code required one to prove that stepparents would have adopted but for a legal barrier that existed until the stepparents' deaths, or whether Section 6454 required one to

strong presumption . . . in favor of a legitimate relationship" if stepchildren show that stepparents "would have adopted [them] but for a legal barrier."¹¹⁹ He also indicates that courts should examine, among other considerations, how stepchildren and their deceased stepparents dealt with one another.¹²⁰ For instance, one should consider whether stepchildren introduced their stepparents as "Dad" or "Mom" and whether the deceased stepparents were involved in their stepchildren's lives by attending the activities in which their stepchildren participated.¹²¹ Finally, in contrast to Professor Mahoney's proposal discussed below, Hanson's proposal does not require the stepfamily relationship to form during the stepchildren's minority.

Although Hanson's genuine stepfamily relationship requirement would promote equity, courts are likely to encounter difficulty when determining where to draw the line. For instance, it would be difficult for courts to determine whether a genuine family relationship exists if stepparents are relatively uninvolved in their stepchildren's extracurricular activities, yet treat their stepchildren well during the little time they spend together. What if stepchildren refer to their stepparent as "Dad" or "Mom" on some occasions and use their stepparent's first name on other occasions? What if stepparents are never introduced by their stepchildren as "Dad" or "Mom?" And, what if stepparents attend the majority of the events in which their stepchildren participate, but are treated poorly by their stepchildren at these events?

To further complicate the issue, many modern biological parents, as well as stepparents, work in demanding fields that require long hours, and therefore they have little time to devote to their children's lives.¹²² In fact, in 1991, there were

prove that stepparents would have adopted but for a legal barrier that only existed during the stepchildren's minority. See Hanson, *supra* note 113, at 279. See also *Estate of Cleveland*, 22 Cal. Rptr. 2d at 593; *Estate of Stevenson*, 14 Cal. Rptr. 2d at 252-53.

¹¹⁹ Hanson, *supra* note 113, at 284.

¹²⁰ See *id.* at 278-79.

¹²¹ See *id.* at 279.

¹²² See Urie Bronfenbrenner, *Who Cares for America's Children? in THE FUTURE OF THE FAMILY* 139, 141 (Louise Kapp Howe ed., 1972) ("In today's world, parents find themselves at the mercy of a society which imposes pressures and priorities that allow neither time nor place for meaningful activities and relations between

over 11 million children under six years of age with two parents (or their only parent, in the case of single-parent homes) working.¹²³ In such families, parents may disappear for days due to business travel, and they often return home from work late at night.¹²⁴ As a result, the classic family dinner is almost nonexistent in such households.¹²⁵ Consequently, children's nannies, day care workers, and other types of babysitters may have more contact with parents' children than do the children's parents.¹²⁶ However, those circumstances do not necessarily indicate that such parents want to deprive their children of inheritance rights. It can be quite the contrary because parents often work long hours to financially support their children.¹²⁷ Therefore, one should not assume that working parents want their stepchildren and/or biological children to lack inheritance rights merely because they spend little time with their children. Rather, one should question how much weight to accord criteria, such as involvement in children's extracurricular activities, when determining whether

children and adults, which downgrade the role of parent and the functions of parenthood, and which prevent the parent from doing the things he wants to do as a guide, friend, and companion to his children."). Women have entered the work force in massive numbers and consequently, working parents raise the majority of children. It is a luxury to have a mother that stays home. See SELECTED READINGS IN MARRIAGE AND FAMILY 127 (Lorene H. Stone ed., Greenhaven Press 1999). Two income families are not able to traditionally care for their children. Rather, such families must use alternative child care arrangements such as day care. See GOODMAN, *supra* note 60, at 214-15.

¹²³ See Kristin Droege, *Day Care Can Benefit Children*, in THE FAMILY-OPPOSING VIEWPOINTS 124, 129 (Bruno Leone ed., 1998).

¹²⁴ See Betsy Morris, *Is Your Family Wrecking Your Career?* in SELECTED READINGS IN MARRIAGE AND FAMILY 130, 131 (Lorene H. Stone ed., 1999).

¹²⁵ See *id.* at 131.

¹²⁶ A babysitter often cares for children for more hours than do the children's parents. See Bronfenbrenner, *supra* note 122, at 142. Child care may include community and child care centers, au pairs and stay-at-home nannies, workplace facilities, nursery school, and pre-school programs, as well as having children remain with a babysitter for a regular time during the week. See Droege, *supra* note 123, at 125.

¹²⁷ Since the 1970s, when incomes started to stagnate, it became necessary to have a second income to maintain a family's standard of living. Income growth has slowed down and, simultaneously, the cost of a college education, a car, and a house have dramatically increased. See Morris, *supra* note 124, at 131, 134. Monetary problems are also more prevalent in stepfamilies since they have lower incomes than nuclear families. See GOODMAN, *supra* note 60, at 295. Thus, it may be more essential for both parents in stepfamilies to work to maintain their standard of living as compared with the situation in nuclear families.

a genuine family relationship exists. Such criteria may not accurately indicate whether a genuine family relationship exists in today's society of two-income households, nannies, and day care.¹²⁸

One should also probe Hanson's suggestion that enables stepchildren to obtain inheritance rights when the stepfamily relationship was formed during the stepchildren's majority. Rather than reject stepfamily relationships that form after stepchildren reach majority age, Hanson claims that intestacy statutes should acknowledge that today's family structure differs from that of the past.¹²⁹ Specifically, he advocates a presumption against the existence of a "legitimate family relationship" that directly correlates with a stepchild's age during the stepfamily formation.¹³⁰ In other words, the presumption is stronger when the stepfamily is formed later in a stepchild's life, and thus, a court would view stepfamilies that were formed when stepchildren were toddlers with less "skepticism" than stepfamilies that were formed when stepchildren were in their late teens.¹³¹

Hanson reasons that strong stepfamily relationships can form during stepchildren's majority, even though such relationships are considerably less likely to develop after adulthood.¹³² Hanson supports his belief by discussing how adult children frequently confer with their parents to discuss issues concerning fiscal plans, emotional dilemmas, career paths, and professional as well as personal relationships.¹³³

Although it is possible for strong bonds to develop between stepparents and stepchildren when stepfamily relationships form during stepchildren's majority,¹³⁴ it is simply too big a

¹²⁸ See Droege, *supra* note 123, at 125 (discussing how the children of today's working parents are placed in nontraditional child care programs).

¹²⁹ See Hanson, *supra* note 113, at 283-84.

¹³⁰ *Id.* at 283-84.

¹³¹ *Id.* at 283.

¹³² See *id.* at 283.

¹³³ See *id.*

¹³⁴ See Hanson, *supra* note 113, at 283 (noting the unlikelihood, but not the impossibility, of family bonds developing between stepchildren and their stepparents when the stepfamily forms during adulthood). See also *id.* (citing Mahoney, *supra* note 7, at 930 ("The likelihood of real family ties between stepparent and child are remote in cases where the child has reached adulthood at the time of his or her parent's marriage to the stepparent.")).

leap to provide inheritance rights to such stepchildren. Indeed, most state legislatures do not even provide inheritance rights to stepchildren who were minors when the stepfamily was formed.¹³⁵ Perhaps, if state legislatures extend inheritance rights to stepchildren who were minors during the stepfamily formation, the next appropriate step will be for state legislatures to consider stepfamily relationships that were formed during the stepchildren's majority.

Finally, although Hanson's proposal may promote more justice than does Section 6454 of the California Probate Code, his proposal does not comply with an intestacy statute's goals. An intestacy statute is not meant to reflect what a particular testator had in mind. Rather, an intestacy statute is a default position that is meant to reflect what the majority of people in the decedent's position would want to happen in the event of death.¹³⁶ In other words, "Intestacy laws are designed to effectuate testamentary intent in the large majority of cases for property owners who die without a valid will."¹³⁷ That default position is meant to provide certainty and avoid unnecessary court proceedings upon death.¹³⁸

Since it is likely that there will be more stepfamilies than nuclear families in the future, Hanson's proposal is likely to congest the courts with thousands of stepchildren trying to prove that they had genuine family relationships with their stepparents. Courts will be overwhelmed with the task of determining a particular testator's intent on a case-by-case basis. Consequently, it may be difficult for stepchildren to anticipate whether they have inheritance rights when each case will depend on its particular set of facts. Such a result is inconsistent with the goals of intestacy statutes.

¹³⁵ But see CAL. PROB. CODE § 6454 (West Supp. 1999) (providing inheritance rights to stepchildren when the stepfamily relationship began during the child's minority, continued during the child's and parent's life together, and clear and convincing evidence establishes that a legal barrier prevented the child's adoption).

¹³⁶ See DUKEMINIER & JOHANSON, *supra* note 1, at 74.

¹³⁷ Mahoney, *supra* note 7, at 928.

¹³⁸ See Hanson, *supra* note 113, at 278 (indicating that the *Cleveland* decision may better satisfy intestacy statutes' traditional aim of certainty). See also Mahoney, *supra* note 7, at 931 (noting that certainty is one goal towards which intestacy statutes aim).

B. Professor Margaret Mahoney's Proposal

Like Thomas Hanson's suggestion, Professor Mahoney's proposal may also promote more justice than the existing state intestacy laws, including California's intestacy statute. Mahoney rejects the theory of equitable adoption and proposes that courts grant stepchildren inheritance rights if the following three requirements are met. First, the stepfamily relationship must form during the stepchildren's minority.¹³⁹ Second, the relationship must continue during the lives of the stepparents and their stepchildren.¹⁴⁰ Third, "an in loco parentis relationship [must exist] during the [step]child[ren]'s minority."¹⁴¹

Sound reasoning underlies Mahoney's rejection of the equitable adoption doctrine.¹⁴² Equitable adoption allows an individual to inherit from an intestate decedent's estate by providing him or her with an adopted child's status¹⁴³ when there is a "clear and complete agreement to adopt."¹⁴⁴ Hence, the doctrine fails to safeguard stepfamilies' interests¹⁴⁵ because it is rare for courts to provide stepchildren with the status of "equitably adopted children."¹⁴⁶

Logic also underlies Mahoney's suggestion that courts should not grant stepchildren inheritance rights when the family relationship formed during the stepchildren's majority.¹⁴⁷ Although it is still possible for strong steprelationships to develop in the aforementioned situation, it is not likely that strong family bonds will form under those circumstances.¹⁴⁸

While Mahoney agrees with California's requirement that stepchildren must be minors when the stepfamily was

¹³⁹ See Mahoney, *supra* note 7, at 930. The California Supreme Court has also interpreted Section 6454 of the California Probate Code to require that the family relationship was formed during the children's minority. See *Estate of Joseph*, 949 P.2d at 477.

¹⁴⁰ See Mahoney, *supra* note 7, at 932.

¹⁴¹ Mahoney, *supra* note 7, at 936.

¹⁴² See Mahoney, *supra* note 7, at 936.

¹⁴³ See Mahoney, *supra* note 7, at 925.

¹⁴⁴ Mahoney, *supra* note 7, at 927.

¹⁴⁵ See Mahoney, *supra* note 7, at 928.

¹⁴⁶ Mahoney, *supra* note 7, at 926, 950 n.42.

¹⁴⁷ See Mahoney, *supra* note 7, at 930.

¹⁴⁸ See Mahoney, *supra* note 7, at 930.

formed,¹⁴⁹ she believes that the California intestacy statute is under-inclusive in ascertaining situations where close-knit stepfamily relationships exist.¹⁵⁰ For instance, the California statute, which grants inheritance rights to stepchildren when they prove, *inter alia*, that stepparents "would have adopted but for a legal barrier," does not necessarily indicate whether stepparents wish to give inheritance rights to their stepchildren.¹⁵¹ Consequently, Mahoney suggests that it is more equitable for courts to use the common law *in loco parentis*¹⁵² doctrine to decide whether a *de facto* relationship existed between stepparents and stepchildren.¹⁵³ When making such determinations, courts may assess evidence, including the stepparent's performance of domestic tasks for stepchildren, the stepparent's performance of parental counseling, and the stepparent's monetary support.¹⁵⁴

It is quite convincing for Mahoney to suggest that state legislatures adopt the *in loco parentis* test. That test is broader than the California Probate Code, which requires stepparents to attempt adoption.¹⁵⁵ Mahoney reasons that stepparents may not legally formalize relationships with their stepchildren even though stepparents may love their stepchildren and no legal impediment to adoption exists.¹⁵⁶ More specifically, as Part II.C of this Note demonstrates, stepparents who want their stepchildren to have inheritance rights may avoid adoption to prevent their stepchildren from confronting emotional issues that may arise in the context of adoption.¹⁵⁷

However, although Mahoney's proposal would be ideal in that it "[r]elates [inheritance] to the quality of the

¹⁴⁹ See Mahoney, *supra* note 7, at 930, 932 (referring to the California Probate Code's requirement that a stepfamily be formed during the stepchildren's minority and the requirement that the relationship endure during the stepparent's and stepchildren's lives).

¹⁵⁰ See Mahoney, *supra* note 7, at 931.

¹⁵¹ Mahoney, *supra* note 7, at 931.

¹⁵² See BLACK'S LAW DICTIONARY 787 (6th ed. 1990) (defining *in loco parentis* as "[i]n the place of a parent; instead of a parent, charged, factitiously, with a parent's rights, duties, and responsibilities").

¹⁵³ See Mahoney, *supra* note 7, at 931-32.

¹⁵⁴ See Mahoney, *supra* note 7, at 931.

¹⁵⁵ See Mahoney, *supra* note 7, at 930-31.

¹⁵⁶ See Mahoney, *supra* note 7, at 931.

¹⁵⁷ See *infra* Part II.C.

steprelationship during the child's minority,¹⁵⁸ one must realize that intestacy laws governing the disposition of property among members of traditional families do not always correspond to the quality of every traditional family relationship. No such qualitative analysis is necessary to determine inheritance rights among traditional families because courts assume that most traditional family members wish to pass their estates to blood relatives.¹⁵⁹ Similarly, one should not expect intestacy laws governing the disposition of property among stepfamilies to correspond to the quality of every stepfamily relationship.

The costs of implementing the in loco parentis test may also far outweigh the test's benefits, considering the case-based nature of Mahoney's proposal and the continuing increase in the number of stepfamilies.¹⁶⁰ Hence, such a case-based determination would not only congest the courts as the number of stepfamilies increased, but would also create uncertainty about the outcome of each particular case.¹⁶¹ Even though Mahoney argues that "[t]he Pennsylvania Legislature has . . . authorized a case-by-case determination when the adopted child seeks to inherit from natural relatives" and equitable results have followed, one state's authorization should not be viewed as a green light indication that such a plan is wise.¹⁶² Finally, Mahoney's in loco parentis test may also have the unfortunate effect of causing stepparents to intentionally separate themselves from their stepchildren to prevent such children from obtaining inheritance rights.¹⁶³

If judges are allowed to make case-by-case determinations, then other individuals might attempt to extend the case-by-

¹⁵⁸ Mahoney, *supra* note 7, at 932.

¹⁵⁹ See Mahoney, *supra* note 7, at 918.

¹⁶⁰ See Mahoney, *supra* note 7, at 936-37; Norton & Miller, *supra* note 42, at 1.

¹⁶¹ See Mahoney, *supra* note 7, at 936-37 (indicating that the proposal evokes concerns about certainty).

¹⁶² Mahoney, *supra* note 7, at 937.

¹⁶³ See Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 123-24 (1996) (fearing that stepfathers will distance themselves from stepchildren to avoid parental responsibility following divorce). See also *id.* (citing *K.A.T. v. C.A.B.*, 645 A.2d 570, 572 (D.C. 1994)). See also Engel, *supra* note 1, at 329 (citing David R. Fine & Mark A. Fine, *Learning From Social Sciences: A Model For Reformation of the Laws Affecting Stepfamilies*, 97 DICK. L. REV. 49, 52 & n.17 (1992) (discussing *In re Marriage of Holcomb*, 471 N.W.2d 76 (Iowa Ct. App. 1991))).

case analysis from the more defined stepfamily context to a setting without any boundaries. For example, just as stepchildren might try to convince judges to grant them inheritance rights if the stepchildren had close relationships with their stepparents, a decedent's close friends might also try to convince judges to grant them inheritance rights if the friends had close relationships with the decedent. To further complicate matters, some of a decedent's blood relatives might try to persuade judges to withhold inheritance rights from other blood relatives who were not closely tied to the decedent. Contrary to the goals of intestacy laws, such actions would prolong estate settlement and produce uncertainty.

Furthermore, even though Mahoney claims that fairly solid standards will bind judges who apply the *in loco parentis* test and that the test's components are objective enough to enable individuals to determine their inheritance rights in most situations,¹⁶⁴ it may not be as easy for a judge or a family member to identify strong stepfamily relationships as Mahoney supposes. Objective standards may not really exist because Mahoney's *in loco parentis* test grants judges broad discretion in determining stepchildren's inheritance rights.

Notwithstanding Mahoney's aim of "individualized justice," the result is often "an illusion, while the social cost of trying to achieve it . . . is high."¹⁶⁵ Broad discretion in estate distribution could result in advertisements such as the following:

Disappointed in your parent's will? Not invited to your ex-husband's funeral? Feel left out in the cold when your best friend died without a will? You may have valuable legal rights in the estate of a deceased parent, patron, ex-spouse or pal. Call Smooch, Smathers and Smunch for a free consultation.¹⁶⁶

If a discretionary intestacy statute granted inheritance rights to stepchildren, it is likely that the above advertisement would read, "Feel left out in the cold when your [stepparent] died without a will?"¹⁶⁷ Such advertisements are likely to result in

¹⁶⁴ See Mahoney, *supra* note 7, at 938.

¹⁶⁵ Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1166 (1986) (citing Richard Epstein, *Settlement and Litigation: Of Vices Individual and Institutional*, 30 U. CHI. L. SCH. REC. 2 (1984)).

¹⁶⁶ *Id.* at 1189.

¹⁶⁷ See *id.*

a flooding of the courts. Thus, rather than allow judges to have broad discretion in such legal areas, state legislatures should adopt a statute that eliminates the need to consult judges when an intestate stepparent dies. Such a statute should balance fairness, predictability, and cost.

C. *Marjorie Engel's Proposal*

Marjorie Engel's article focuses on the financial consequences of existing policies and laws concerning stepfamily inheritance and the financial obligations of stepparents.¹⁶⁸ Many suggestions contained in her "five-point strategy" to improve the value of stepfamily relationships are applicable to rectifying the problems associated with stepchildren's inheritance rights.¹⁶⁹ For instance, Engel recommends that couples seek "pre-remarriage counseling" to help them confront financial concerns related to the stepfamily unit.¹⁷⁰ Couples should talk about managing their money and such conversations should address inheritance issues.¹⁷¹ Engel also proposes that women learn about the laws that impact their lives,¹⁷² and she recommends that policies be advanced to foster stepfamilies' welfare.¹⁷³

Although it is laudable for Engel to suggest that couples seek premarital counseling,¹⁷⁴ stepfamilies may not receive that recommendation with open arms. Stepparents may not be inclined to discuss financial and inheritance issues at the beginning of their remarriages.¹⁷⁵ In addition, just as stepparents may avoid writing wills due to a belief that it is an expensive and lengthy process,¹⁷⁶ stepparents may also avoid finan-

¹⁶⁸ See Engel, *supra* note 1, at 310-11.

¹⁶⁹ Engel, *supra* note 1, at 370.

¹⁷⁰ Engel, *supra* note 1, at 370.

¹⁷¹ See Engel, *supra* note 1, at 371 (citing MARGORIE ENGEL, WEDDINGS A FAMILY AFFAIR: THE NEW ETIQUETTE FOR SECOND MARRIAGES AND COUPLES WITH DIVORCED PARENTS 149 (1998)).

¹⁷² See Engel, *supra* note 1, at 371.

¹⁷³ See Engel, *supra* note 1, at 370.

¹⁷⁴ See Engel, *supra* note 1, at 370.

¹⁷⁵ See Susan Littwin, *Combining Grown Families*, in SELECTED READINGS IN MARRIAGE AND FAMILY, *supra* note 124, 235-36 (discussing how money is the cause of many stepfamily problems).

¹⁷⁶ See DUKEMINIER & JOHANSON, *supra* note 1, at 71 (discussing how some individuals do not execute wills because of the cost and the belief that it is a "big

cial counseling because of its cost, time, and the friction that may result from a discussion of financial issues.

Furthermore, Engel's suggestion that the legal and financial community increase awareness among women by presenting them with forums about marital issues is also noteworthy.¹⁷⁷ However, that suggestion will probably be costly. Hence, such informational programs will most likely be inaccessible to many stepfamilies, who will not have the opportunity to learn about legal issues that are unique to the stepfamily unit. Consequently, most stepparents will not realize that they need to write a will to provide their stepchildren with inheritance rights, and stepchildren will not inherit anything from such intestate stepparents.

In addition, Engel also proposes that women learn about the laws that impact their lives.¹⁷⁸ That suggestion has merit, and, if followed not only by women but also by men, could help stepparents avoid the intestacy problems that modern stepfamilies encounter. Perhaps stepparents would execute wills specifically stating whether they wanted their stepchildren to have inheritance rights if they learned about the lack of stepchildren's inheritance rights under intestacy statutes. However, one must realize that intestacy statutes are written to protect people who do not seek an attorney's advice concerning estate distribution and, consequently, do not write a will. Thus, one must determine how to protect individuals who are unfamiliar with such laws that will, nevertheless, have an impact on their lives.

Conceivably, one could restore dignity to remarriage by implementing Engel's recommendation that society establish "[t]he Permanent Commission on the Status of the Family."¹⁷⁹ Such a commission could present new proposals to the legal world and could discern how to make remarriage less damaging to children and women living in stepfamilies.¹⁸⁰ It might also be able to help resolve stepfamily concerns and advocate laws that would protect stepfamilies' interests.¹⁸¹

deal" to meet with a lawyer).

¹⁷⁷ See Engel, *supra* note 1, at 373.

¹⁷⁸ See Engel, *supra* note 1, at 371.

¹⁷⁹ Engel, *supra* note 1, at 379-80.

¹⁸⁰ See Engel, *supra* note 1, at 379-80.

¹⁸¹ See Engel, *supra* note 1, at 379-80.

Engel is also correct to stress the unfortunate consequences related to the reduction of "reliable data" concerning remarriage and stepfamily units.¹⁸² Such information, which reflects the changing composition of American families, is not only essential for designing financial plans for stepfamilies, but is also important for developing new intestacy schemes that accurately reflect the intent of stepparents.¹⁸³ Thus, Engel's suggestion that research groups examine stepfamily relationships is wise, especially considering the reduction of government involvement in that arena.¹⁸⁴

Finally, Engel cleverly proposes a new type of adoption that could automatically occur when one marries a stepchild's "biological parent but would not" affect the obligations or "inheritance eligibility" of both biological parents.¹⁸⁵ Engel states, "It would legitimize the stepparent/stepchild relationship, recognize that biology is not the sole determining factor of whether someone is a parent, and publicly acknowledge an important source of care-taking and support for the child."¹⁸⁶ This type of adoption may alleviate many of the problems concerning stepchildren's inheritance rights. However, it may simultaneously create many problems for stepparents who prefer to pass more of their estate to their biological children and other blood relatives rather than to their stepchildren.

IV. PROPOSED INTESTACY STATUTE

It is challenging to formulate a proposal regarding stepchildren's inheritance rights, considering that the federal government no longer collects detailed information on divorces and marriages from the states.¹⁸⁷ In fact, the termination of such programs "will result in a loss of data to researchers who currently rely on this data source for information on annual changes in the collective marriage and divorce behavior of the

¹⁸² Engel, *supra* note 1, at 374. See also Change in Marriage and Divorce Data Available From the National Center for Health Statistics, 60 FED. REG. 64437 (1995).

¹⁸³ See Engel, *supra* note 1, at 374.

¹⁸⁴ See Engel, *supra* note 1, at 374-75.

¹⁸⁵ Engel, *supra* note 1, at 377-78.

¹⁸⁶ Engel, *supra* note 1, at 378.

¹⁸⁷ See 60 FED. REG. at 64438.

population, including trends and differentials in the propensity to marry, to divorce, and to remarry after divorce or widowhood.¹⁸⁸ However, researchers may still extract information from various sources, such as population reports, birth registration records, statistical surveys, and sociological literature examining stepfamily relationships.¹⁸⁹ Such sociological data offers judges and legislators a way to evaluate stepfamily relationships.¹⁹⁰ And, "to cast off the use of social science research in law would be to ignore a wealth of information, albeit not applicable to every individual case, but nonetheless considerably better than the conjectures of judges and legislators."¹⁹¹ Such data indicates that "intestacy statutes ignore the reality of modern family life" by using biological status to determine children's inheritance rights.¹⁹² Thus, legislators must examine sociological findings when drafting intestacy statutes to more accurately reflect the changing composition of the American family.¹⁹³

Specifically, sociological findings indicate that the number of stepfamilies is increasing and that the stepfamily structure appears to be replacing or at least co-existing with the traditional family.¹⁹⁴ In fact, "[i]t is clear that children today are living in a much wider variety of living arrangements than

¹⁸⁸ *Id.*

¹⁸⁹ *See id.* at 64437-38.

¹⁹⁰ *See* David R. Fine & Mark A. Fine, *Learning From Social Sciences: A Model For Reformation of the Laws Affecting Stepfamilies*, 97 DICK. L. REV. 49, 50 (1992).

¹⁹¹ *Id.*

¹⁹² Engel, *supra* note 1, at 363-64.

¹⁹³ *See* Fine & Fine, *supra* note 190, at 67-68.

¹⁹⁴ *See* Stepfamily Foundation, *supra* note 38 ("By the year 2000, according to the Census Bureau, more Americans will be living in stepfamilies than in nuclear families."). However, despite the predicted increase in the number of stepfamilies, the divorce rate has not increased in the last ten years. *See* Norton & Miller, *supra* note 42, at 1.

Between the late 1960s and 1980, the divorce rate doubled, reaching a level where at least one out of two marriages was expected to end in divorce. The divorce rate remained relatively unchanged during the 1980s, exhibiting a small drop toward the end of the decade. The first marriage and remarriage rates declined rather constantly throughout both the 1970s and 1980s. The divorce trend reflected in these rates implies a continued high proportion of marriages ending in divorce, even though there has been no increase in the last decade. *See* Norton & Miller, *supra* note 42, at 1.

they were 20 years ago.”¹⁹⁵ Whereas, in 1980, 3.9 million married parents had one or more stepchildren under 18, in 1990, 5.3 million of such families existed.¹⁹⁶ Experts even predicted that stepfamilies would outnumber traditional families in the United States by the twenty-first century.¹⁹⁷ Hence, the existing intestacy laws, which almost entirely disregard the stepfamily relationship, will frequently affect stepfamilies in a harsh manner.

In addition, stepfamilies are not necessarily less close-knit than traditional families because all types of twenty-first century families encounter their own share of problems, some families dealing with difficulty better than other families. Thus, all stepchildren should not lack inheritance rights when courts award such rights to biological children.

However, several reasons indicate why one should not take a grand leap and allow unadopted stepchildren to obtain a share of inheritance rights equal to the share belonging to biological and adopted children. First, stepparents have the option to write wills, which specify their intent to provide for stepchildren.¹⁹⁸ Second, stepparents may attempt to adopt stepchildren so that stepchildren are considered blood relatives in the law's eyes. In fact, “[s]tepparents are among this country's largest group of adopters.”¹⁹⁹ Third, a strong societal notion about the importance of blood relations still exists, and consequently, society views the stepfamily relationship in an unfavorable light, although much less negatively than in the past.

Hence, one must examine several factors to determine whether inheritance rights should be awarded to stepchildren and the amount that should be awarded to them. Similar to California's intestacy statute and Mahoney's proposal, the first essential criterion should require that stepfamily relationships be formed during a stepchild's minority.²⁰⁰ Common sense in-

¹⁹⁵ Norton & Miller, *supra* note 42, at 9.

¹⁹⁶ See Norton & Miller, *supra* note 42, at 9.

¹⁹⁷ *Wicked Stepmothers, Fact or Fiction?* (visited Jan. 14, 2000) <<http://www.secondwivesclub.com/fairytales1.htm>>.

¹⁹⁸ See DUKEMINIER & JOHANSON, *supra* note 1, at 159 (explaining that individuals who execute wills must be at least eighteen years old and also must “be of sound mind”).

¹⁹⁹ *Stepparent Adoptions*, *supra* note 37.

²⁰⁰ See CAL. PROB. CODE § 6454(a) (West Supp. 2000); Mahoney, *supra* note 7,

dicates that it is more likely for minor children, rather than for adult children, to develop close relationships with their step-parents.²⁰¹ A requirement that the stepfamily relationship be formed during stepchildren's minority is also likely to have the desired effect of impacting many stepchildren because one-third of today's living children are expected to enter into stepfamily relationships before they reach majority age.²⁰²

Because stepfamily relationships will develop into stronger units as time passes, a second important requirement is the number of years that the stepfamily relationship lasted.²⁰³ In fact, a stepfather's or stepmother's commitment is positively related to the length of time that a particular stepfamily has existed.²⁰⁴ Thus, it is reasonable to believe that a stepparent would want his or her stepchildren to have inheritance rights if the stepfamily relationship endured.

The legislature should use the number of years that a stepfamily relationship endured to derive the percentage of the stepparent's estate that intestacy statutes should award to stepchildren. For example, a stepfamily relationship that lasted for ten years should enable stepchildren to obtain a larger share than the share received by stepchildren who were involved in stepfamily relationships that lasted for fewer years.

Furthermore, stepchildren should not receive large intestate shares if their deceased stepparents were married to their biological parents for a short period because "redivorce is most likely to occur in the early . . . years of a remarriage" and stepchildren receive no inheritance rights after divorce.²⁰⁵ It would not be wise to give large intestate shares to such step-

at 930.

²⁰¹ See Mahoney, *supra* note 7, at 930.

²⁰² See Arnold, *supra* note 46.

²⁰³ "Caring relationships take time to evolve. The expectation of 'instant love' between stepparents and stepchildren can lead to many disappointments and difficulties. If the stepfamily relationships are allowed to develop as seems comfortable to the individuals involved, then caring between step-relatives has the opportunity to develop." VISHNER & VISHNER, *supra* note 52, at 80.

²⁰⁴ See VISHNER & VISHNER, *supra* note 52, at 80.

²⁰⁵ Engel, *supra* note 1, at 368 (citing Norton & Miller, *supra*, note 42, at 6). See Norton & Miller, *supra* note 42 (citing Teresa Castro Martin & Larry L. Bumpass, *Recent Trends and Differentials in Marital Disruption*, DEMOGRAPHY, Vol. 26, No. 1, pp. 37-51, 1989). See also Norton & Miller, *supra* note 42, at 8 (indicating that 6.3 years is the average duration of first marriages for women between the ages of 20 and 54).

children because it is likely that many of their parents' remarriages would have ended in divorce had the deceased parent lived a short while longer.²⁰⁶ In that situation, stepchildren would have no right to inherit from the divorced parent's estate. Hence, the legislature should not award a large inheritance right to such stepchildren because they would have had no inheritance right if their stepparent terminated the short marriage before death.

Sociological data is also likely to lead one to believe that stepchildren should not be given inheritance rights equal to those awarded to biological or adopted children. Rather, stepchildren should receive a percentage of their stepparent's estate based on a sliding scale similar to the sliding scale percentage to which a spouse is entitled to an elective share under Section 2-202 of the UPC.²⁰⁷ Hence, the following proposal incorporates such a sliding scale percentage.²⁰⁸

²⁰⁶ See Norton & Miller, *supra* note 42, at 8.

²⁰⁷ See JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 486 (5th ed. 1995) (citing UNIF. PROBATE CODE § 2-202, 8 U.L.A. 102 (1998)).

(a) [Elective-Share Amount]. The surviving spouse of a decedent who dies domiciled in this State has a right of election, under the limitations and conditions stated in this Part, to take an elective-share amount equal to the value of the elective-share percentage of the augmented estate, determined by the length of time the spouse and the decedent were married to each other, in accordance with the following schedule.

If the decedent and the spouse were married to each other:

The elective-share percentage is:

	Supplemental Amount Only
Less than 1 year	3% of the augmented estate
1 year but less than 2 years	6% of the augmented estate
2 years but less than 3 years	9% of the augmented estate
3 years but less than 4 years	12% of the augmented estate
4 years but less than 5 years	15% of the augmented estate
5 years but less than 6 years	18% of the augmented estate
6 years but less than 7 years	21% of the augmented estate
7 years but less than 8 years	24% of the augmented estate
8 years but less than 9 years	27% of the augmented estate
9 years but less than 10 years	30% of the augmented estate
10 years but less than 11 years	34% of the augmented estate
11 years but less than 12 years	38% of the augmented estate
12 years but less than 13 years	42% of the augmented estate
13 years but less than 14 years	46% of the augmented estate
14 years but less than 15 years	50% of the augmented estate
15 years or more	

Id. (quoting UNIF. PROBATE CODE § 2-202, 8 U.L.A. 102 (1998)).

²⁰⁸ See *id.*

PROPOSED SLIDING SCALE INTESTACY STATUE

If the decedent & the spouse were married to each other:	Percentage of estate to which stepchildren are entitled:	Acceleration rate:
Less than 1 year	0.0	
		> 0.5
1 year but less than 2 years	0.5	
		> 1.0
2 years but less than 3 years	1.5	
		> 1.5
3 years but less than 4 years	3.0	
		> 2.0
4 years but less than 5 years	5.0	
		> 2.5
5 years but less than 6 years	7.5	
		> 3.0
6 years but less than 7 years	10.5	
		> 3.5
7 years but less than 8 years	14.0	
		> 4.0
8 years but less than 9 years	18.0	
		> 4.5
9 years but less than 10 years	22.5	
		> 5.0
10 years but less than 11 years	27.5	
		> 5.5
11 years but less than 12 years	33.0	
		> 6.0
12 years but less than 13 years	39.0	
		> 6.5
13 years but less than 14 years	45.5	
		> 7.0
14 years but less than 15 years	52.5	
		> 7.5
15 years or more	60.0	

This proposed intestacy statute gives stepchildren minimal inheritance rights when their stepparent was married to their

biological parent for a short period of time. For instance, a stepchild whose stepparent remained married to the child's biological parent for at least two years, but less than three years, will only receive 1.5% of that stepparent's estate. By comparison, the proposed statute rewards a stepchild, whose stepparent remained married to the child's biological parent for a longer time, by not only increasing the child's overall share of their stepparent's estate for each year that the marriage endured but also by accounting for an acceleration factor. The acceleration factor increases the inheritance award even more for every additional year that the marriage lasts. Furthermore, this proposed statute recognizes that stepchildren are significant family members, by ultimately allowing stepchildren to obtain 60% of the estate to which the biological children would be entitled.

However, it is important to realize that stepchildren will not necessarily receive a percentage of the intestate stepparent's *entire* estate under this proposed statute. In other words, stepchildren whose parents were married for 15 years will not necessarily receive 60% of the stepparent's *entire* estate. Rather, stepchildren may only receive a percentage of a *portion* of the intestate stepparent's estate. In other words, stepchildren may only receive 60% of a *portion* of the stepparent's estate when the remarriage lasted for 15 or more years.

To determine the *portion* of an intestate parent's estate to which biological children are entitled, one must first refer to the intestacy statute of the state in which the decedent died. Under the above proposed statute, the portion of an intestate parent's estate to which biological children are entitled will be the same portion to which stepchildren are entitled.²⁰⁹ For instance, Section 4-1.1 of the New York Estate Powers and Trusts Law awards "fifty thousand dollars and one-half of the residue" to a decedent's living spouse when the decedent is

²⁰⁹ This assumes that the stepparent is either only survived by stepchildren and no biological children or that the stepparent is survived by equal numbers of stepchildren and biological children. However, if either the surviving stepchildren outnumber the surviving biological children or the surviving biological children outnumber the surviving stepchildren, then the portion to which one applies the percentage that stepchildren receive will not necessarily be the same portion that biological children receive. See *supra* Part IV.

survived by issue²¹⁰ and a spouse.²¹¹ The other one-half balance passes to the issue.²¹² Thus, according to the above reform proposal, in New York, stepchildren, like biological children, should have a claim to the remaining one-half balance if the decedent is also survived by a spouse.

For example, suppose a New York intestate decedent had an estate worth \$1.05 million and was survived by one stepchild and a spouse, to whom the decedent was married for 15 years. In that scenario, the surviving spouse would receive \$50,000 plus one-half of the residue, which is \$500,000. Thus, the surviving spouse would receive a total of \$550,000. The other one-half of the residue, or \$500,000, is the portion that biological children are entitled to receive. Hence, under the proposed statute, stepchildren would receive a percentage of that one-half portion (\$500,000) because stepchildren are entitled to a percentage of the same *portion* to which biological children are entitled.

After one determines the portion of which stepchildren are entitled to take a percentage, one must determine the *percentage* of the portion that stepchildren are entitled to take. The proposed intestacy statute specifies that stepchildren are entitled to 60% of their stepparent's estate if the decedent and spouse were married for 15 years or more. Hence, according to the above hypothetical, the stepchild would receive 60% of one-half of the residue (\$500,000), or \$300,000.²¹³

²¹⁰ See BLACK'S LAW DICTIONARY 831 (defining issue as individuals who "descended from a common ancestor" and noting that adopted children are considered the "issue" of their adoptive parents in many states). Hence, biological children and most adopted children are considered issue. See *id.*

²¹¹ N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(a)(1) (McKinney 1999). Intestacy statutes vary in the amount to which they award the surviving spouse. See, e.g., FLA. STAT. ANN. § 732.102 (West 1999) (awarding a surviving spouse \$20,000 plus one-half of the estate when the decedent is survived by lineal descendants); MICH. COMP. LAWS ANN. § 700.105 (West 1999) (awarding a surviving spouse \$60,000 plus one-half of the estate when the decedent is survived by issue); TENN. CODE ANN. § 31-2-104 (1999) (awarding a surviving spouse "either one-third (1/3) or a child's share of the entire intestate estate, whichever is" larger, when the decedent is survived by issue).

²¹² See N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(a)(1).

²¹³ However, in New York, as in many other states, biological issue receive a share of the entire estate, rather than one-half of the residue, if a spouse predeceases the intestate decedent. In that situation, stepchildren should also be able to claim a percentage of the whole estate. Thus, according to the facts in the hypothetical, stepchildren would receive 60% of \$1.5 million (entire estate), or

The above hypothetical situation assumes that a decedent is survived by stepchildren and no biological children. However, if stepchildren and biological children survive the decedent, then a stepchild should not receive 60% of the one-half residue (\$500,000) because it is not reasonable to award a stepchild 60% of the estate, or \$300,000, and to award biological children only 40% of the estate, or \$200,000. Hence, when a decedent is survived by both stepchildren and biological children, one needs to first divide the residue by the total number of stepchildren and biological children.

For example, if the decedent is survived by one stepchild and one biological child, then one should divide the residue (\$500,000) by two since there are two children. That division yields \$250,000. The stepchild would take 60% of \$250,000 (the residue divided by two), which is \$150,000. The biological child will receive the difference between the one-half residue (\$500,000) and the amount that the stepchild would receive (\$150,000), which is \$350,000. Hence, according to this hypothetical situation, the stepchild would receive \$150,000 and the biological child would receive \$350,000.

The equation will differ slightly if a decedent is not survived by equal numbers of stepchildren and biological children. For instance, if a decedent is survived by one stepchild and five biological children, then one should divide the residue (\$500,000) by six since there are six children. That division yields \$83,333. The one stepchild should receive 60% of \$83,333, which is \$49,999.80. The five biological children should receive the difference between the residue (\$500,000) and the amount that the stepchild receives (\$49,999.80). Thus, the total amount that the five biological children would receive is \$450,000.20, and each biological child would receive \$90,000.04.

Similarly, if a decedent is survived by five stepchildren and one biological child, then one should divide the residue (\$500,000) by six since there are six children. Again, that division yields \$83,333. However, that figure (\$83,333) should be multiplied by five since there are five stepchildren. That multiplication yields \$416,665. The five children should receive 60%

\$630,000, if their stepparent was not survived by a spouse or any biological children.

of \$416,665, which is a total of \$249,999. Hence, each stepchild would receive \$49,999.80. The one biological child would receive the difference between the residue (\$500,000) and the amount that the stepchildren receive (\$249,999). Thus, the biological child would receive \$250,001. Most importantly, in all of the above examples, each biological child would receive more money than each stepchild, while stepchildren are nonetheless awarded significant inheritance rights.

One may argue that this proposed statute is flawed in the same ways in which the spousal elective share concept is deficient. Specifically, the elective share concept may not protect a spouse because the portion of the decedent's estate against which the surviving spouse may elect²¹⁴ may be drastically reduced if the decedent spouse conveyed assets through inter vivos transfers, joint tenancies, and other will substitutes.²¹⁵ Similarly, one may argue that the decedent stepparent may also reduce the portion of his or her estate of which the stepchildren receive a percentage by conveying property through inter vivos transfers and various will substitutes to individuals other than stepchildren.

However, one may counter that argument by explaining how some states, such as New York, have rectified flaws associated with spousal elective share statutes. For instance, New York now requires the estate against which a spouse elects to include certain will substitutes, such as property owned in the form of joint tenancy.²¹⁶ The UPC also attempted to correct such concerns by requiring the estate against which the spouse elects to include certain will substitutes.²¹⁷ Thus, even if the decedent spouse used will substitutes to gift assets to other individuals, those assets will be brought back into the estate to determine the share that the surviving spouse receives.²¹⁸

²¹⁴ "Under typical American elective-share law, including the elective share provided by the pre-1990 Uniform Probate Code, a surviving spouse may claim a one-third share of the decedent's estate . . ." *DUKEMINIER & JOHANSON, supra* note 1, at 482.

²¹⁵ See Glendon, *supra* note 165, at 1190.

²¹⁶ See generally N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A (McKinney 1999).

²¹⁷ See *DUKEMINIER & JOHANSON, supra* note 207, at 513-16 (citing UNIF. PROBATE CODE §§ 2-203 to 2-208 (West 1999)).

²¹⁸ See *id.* (citing UNIF. PROBATE CODE §§ 2-203 to 2-208 (West 1999)).

Stepchildren may be in a situation similar to that of surviving spouses if decedents intentionally transferred assets out of their estates to deprive stepchildren from receiving a percentage of the estate. Decedents may have transferred assets to financially provide for biological children at the expense of stepchildren. Thus, a court should also consider bringing some transferred assets back into the decedents' estates.²¹⁹

Furthermore, although one may argue against this proposed statute by claiming that allowing such inheritance rights would enable stepchildren to obtain a double inheritance, such an argument is not particularly convincing. In actuality, it is not likely that stepchildren will inherit from their stepparents and again from their non-custodial biological parents because "noncustodial parents appear particularly likely to disinherit their minor children."²²⁰ Thus, it is necessary to permit stepchildren to inherit from both stepparents and biological parents to preserve some type of inheritance right for stepchildren. Otherwise, stepchildren may not inherit from either their stepparents or their non-custodial biological parents because most intestacy statutes do not award inheritance rights to stepchildren and because non-custodial biological parents are inclined to disinherit their children.²²¹

It is even more alarming to learn that stepchildren may not only be prevented from receiving a portion of their stepparents' and non-custodial parents' estates, but that they may also be prevented from inheriting assets belonging to their custodial biological parent. For instance, a wife may will her entire estate to her second husband, rather than to her biological child from her first marriage, under the impression that the child will inherit from her second husband. However, the second husband, who is the child's stepparent, receives complete control over the wife's estate after she wills it to him.

²¹⁹ See N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A(b)(1) (McKinney 1999) (treating certain inter vivos transfers as will substitutes and bringing the value of those assets back into the estate against which the surviving spouse may elect).

²²⁰ Engel, *supra* note 1, at 360 (quoting Ralph C. Brashier, *Protecting the Child from Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 2, 9 (1996)).

²²¹ See Engel, *supra* note 1, at 360 (citing Ralph C. Brashier, *Protecting the Child from Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 2, 9 (1996)); DUKEMINIER & JOHANSON, *supra* note 1, at 536 (stating that parents can disinherit their children in every state except one).

Hence, if the second husband dies intestate, then the wife's assets over which her second husband had control do not necessarily pass to the husband's stepchild (the wife's child from her first marriage). Under most existing intestacy statutes, the husband's other blood relatives would inherit his wife's assets, and unfortunately, the second husband's stepchild would not inherit anything that belonged to his or her biological mother.

CONCLUSION

The rise in the number of stepfamilies indicates that the structure of the twenty-first century family is changing.²²² In fact, the stepfamily seems to be supplanting the traditional family unit.²²³ Yet, intestacy statutes do not reflect this change. Hence, stepchildren, who have close relationships with their stepparents, may be harshly affected by their lack of inheritance rights under most intestacy statutes. Even California's intestacy statute does not provide the majority of stepchildren with inheritance rights.²²⁴ This situation appears to be even more serious because the majority of people die intestate.²²⁵

The intestacy statute proposed in this Note is an attempt to rectify the aforementioned problems by recognizing stepfamilies' existence and providing stepchildren with inheritance rights that satisfy the intent of the majority of twenty-first century stepparents. The proposal distributes property as do other intestacy statutes, which distribute a decedent's estate based on "legal status relationships."²²⁶ The proposed statute accords stepchildren with a type of legal status and provides them with an entitlement based on the length of the remarriage rather than distributing a decedent's estate to stepchildren based on the particular facts of each case.

The stepfamily is a current day phenomenon that society must accept. Although thoughts of awarding inheritance rights to stepchildren may have appeared radical to people living a century ago, stepfamilies are the norm in the twenty-first cen-

²²² See Norton & Miller, *supra* note 42, at 1.

²²³ See *id.* See also *Stepfamily Foundation*, *supra* note 38.

²²⁴ See CAL. PROB. CODE § 6454 (West Supp. 2000).

²²⁵ See DUKEMINIER & JOHANSON, *supra* note 1, at 71.

²²⁶ Mahoney, *supra* note 7, at 928.

tury, and therefore state legislatures should amend intestacy statutes to account for and to keep pace with the changing family structure. Social scientists need to continue researching in this field to provide legislators with the necessary data to formulate intestacy statutes that satisfy the intent of the majority of intestate stepparents.

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