

Stepfamilies in the Law of Intestate Succession and Wills

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INTRODUCTION

Many modern families do not take the form of the traditional nuclear family.¹ A common variant is the stepfamily, formed when the parent of a minor child marries an individual who is not the other natural parent.² In many cases, the relationship that forms between

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¹ See Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need For Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 880-81 (1984); Lovas, *When Is a Family Not a Family? Inheritance and the Taxation of Inheritance Within the Non-Traditional Family*, 24 IDAHO L. REV. 353, 353 (1987-1988).

² Divorce and remarriage rates in this country are very high. For example, in 1987 the first marriages of 31.7% of women who were ever married had ended in divorce. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACTS OF THE UNITED STATES 41 (1987). More than half of these women were remarried. *Id.*

stepparent and child is an important family relationship. Nevertheless, the laws regulating the rights and duties of family members generally exclude stepfamily members.

The law of intestate succession illustrates the peremptory manner in which the legal system ignores stepfamilies. Stepfamily members are not eligible to inherit from each other under modern intestate succession statutes. Intestacy laws attempt to design a donative plan that is consistent with the testamentary wishes of the large majority of property owners.³ The laws assume that most intestate owners desire to benefit designated classes of family members. The exclusion of a significant category of family members, namely, stepfamily members, from rights of inheritance is unfair and inconsistent with the purpose of the intestacy laws.

Recognition of nontraditional family members would necessarily complicate the statutory intestacy scheme. Professor Glendon has described the balance in the legal system between fixed legislative rules, which promote certainty, and the judicial discretion which is necessary to achieve equitable results in particular cases.⁴ She has characterized succession law as "the traditional stronghold of fixed rules."⁵ Heirship determinations are generally made on the basis of easily identifiable family status relationships, and involve little discretion on the part of the probate court. Recognition of steprelationships in the law of inheritance would require a shift of this balance away from certainty and predictability toward greater fairness. In an era when many individuals do not live in traditional families, the shift away from fixed rules, which are premised on the traditional nuclear family, would be appropriate.⁶

The majority of marriages that end in divorce involve minor children. OFFICE OF HUMAN DEV. SERVS., U.S. DEP'T OF HEALTH & HUMAN SERVS., *HELPING YOUTH AND FAMILIES OF SEPARATION, DIVORCE, AND REMARRIAGE* 3 (1980). According to one estimate, 13% of the Nation's children live in stepfamilies. *Id.*

³ See UNIFORM PROBATE CODE, 8 U.L.A. 56 (1983) ("The Code attempts to reflect the normal desire of the owner of wealth as to disposition of his property at death . . ."); Fellows, Simon & Raw, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 323-34.

⁴ Glendon, *Fixed Rules and Discretion in Contemporary Family and Succession Law*, 60 TUL. L. REV. 1165 (1986).

⁵ *Id.* at 1185.

⁶ See Lovas, *supra* note 1, at 395 ("Where the non-traditional family is concerned, social evolution has outpaced legal evolution. The laws that protected the traditional family in the past no longer provide adequate protection for the justifiable expectations of today's non-traditional family members.").

Part I of this Article begins by describing the treatment of steprelatives under the existing intestate succession laws. A proposal follows for including "qualifying" stepparents and stepchildren in the categories of parents and children within the intestacy statutes. The test for eligibility strives to identify those stepparent-child relationships in which the parties would desire to benefit each other in the event of death without a valid will. The suggested standard is sufficiently objective that heirship determinations would not become unduly difficult. Part I concludes that the fair results achieved under a stepfamily inheritance law would far outweigh the costs of the proposal.

Part II evaluates the treatment of stepfamily members under the related law of wills. In a number of testamentary settings, including class gifts and the law of lapse, the existence of family relationships may affect property distribution. Some existing laws reveal a bias against the treatment of steprelatives as family members. Exclusion of steprelatives has occurred even in the face of evidence that the individual testator regarded the claimant as a family member. The law of wills is designed to effectuate the intent of the individual property owner. Therefore, claims by steprelatives should be evaluated on the basis of the quality of steprelationships in each case, rather than with a bias against nontraditional families.

The legal system must be responsive to the changing nature of families, in a thoughtful and constructive manner. Laws in the areas of intestate succession and wills seek to accomplish the testamentary intentions of property owners, and to provide certainty and financial protection for surviving family members. This Article demonstrates that these goals are best accomplished when lawmakers recognize that for many individuals steprelatives are family members.

I. THE LAW OF INTESTATE SUCCESSION

A. *Statutory Inheritance Rights of Stepfamily Members*

Intestacy statutes in every state define the categories of heirs who inherit the undivided property of resident decedents. Historically, the law of intestate succession has focused rigidly on blood relationships.⁷ Indeed, modern provisions for the surviving spouse and for adopted children are the only significant exceptions to the requirement of kinship.⁸ Steprelatives who are not related by blood have not fared well in

⁷ 5 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 2412, at 254 (Replacement ed. 1979).

⁸ *Id.*

this system.

Under modern intestacy laws, the decedent's "children" have priority over most other surviving relatives. The term "children" has never been defined broadly to include stepchildren in this context.⁹ Similarly, stepparents have never been included in the category of "parents," who are preferred under most intestacy laws over the decedent's collateral relatives. A few statutes expressly exclude steprelatives from the definitions of "child" and "parent."¹⁰ In other jurisdictions, courts have imposed the same limitation.¹¹

In *In re Smith's Estate*,¹² for example, the residuary estate, intended for the testator's predeceased wife, lapsed into intestacy. The testator's two stepchildren claimed the property as his children, under the Washington intestacy statute. The stepchildren established that the decedent had regarded them as his children during life. He named them expressly, along with his three natural children, in an earlier clause of the will giving one dollar to each of his "children." This proof of the de facto relationships between the parties, and the designation of the claimants as "children" by the testator, did not affect the court's determination that the residuary estate belonged to testator's sole surviving descendant, a grandchild. The court held that in the absence of legal adoption, stepchildren do not belong to the category of children under the intestacy law.¹³

Stepchildren and stepparents have found their way into the statutory intestacy schemes of a few states, but only as takers by default. Ohio, Maryland, Connecticut and South Carolina expressly include stepchildren and their issue, in cases in which the estate would otherwise escheat to the state.¹⁴ The Ohio statute, for example, distributes property,

⁹ The California intestacy statute includes stepchildren in the category of children, but only in cases in which it is established by clear and convincing evidence that "the . . . stepparent would have adopted the person but for a legal barrier." CAL. PROB. CODE § 6408(b) (West Supp. 1988). For further discussion, see *infra* text accompanying notes 53-67.

¹⁰ See ALASKA STAT. § 13.06.050(3) (1985); FLA. STAT. ANN. § 731.201(3) (West Supp. 1988) (defining "child"); HAW. REV. STAT. § 560:1-201(3), (32) (1985); IDAHO CODE § 15-1-201(4), (32) (Supp. 1988); MINN. STAT. ANN. § 524.1-201(3) (West Supp. 1988) (defining "child"); N.M. STAT. ANN. § 45-1-201 (3), (27) (Supp. 1987).

¹¹ See *In re Paus' Estate*, 324 Ill. App. 58, 57 N.E.2d 212 (1944); *In re Field*, 82 App. Div. 226, 169 N.Y.S. 677 (1918); *In re Smith's Estate*, 49 Wash. 2d 229, 299 P.2d 550 (1956).

¹² 49 Wash. 2d 229, 299 P.2d 550 (1956).

¹³ *Id.* at 234-35, 299 P.2d at 553.

¹⁴ See CONN. GEN. STAT. ANN. § 45-276(a)(5) (West Supp. 1988); MD. EST. & TRUST CODE ANN. § 3-104(e) (1974); OHIO REV. CODE ANN. § 2105.06(I) (Anderson

“[i]f there are no next of kin, to stepchildren or their lineal descendants, per stirpes.”¹⁵ The primary purpose of these laws is to prevent escheat of the estate.

Other states allow intestate property to pass, in limited circumstances, to the surviving relatives of an individual who would have been an heir if he or she had survived the property owner.¹⁶ The survivors may include the steprelatives of the intestate property owner. For example, in Iowa, property passes to the heirs of the owner's parents if no issue or parent survives the owner.¹⁷ The category of heirs of predeceased parents may include the stepparent of the intestate property owner.¹⁸ A similar statute in Kansas expressly excludes the owner's stepparents from the category of the parents' heirs who may inherit.¹⁹

Another category of statutes distributes property to the heirs of the intestate owner's deceased spouse to prevent escheat.²⁰ The spouse's

1986); S.C. CODE ANN. § 62-2-103(6) (Law. Co-op. 1987). A similar provision in the Washington intestate succession law was repealed in 1967. *See* WASH. REV. CODE ANN. § 11.08.010, *repealed by* 1965 Wash. Laws ch. 145, § 11.99.015.

¹⁵ OHIO REV. CODE ANN. § 2105.06(I) (Anderson 1976). In *Kest v. Lewis*, 169 Ohio St. 317, 159 N.E. 2d 449 (1959), the court held that the term “stepchildren” in this statute included a child born to its mother out of wedlock prior to her marriage to the intestate.

¹⁶ *See* IOWA CODE ANN. § 633.219 (West Supp. 1988); KAN. STAT. ANN. § 59-508 (1983).

¹⁷ *See* IOWA CODE ANN. § 633.219 (West Supp. 1988) (distributing share of estate that does not pass to surviving spouse).

¹⁸ *See, e.g., In re Parker's Estate*, 66 N.W. 908 (Iowa 1896) (interpreting earlier version of Iowa statute to allow decedent's stepmother to inherit part of the share her husband would have received had he survived decedent).

¹⁹ *See* KAN. STAT. ANN. § 59-508 (1983) (“If decedent leaves no surviving spouse, child, issue or parents, the respective shares of his or her property which would have passed to the parents, had both of them been living, shall pass to the heirs of such parents respectively (excluding their respective spouses).”). *But cf. Sarver v. Beal*, 13 P. 743 (Kan. 1887) (stepfather inherited, as heir of intestate's deceased mother, under earlier version of Kansas statute that did not contain exclusionary language).

²⁰ *See* ARK. STAT. ANN. § 28-9-215(2) (1987); FLA. STAT. ANN. § 732.103(5) (West Supp. 1988) (providing that share of estate that does not pass to decedent's surviving spouse descends “to the kindred of the last deceased spouse of the decedent”); IOWA CODE ANN. § 633.219(4) (West 1964); KY. REV. STAT. ANN. § 391.010(6) (Baldwin 1981) (real estate); MO. ANN. STAT. § 474.010(3) (Vernon Supp. 1988); NEV. REV. STAT. ANN. §§ 134.200, 134.210 (Michie 1986); R.I. GEN. LAWS § 33-1-3 (1984); VA. CODE ANN. § 64.1-1 (1987). The California Code names the “issue of the predeceased spouse” if there are “no surviving issue, parent or issue of a parent, grandparent or issue of a grandparent.” CAL. PROB. CODE § 6402(e) (West Supp. 1988). The less-favored “parents of a predeceased spouse or the issue of such parents” are allowed to inherit only if there are “no surviving next of kin of the decedent and no

heirs may include stepchildren of the intestate owner. A more restricted version of this type of statute appears in the Washington Code. In Washington, only those assets gifted to the intestate owner by a predeceased spouse pass to the issue of the latter, when the intestate owner leaves no heirs.²¹ In addition to the goal of preventing escheat, the Washington provision reveals equitable concern about returning property to the family of the original donor.²² In the absence of such a statute, the children of a first marriage lose all inheritance rights in their parent's property when it passes to the surviving spouse of a subsequent marriage.²³

Modern intestacy laws recognize the existence of reconstituted families in provisions dealing with collateral relatives of the half blood. Contrary to the strict traditional common-law rule which disfavored relatives of the half blood, modern intestacy laws frequently provide for equal rights of inheritance by relatives of the whole blood and the half blood.²⁴ For example, under the modern approach to half blood relationships, an intestate decedent's sister, who shared both parents with the decedent, and the half-sister with whom the decedent shared just one parent, would inherit equal shares of the decedent's estate.

This doctrine is limited to inheritance by half blood collateral relatives, and has no impact on the eligibility of lineal steprelatives who

surviving issue of a predeceased spouse of the decedent." *Id.* § 6402(g).

In *Jackson v. Schultz*, 151 A.2d 284 (Del. Ch. 1959), the court reached a similar result in the absence of any statutory authority, for a decedent who had no heirs and whose will attempted to devise his entire estate "to my beloved wife . . . and her heirs and assigns forever." *Id.* at 285. The court held that the word "and" meant "or" and that the heirs of the deceased wife were alternative beneficiaries, contrary to the general rules of will construction. The court avoided an escheat and distributed the estate to testator's three stepchildren.

²¹ See WASH. REV. CODE ANN. § 11.04.095 (1987).

²² See CAL. PROB. CODE § 6402.5(a)(1), (b)(1) (West Supp. 1988) (distributing "portion of the decedent's estate attributable to decedent's predeceased spouse" to surviving relatives of latter, when no spouse or issue of the decedent survive).

²³ See, e.g., *In re Field*, 169 N.Y.S. 677 (App. Div. 1918). In *Field*, a testator devised real property to his surviving second wife. Upon her death intestate five years later, the children of her husband's first marriage unsuccessfully asserted a claim to a share of the same asset.

²⁴ 5 G. THOMPSON, *supra* note 7, § 2417; see, e.g., D.C. CODE ANN. § 19-306 (1981). In some jurisdictions, relatives of the half blood continue to receive less favorable treatment than relatives of the whole blood. 7 R. POWELL, *POWELL ON REAL PROPERTY* 1000 (1987); see, e.g., S.C. CODE ANN. § 62-2-107 (Law. Co-op. 1987) (excluding half blood relatives if whole blood relatives survive); VA. CODE ANN. § 64.1-2 (1987) (providing that half blood relatives receive half share).

have no blood relationship. In *In re Smith's Estate*,²⁵ for example, the Washington Supreme Court rejected the claims of decedent's two stepchildren that they were heirs under a statute that required equal treatment for relatives of the half blood and the whole blood.²⁶ The court accurately described the scope of the statute:

The "kindred" mentioned in [the half blood statute], whether of the half blood or of the whole blood, are kindred of the intestate. The meaning of the word 'kin' is a blood relation. As between a stepchild and a stepparent there is no blood relationship, but only that designated as affinity, the relationship which one spouse, because of marriage, has to blood relatives of the other [The half blood statute] is not applicable to the facts in the case at bar.²⁷

In this manner, the *Smith* court appropriately limited the scope of the half blood statute to exclude stepparents and stepchildren.

This necessary distinction between collateral and lineal relatives drawn by the half blood inheritance doctrine was overlooked by a federal district court in the District of Columbia in *In re Estate of Humphrey*.²⁸ The court in *Humphrey* held that a stepdaughter was entitled to inherit under the District's half blood statute, and therefore entitled to appointment as administrator of her stepfather's estate. In reaching this conclusion, the court relied upon the unqualified language of Congress in the intestacy statute, which provided that "[t]here is no distinction between the kindred of the whole and the half-blood."²⁹ In addition, the court relied upon "the modern public policy of Congress to accord to stepchildren the same rights as to natural children," evidenced by the inclusion of stepchildren in various federal benefit programs.³⁰

The *Humphrey* court correctly identified a Congressional policy of recognition for the stepparent-child relationship in federal programs.³¹ However, the court incorrectly found an expression of that policy in the

²⁵ 49 Wash. 2d 229, 299 P.2d 550 (1956).

²⁶ The stepchildren in *Smith's Estate* also failed to convince the court that the facts of the case established a parent-child relationship that qualified them for inheritance as children of their stepfather. See *supra* text accompanying notes 12-13.

²⁷ *Smith's Estate*, 49 Wash. 2d at 232, 299 P.2d at 553; see also *In re Paus' Estate*, 324 Ill. App. 58, 59, 57 N.E.2d 212, 213 (1944) (holding that nieces of individual could not inherit from his stepdaughter under half blood statute because legislature did not intend to "create another class of persons who will take").

²⁸ 254 F. Supp. 33 (D.D.C.), *rev'd*, *Humphrey v. Tolson*, 384 F.2d 987 (D.C. Cir. 1966).

²⁹ *Id.* at 34.

³⁰ *Id.* at 35.

³¹ See Mahoney, *Stepfamilies in the Federal Law*, 48 U. PITT. L. REV. 491 (1987).

District of Columbia intestacy statute. As described above, the half blood category naturally applies only to collateral relatives and not to steprelatives. On appeal, the Court of Appeals summarily reversed the *Humphrey* decision.³²

The *Humphrey* case raises the question of proper treatment of steprelatives in the inheritance law system. The half blood statutes permit inheritance between stepfamily members in limited circumstances, namely, when stepsiblings share one parent. For example, in a stepfamily that consists of the father of a child (*F*), his child (*C*), the father's wife (*W*), and the wife's child (*C1*), no inheritance between steprelatives *W* and *C*, or *C* and *C1*, or *F* and *C1*, is permitted. If *F* and *W* have a child (*C2*), inheritance rights between *C2* and *C1*, and between *C2* and *C*, are created by the half blood statutes, like the District of Columbia statute applied in the *Humphrey* case. The basis for distinguishing in this manner among stepfamily relationships is, of course, the shared blood between the half blood relatives. The de facto family relationships and donative concern among all of the members of this hypothetical family may be equally strong, but these factors would be irrelevant in determining inheritance rights under existing intestacy laws.³³

As described in this Part, intestate succession statutes fail to recognize family relationships based on affinity rather than blood. The narrow legislative exceptions to this rule operate only when no "real" heirs survive the property owner. In these cases, individuals related to the owner by virtue of marriage are allowed to inherit to prevent an escheat of the estate.³⁴

As a general rule, the formal adoption of a stepchild enables the child to gain the legal status of an heir.³⁵ Absent formal adoption, the judicial doctrine of equitable adoption creates inheritance rights in limited circumstances for children unrelated by blood to the intestate property owner. As described in the next Part, the doctrine provides no adequate remedy for the inequitable treatment of stepfamily members under the intestacy statutes.

³² *Humphrey v. Tolson*, 384 F.2d 987 (D.C. Cir. 1966).

³³ Even when strong evidence of loving family relationships exists, the blood relationship is the sole consideration under the intestacy statutes. See *In re Smith*, 49 Wash. 2d 229, 299 P.2d 550 (1956). For additional discussion, see *supra* text accompanying notes 12-13, 25-27.

³⁴ See *supra* text accompanying notes 14-23.

³⁵ 5 G. THOMPSON, *supra* note 7, § 2412, at 254.

B. *The Doctrine of Equitable Adoption*

A well-established judicial avenue around the blood relationship requirement of the intestacy laws is the doctrine of equitable adoption or adoption by estoppel. The doctrine applies in limited circumstances to confer upon an individual the status of the adopted child of an intestate person for inheritance purposes.³⁶

The doctrine of equitable adoption applies when “a contract or agreement to adopt a child, clear and complete in its terms, and entered into by persons capable of contracting, . . . has been fully and faithfully performed on the part of the child.”³⁷ Once these elements are established, courts generally rely upon one of two contract theories as the basis for allowing inheritance by a nonrelative. The intestate share may be allowed as the remedy of specific performance of the promise to adopt. In the alternative, the promisor may be estopped from denying the contract in light of the reliance interests of the child.³⁸

The equitable doctrine has been formulated by reference to the law of contracts for two reasons. First, the promise to adopt a nonrelative is evidence of the property owner’s intent to create inheritance rights for the nonrelative. Second, proof of the contract to adopt enables courts to categorize the successful claimant as an adopted child under the intestacy statute. In this manner, courts have avoided the necessity of creating a new category of heirs.

Scholars have observed that the facts of most equitable adoption cases must be stretched to establish the elements of either contract theory.³⁹ Typically, the real basis for the claim is the family relationship be-

³⁶ The doctrine has been relied upon to establish the parent-child relationship for legal purposes other than inheritance at the time of the “adoptive” parent’s death. *See, e.g.*, *Estate of Radovich*, 48 Cal. 2d 116, 308 P.2d 14 (1957) (treating foster child as adopted child under state inheritance tax statute); *Versland v. Caron Transp.*, 671 P.2d 583 (Mont. 1983) (holding that wrongful death statute authorized “heirs” to bring suit); Rein, *Relatives by Blood, Adoption and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*, 37 VAND. L. REV. 711, 787-806 (1984); Annotation, *Modern Status of Law as to Equitable Adoption or Adoption by Estoppel*, 97 A.L.R.3d 347 (1980).

³⁷ BALLENTINE’S LAW DICTIONARY 409 (3d ed. 1969).

³⁸ Rein, *supra* note 36, at 770-87.

³⁹ *See Note, Equitable Adoption: They Took Him Into Their Home and Called Him Fred*, 58 VA. L. REV. 727, 745 (1972) (stating that “[t]he theories of specific performance and estoppel fit even the paradigm case only roughly; they merely serve as vehicles for effecting results consistent with the demands of conscience”); *see also* H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, 925-27 (2d ed. 1988); Rein, *supra* note 36, at 772-80.

tween the decedent and an individual, who played the role of decedent's child, and who was a likely object of testamentary bounty. Contrary to this rationale, the equitable adoption doctrine looks for a contract to formally adopt, which rarely exists in these cases. Courts have rendered judgment on the pleadings against stepchildren in equitable adoption cases who failed to allege the existence of a contract to adopt.⁴⁰

Stepchildren face more difficulty than other claimants in attempting to establish an equitable claim to heirship under the equitable adoption doctrine. "When the alleged adoptor is the child's stepparent the courts almost invariably find the proof insufficient on the grounds that the conduct of the parties was as consistent with a normal stepparent-child relationship as it was with a contract to adopt."⁴¹ As a result, stepchildren rarely qualify as equitably adopted children.⁴²

The failure of the stepdaughters in *In re Berge's Estate*⁴³ to establish a claim to heirship illustrates the difficulty of proving equitable adoption in the stepfamily setting. In *Berge*, the two stepdaughters moved into Mr. Berge's home when they were seven and eight years old, respectively, at the time of his marriage to their mother. The stepchildren continued to reside there following their mother's death until they married. The stepfather educated and supported them, and they worked on his farm. The stepfather called them "his girls" and they were generally known by his surname. Following his wife's death the stepfather stated his intention to leave all of his property to the stepdaughters, and to disinherit his heirs, who were living in foreign countries.

The *Berge* court held that the surrounding facts did not establish the elements of an equitable adoption. According to the court, "[t]here [was] no claim or proof of any specific oral or written contract to adopt

⁴⁰ See, e.g., *Estate of Stewart*, 122 Cal. App. 3d 625, 176 Cal. Rptr. 142 (1981); *Estate of Davis*, 107 Cal. App. 3d 93, 165 Cal. Rptr. 543 (1980).

⁴¹ Rein, *supra* note 36, at 781-82; see, e.g., *Taylor v. Boles*, 13 S.E.2d 352 (Ga. 1941); *Capps v. Adamson*, 242 S.W.2d 556 (Mo. 1951).

⁴² See *C St. Foodland v. Estate of Renner*, 596 P.2d 1170 (Alaska 1979); *Estate of Stewart*, 122 Cal. App. 3d 625, 176 Cal. Rptr. 142 (1981); *Estate of Davis*, 107 Cal. App. 3d 93, 165 Cal. Rptr. 543 (1980); *Alexandrou v. Alexander*, 37 Cal. App. 3d 306, 112 Cal. Rptr. 307 (1974); *In re McCordle's Estate*, 35 P.2d 850 (Colo. 1934); *In re Estate of Crossman*, 145 Mich. App. 154, 377 N.W. 2d 850 (1985); *In re Berge's Estate*, 47 N.W.2d 428 (Minn. 1951); *Lowrey v. Botello*, 473 S.W.2d 239 (Tex. Civ. App. 1971). *But see Foster v. Cheek*, 212 Ga. 821, 96 S.E.2d 545 (1957) (cause of action existed when stepdaughter alleged contract to adopt between stepfather and custodial grandparents); *Roberts v. Sutton*, 317 Mich. 458, 27 N.W.2d 54 (1947) (contract to adopt stepchild established by proof of unsuccessful attempt to formally adopt).

⁴³ 47 N.W.2d 428 (Minn. 1951).

appellants or to make them decedent's heirs."⁴⁴ In response to the stepdaughters' claim that the recited facts established an implied contract, the court held that "the facts referred to are so equivocal that they fall far short of the required proof."⁴⁵ Having failed to establish an express or implied contract to adopt, the stepdaughters sought to rely upon the more general equitable principle that equity regards as done that which ought to be done. In response, the court narrowed the application of this general principle to the search for a contract to adopt. "[T]he maxim referred to cannot operate to make a contract for a deceased person where there is no rule of law or equity to support the contention that he ought to have made the contract in his lifetime."⁴⁶ Thus, although the evidence established a family relationship and the decedent's intent to benefit his stepdaughters, the stepdaughters were entitled to no share of their stepfather's property.

As the *Berge* case illustrates, the requirement of a clear and complete agreement to adopt is inappropriate to a doctrine intended to produce equitable results under the intestacy laws for individuals incorporated into a family without the formality of adoption.⁴⁷ Nevertheless, equitable adoption is the only theory available to stepfamily members who

⁴⁴ *Id.* at 430.

⁴⁵ *Id.*

⁴⁶ *Id.* at 431.

⁴⁷ Thus, Professor Clark would recast the equitable adoption doctrine as "de facto adoption," available in cases in which real family relationships exist and the policies of the adoption laws would be promoted by including the child in the intestacy scheme. See H. CLARK, *supra* note 39, at 925-27. The proposal eliminates the requirement of a contract. The operative adoption law policy interests in this analysis are the child's welfare and the natural and adoptive parents' interests protected by the adoption laws. According to Professor Clark, the typical equitable adoption case involves foster children whose natural parents have dropped out of the picture. In these cases none of the relevant parental interests would be harmed by recognizing a legal tie between the "adoptive" parents and the child. In many stepfamilies, on the other hand, the noncustodial natural parent remains involved with the child, so that existing adoption law policies might be frustrated if the child were treated as the stepparent's adopted child. In these cases, Professor Clark's doctrine would not permit stepchild inheritance.

The growing recognition of new forms of adoption for stepchildren, in which the steprelationship is formalized without the need for legally terminating the noncustodial parent's rights, represents a change in adoption policies regarding stepchild adoptions. See Bartlett, *supra* note 1, at 951-52; Comment, *A Survey of State Law Authorizing Stepparent Adoptions Without the Noncustodial Parent's Consent*, 15 AKRON L. REV. 567 (1982). See generally Smith, *Adoption — The Case for More Options*, 1986 UTAH L. REV. 495. Treatment of the stepchild as "adopted" by the stepparent for purposes of inheritance under Professor Clark's proposal would not contravene this more modern formulation of stepchild adoption policy.

seek to qualify as heirs.⁴⁸

The existing intestacy laws, including the doctrine of equitable adoption, fail to protect the interests of stepfamily members. The following Part sets out a proposal to modify intestacy statutes by adding steprelatives as a new category of takers. The proposal advocates inheritance by stepparents and stepchildren in certain defined circumstances.

C. Proposal for Reform

Intestacy laws are designed to effectuate testamentary intent in the large majority of cases for property owners who die without a valid will.⁴⁹ These laws distribute property on the basis of legal status relationships rather than de facto relationships.⁵⁰ The distribution of property in this manner to natural and adoptive relatives provides economic protection for many dependent family members.

In light of these well-established purposes of intestacy laws, the time is right for legislatures to consider the inclusion of stepfamily members as legal heirs. Many Americans live in reconstituted families.⁵¹ In many stepfamilies, de facto relationships form that are true family ties. In many cases, the testamentary wishes of a decedent family member in-

⁴⁸ In a few cases stepchildren have been allowed to establish inheritance claims as "legitimated children" under state statutes designed to elevate the status of the "illegitimate" child whose natural parents marry following the child's birth. See *Thomaston v. Thomaston*, 468 So. 2d 116 (Ala. 1985); *Binns v. Dazey*, 147 Ind. 536, 44 N.E. 644 (1896); *Selby v. Brenton*, 75 Ind. App. 248, 130 N.E. 448 (1921); Annotation, *What Amounts to Recognition Within Statutes Affecting the Status or Rights of Illegitimates*, 33 A.L.R.2d 705 (1954). These cases misapplied the relevant legitimization statutes. As a general rule, biological parenthood of both spouses is required before their marriage will operate to "legitimate" their child under the statutes. See H. CLARK, *supra* note 39, at 172-74.

The stepdaughter claimant attempted to rely on a different theory in *Thurn v. McAra*, 374 Mich. 22, 130 N.W.2d 887 (1964). The stepfather in *Thurn* died intestate, survived by five natural children and the stepdaughter. The stepdaughter claimed a one-sixth share of the estate, not as a child heir, but as the beneficiary of a constructive trust. The court refused to impose the constructive trust because the stepdaughter failed to prove an essential element of the theory, namely, the decedent's reliance on representations by the five children that they would hold the property for the benefit of the stepdaughter.

⁴⁹ See *supra* note 3 and accompanying text.

⁵⁰ See 5 G. THOMPSON, *supra* note 7, at 203-04 ("Courts cannot question the justice or propriety of descent prescribed by statutes as to any heir or class of heirs or next of kin These statutes are arbitrary and cannot be modified by the courts on equitable principles.").

⁵¹ See *supra* notes 1-2 and accompanying text.

clude a desire to benefit surviving steprelatives.⁵² The difficult question for lawmakers is whether steprelatives can be included in the intestacy plan in a manner that would accomplish donative intent for most property owners without creating unduly difficult heirship determinations.

Under existing intestacy statutes all of the categories of heirs are too broad in that the heirs may inherit from a decedent with whom they shared no meaningful relationship and whose clear intent was to disinherit them. Nevertheless, lawmakers have correctly assumed that inclusion of spouses, natural children, adopted children, siblings and parents as heirs will reach the right result in most cases. In the stepfamily setting, on the other hand, legislatures have assumed that exclusion in all cases would accomplish the right result in most cases. A complete reversal, whereby the stepmarriage alone would create inheritance rights between stepparents and stepchildren, would be too sweeping. The likelihood of no genuine family ties is greater in the stepfamily context than in the natural family. Thus, a more refined test for making heirship determinations is appropriate.

The standard for inheritance by stepparents and stepchildren must involve proof of the stepmarriage plus proof of the *de facto* family relationship between the nonparent spouse and the children of the other spouse. The standard for stepfamily inheritance must be designed to identify cases in which inheritance would accomplish the wishes of most intestate property owners, and provide guidance to courts making the heirship determinations.

Section 6408 of the California Probate Code, unique in including stepchildren in the category of children who can inherit, attempts to accomplish these goals with the following standard:

For the purpose of determining intestate succession by a person or his or her descendants from or through a foster parent or stepparent, the rela-

⁵² An intestacy scheme's accuracy in mirroring property owners' donative intent can be validated by empirical studies of probated wills and by empirical studies of living persons' testamentary wishes. *See* Fellows, Simon & Rau, *supra* note 3, at 323 n.15, 325 n.29. A 1965 study of 659 probated estates, including 453 testate estates, in Cuyahoga County, Ohio, lends support to the position that steprelatives are the likely objects of bounty of many property owners. *See* M. SUSSMAN, J. CATES, D. SMITH, *THE FAMILY AND INHERITANCE* 108-13 (1970). According to the study, sixty-three of the 453 testators made gifts to "nonrelated inheritors." *Id.* at 108. More than one-half of these donors designated stepchildren or in-laws as the beneficiaries. *Id.* at 109-11. The authors described the motivation behind these bequests to relatives by affinity. "Either the stepchildren and the in-laws who inherit appear to have been so well assimilated into the family that the designation 'step-' or 'in-law' was a superfluous distinction in the testator's mind, or the bequest was made out of respect for [the testator's predeceased] spouse." *Id.* at 112.

tionship of parent and child exists between that person and his or her foster parent or stepparent if (1) the relationship began during the person's minority and continued throughout the parties' joint lifetimes and (2) it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier.⁵³

According to the Legislative Committee Commentary regarding section 6408, the legal barrier to adoption requirement could be satisfied, "for example, where a foster child or stepchild is not adopted because a parent of the child refuses to consent to adoption."⁵⁴

The California legislation highlights the issues that must be resolved in formulating a stepfamily inheritance law. First, must the stepfamily be formed during the child's minority? Second, what type of de facto relationship between the family members during the child's minority will qualify them for inheritance? Third, after the child's emancipation, what type of de facto relationship between the family members must be established? Fourth, in an eligible stepfamily, what family members are entitled to inherit?

Stepfamily inheritance should be permitted only when the stepfamily is formed during the child's minority. 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. The California statute properly excludes stepfamilies created under these circumstances from inheritance.⁵⁵

The second part of the test for stepfamily inheritance is more difficult to conceive. A factor must be formulated that relates to the quality of the stepparent-child relationship during the child's minority. The California statute employs the "would have adopted but for a legal barrier" factor for this purpose.⁵⁶ The focus on adoption in the California statute is reminiscent of the equitable adoption doctrine, but does not require the child to prove a contract to adopt.⁵⁷

⁵³ CAL. PROB. CODE § 6408(b) (West Supp. 1988).

⁵⁴ *Id.* § 6408 Senate Committee comment.

⁵⁵ *See id.* § 6408(b)(1).

⁵⁶ *See id.* § 6408(b)(2).

⁵⁷ A subsequent subsection of the California statute provides that "[n]othing in this section affects or limits application of the judicial doctrine of equitable adoption for the benefit of the child or his or her descendants." *Id.* § 6408(d).

Section 6408(b)(2) requires that the "would have adopted but for a legal barrier" portion of the test for stepchild inheritance be established "by clear and convincing evidence." *Id.* § 6408(b)(2). In some equitable adoption cases, courts have similarly imposed this heightened clear and convincing evidence requirement on child claimants. *See Rein, supra* note 36, at 780-83. Under the proposal for stepfamily inheritance formulated in this Article, no such requirement is imposed on stepfamily claimants.

Section 6408's requirement of the stepparent's willingness to adopt is apparently designed to allow inheritance in cases in which a close family relationship existed, and the stepparent desired to benefit the stepchild. The "would have adopted but for a legal barrier" test, however, is underinclusive for identifying such cases. In some families, where loving ties and donative intent exist, the stepparent-child relationship may never be formalized even though no legal barrier to adoption stands in the way. Furthermore, in situations involving a legal barrier to adoption, the stepparent may never expressly contemplate adoption but may intend to benefit steprelatives with whom genuine family relationships exist. In all such cases, clear and convincing evidence that the stepparent would have adopted but for a legal barrier would be difficult to produce. Thus, the California test for quality of the relationship during the child's minority is underinclusive in light of intestacy law goals of certainty, fairness, and consistency with donative intent.

A broader test for de facto family relationships can be formulated that is not tied to the stepparent's intent or desire to adopt the stepchild. A better stepfamily eligibility test would be based upon the same assumption as the entire law of intestacy, namely, that certain relationships typically involve individuals who are the natural objects of each other's bounty. Even in the absence of express indications of testamentary intent, these individuals are permitted to inherit from each other.

In other legal settings, the standard employed to determine whether legal significance should attach to the stepparent-child relationship is based on the common law in loco parentis doctrine. Simply stated, when an adult voluntarily assumes parenting responsibilities, the law puts that individual "in the place of a parent."⁵⁸ The types of evidence relied upon to determine this status include the membership of stepparent and child in the same household, performance of household services for the child, payment of the child's expenses, and the performance of the counseling functions of parenthood.⁵⁹ The in loco parentis doctrine has been employed primarily in the child support context.⁶⁰ The doc-

⁵⁸ See H. CLARK, *supra* note 39, at 264-65; Berkowitz, *Legal Incidents of Today's "Step" Relationship: Cinderella Revisited*, 4 FAM. L.Q. 209, 212-14 (1970); Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 41-43 (1984).

⁵⁹ See, e.g., *Loomis v. State*, 228 Cal. App. 2d 820, 39 Cal. Rptr. 820 (1964) (stepmother stood in loco parentis for the purpose of state gift tax).

⁶⁰ See, e.g., *Cohen v. Lieberman*, 160 Misc. 310, 289 N.Y.S. 797 (N.Y. App. Div. 1936) (recovery allowed against stepparent for dental services); H. CLARK, *supra* note

trine could be employed as well in the intestacy law as the statutory test for the necessary de facto relationship between stepparent and child during the child's minority.⁶¹

The in loco parentis determination relates to the quality of the steprelationship during the child's minority. Inheritance issues frequently arise after the stepchild has reached adulthood. The third requirement for stepchild inheritance under the California statute focuses on the period in the relationship after the child reaches adulthood. Section 6408 requires proof that the stepparent-child relationship "continued throughout the parties' joint lifetimes."⁶² This requirement is well designed to identify those cases in which stepfamily inheritance would be desired by intestate family members. The possibility that family members will drift apart following the child's emancipation may be greater in the stepfamily than in the natural family, and this requirement would disallow inheritance in such a case.

Probate courts have received evidence of the de facto relationships between stepparents and their adult stepchildren in cases involving intestacy issues and in those involving will construction. Frequently, equitable adoption claims in intestacy cases involve evidence of a de facto relationship between decedent and the stepchild claimant, which extended into the claimant's adulthood. As discussed earlier, this evidence is relevant to the extent that it proves the existence of a contract to adopt the stepchild.⁶³ Probate courts have considered the nature of adult stepchild-stepparent relationships as well in resolving stepchild claims

39, at 264-65; Mahoney, *supra* note 58, at 41-43; Ramsey & Masson, *Stepparent Support of Stepchildren: A Comparative Analysis of Policies and Problems in the American and English Experience*, 36 SYRACUSE L. REV. 659, 673-74 (1985). Other contexts in which the doctrine has been employed as the basis for assigning rights and duties to stepparents and stepchildren include the law of torts, contracts and insurance. See Berkowitz, *supra* note 58, at 213, 219.

⁶¹ In Note, *Stepfamily Law: Review and Proposals for Change*, 18 SUFFOLK U.L. REV. 701, 717-21 (1984), the author proposes a best interests of the child test for stepchild inheritance, for cases in which an in loco parentis relationship has been established. The proposal apparently applies only in cases in which the stepparent dies during the stepchild's minority.

⁶² CAL. PROB. CODE § 6408(b)(1) (West Supp. 1988).

⁶³ See *supra* text accompanying notes 36-48. In *In re Estate of Crossman*, 145 Mich. App. 154, 377 N.W.2d 850 (1985), for example, the evidence of a family relationship between decedent and his three adult stepdaughters included financial assistance from the decedent, the exchange of visits, cards and gifts between the parties, babysitting of grandchildren by the stepfather, and similar types of family interaction. The *Crossman* court held that the evidence failed to prove an agreement to adopt the stepdaughters.

for participation in testamentary class gifts to the testator's children.⁶⁴ The same types of evidence proffered in these equitable adoption and will construction cases would be relevant in assessing inheritance claims involving adult stepchildren under the stepfamily intestacy law proposed herein.

Other events in the parties' lives, in addition to the stepchild's emancipation, may affect the continuing viability of the stepparent-child relationship. The natural parent may die, or the stepmarriage end in divorce, either during the child's minority or afterward.⁶⁵ These events should be relevant to stepfamily inheritance rights only if they affect the stepparent-child relationship. If the relationship fails the *in loco parentis* test during the child's minority or the continuing family ties test thereafter, then inheritance should be disallowed. If the family ties between stepparent and child remain intact following the termination of the stepmarriage, then inheritance on the basis of the stepparent-child relationship should be allowed.

The fourth and final legislative determination required in formulating a stepfamily inheritance law relates to the limitation on eligible stepfamily heirs. The California statute allows stepchildren and their descendants to inherit from stepparents, as if the relationship of natural parent-child existed, when the three requirements discussed above are met.⁶⁶ However, inheritance by stepparents from stepchildren is not permitted because the California test focuses on the stepparent's intent to treat the child as an heir, demonstrated by the willingness to adopt.⁶⁷

Under the broader test for inheritance proposed herein the focus shifts to the quality of the family relationship. Therefore, no reason exists for limiting rights unilaterally to the stepchild and his or her descendants. The stepparent should be treated as the heir of the stepchild and be eligible to inherit as a parent, when the stepfamily satisfies the three requirements for inheritance set out above.⁶⁸ Step-

⁶⁴ See text accompanying *infra* notes 87-109. In *In re Estate of Gehl*, 39 Wis. 2d 206, 159 N.W.2d 72 (1968), for example, the court's conclusion that the testator intended to include her stepchildren in the residuary gift to children was supported by evidence that "even after the [stepchildren] became adults, [the testator] visited their homes for long periods of time and the relationship continued to be that of a well loved parent and adult children." *Id.* at 214, 159 N.W.2d at 75.

⁶⁵ See generally Mahoney, *supra* note 58, at 52-75 (discussing support and custody); Mahoney, *supra* note 31, at 531-34 (discussing Immigration Act).

⁶⁶ See CAL. PROB. CODE § 6408(b) (West Supp. 1988).

⁶⁷ See *supra* text accompanying notes 56-57.

⁶⁸ The requirements are formation of the stepfamily during the child's minority, a quality relationship during the child's minority, and if relevant, continuation of the

grandchild inheritance would also be permitted under this limitation. The child of a stepchild who predeceases the intestate stepparent would be substituted for the predeceased stepchild, according to the general rules in the jurisdiction about lineal substitution. Extension of inheritance rights to other categories of steprelatives would not be consistent with the goals of benefiting the likely objects of bounty in a manner that does not create insurmountable administrative problems. Inheritance rights by stepgrandparents, stepsiblings (who do not share a common parent),⁶⁹ stepnephews and nieces, stepuncles and aunts, and other steprelatives should be disallowed. In cases in which the stepchild has been incorporated into an extended stepfamily, disallowance of these broader inheritance rights may defeat the intent of intestate stepfamily members and require an unfair distribution of property. Nevertheless, the remoteness of the relationships and the complexity of the necessary heirship determinations under a general law of stepfamily inheritance justify the limitation to stepparents and stepchildren and their descendants.⁷⁰

There is no established counterpart to the *in loco parentis* test, for steprelatives other than stepparents. For example, there is no established norm for the manner in which an uncle should relate to a niece, during her minority or afterward. Thus, a test to determine whether or not a stepuncle should be allowed to inherit from his stepniece, that focused on the relationship between them would be difficult to formulate. An alternative approach might focus on the relationship between

relationship after the child reaches adulthood. *See supra* notes 53-65 and accompanying text.

⁶⁹ When siblings in a stepfamily share one natural parent, they are regarded as relatives of the half blood. Under modern intestacy statutes in many states, they are entitled to inherit from each other. *See supra* text accompanying notes 24-32.

⁷⁰ Under the doctrine of equitable adoption, *see* text accompanying *supra* notes 36-48, courts have generally refused to extend inheritance rights beyond the "adoptive" parent-child relationship. *See Rein, supra* note 36, at 788-90; Annotation, *supra* note 36, §§ 4, 16-17, 19.

The various intestacy statutes that permit stepfamily inheritance to avoid escheat do not take a consistent approach to the question of inheritance by extended stepfamily members. *See supra* text accompanying notes 14-23. On the one hand, the Ohio intestacy law limits inheritance, "[i]f there are no next of kin, to stepchildren or their lineal descendants, *per stirpes*." OHIO REV. CODE ANN. § 2105.06(I) (Anderson Supp. 1987); *see also* WASH. REV. CODE ANN. § 11.04.095 (1987) (property received by the intestate from a spouse who predeceased intestate without heirs passes to the "issue of the spouse first deceased"). On the other hand, the Florida statute, in order to prevent escheat, confers inheritance rights on "the kindred of the last deceased spouse of the decedent." FLA. STAT. ANN. § 732.103(5) (West Supp. 1988). This category could include stepfamily members other than stepchildren.

the stepniece and her stepparent, and allow the stepuncle to inherit if the test for stepparent-child inheritance rights, set forth above, could be satisfied. The problem with this approach, however, is the derivative nature of the stepuncle's rights. In too many cases, the actual relationship between the stepniece and her stepuncle would be too remote to justify a property right for the stepuncle premised on the stepparent-child relationship.

This proposal for stepfamily inheritance has ramifications beyond the distribution of intestate estates. In the law of intestate succession, qualification as an heir confers other rights in addition to the right to inherit. For example, the personal representative, who administers the intestate estate, is designated in most jurisdictions by a statute that assigns priority among heirs.⁷¹ Furthermore, as a procedural matter, persons who are interested in the estate, including heirs, are entitled to notice of all relevant proceedings.⁷² Under the stepfamily inheritance proposal, qualifying stepparents and stepchildren should be treated as "heirs" for all purposes in the law of intestate succession.

Other doctrines in the law of intestate succession apply to "children" of the decedent. For example, family allowances and homestead rights, which protect surviving family members against the decedent's creditors, generally benefit the surviving spouse and children of the decedent.⁷³ The doctrine of advancements generally requires the intestate share of decedent's child to be reduced by the amount of inter vivos gifts to the child intended as an advancement on inheritance, in certain defined circumstances.⁷⁴ When the determination is made that a stepchild is entitled to inherit as the child of the decedent, then the stepchild should be treated as a "child" for these and all other purposes in the

⁷¹ See UNIF. PROB. CODE § 3-203(a), 8 U.L.A. 239-40 (1983); T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 109, at 606-08 (2d ed. 1953).

⁷² See UNIF. PROB. CODE §§ 1-201(20), 1-401, 8 U.L.A. 32 (1987); T. ATKINSON, *supra* note 71, § 95, at 494-95.

⁷³ See UNIF. PROB. CODE §§ 2-401 to -403, 8 U.L.A. 94-99 (1983); T. ATKINSON, *supra* note 71, § 34, at 126-34. Stepchildren have been excluded when the statutory allowance provisions are expressly limited to "children" of the decedent. In other jurisdictions, where the statutory language refers more broadly to "family members" or "dependent children," stepchildren may qualify under existing legislation. *Id.* at 129-30; see UNIF. PROB. CODE § 2-403, 8 U.L.A. 98 (1983) (providing allowance for "minor children . . . who were in fact being supported by [the decedent]").

⁷⁴ See *Wilson v. Smith*, 117 F. Supp. 707 (E.D. Pa. 1902) (inter vivos conveyance to individual who is not property owner's natural child regarded as advancement only if in loco parentis relationship existed); UNIF. PROB. CODE § 2-110, 8 U.L.A. 69 (1983) (advancement must be declared in document executed by property owner at time of inter vivos transfer); T. ATKINSON, *supra* note 71, § 129.

law of intestate succession.

A stepfamily inheritance law, properly tailored to identify stepfamilies in which real family ties exist between stepparents and stepchildren, would promote the primary goal of the intestacy laws. As described in this Part, the testamentary wishes of stepparents and stepchildren who die without a will would be effectuated by a law that tests for stepmarriage during the child's minority, an *in loco parentis* relationship during the child's minority, and continuing family ties thereafter. In cases in which these requirements are satisfied, inheritance by stepparents, as parents, from their stepchildren and by stepchildren (and the issue of deceased stepchildren) from stepparents should be authorized.

D. The Costs of the Proposal for the Courts and the Parties

The preceding Part proposes a test for identifying stepparents and stepchildren who should be allowed to inherit from each other as parents and children. Arguably, the proposal better comports with the testamentary wishes of stepfamily members than the automatic denial of stepfamily inheritance rights under the laws of every state except California.⁷⁵ The proposed change in the intestacy laws raises legitimate concerns about the certainty and predictability of property rights and the imposition of an additional burden on the probate courts.⁷⁶ These concerns do not, however, outweigh the benefits of the proposal.

Probate courts are accustomed to making heirship determinations based on the existence of easily identifiable legal relationships, such as marriage or natural parenthood. The proposed test for qualifying steprelationships, on the other hand, focuses not only on the existence of the stepmarriage, but on the quality of the stepparent-child relationship in each case.

There is limited precedent in the law of descent and distribution for this type of case by case determination of heirship. The doctrine of equitable adoption, for example, requires the courts to inquire into facts surrounding the "adoptive" parent-child relationship in order to determine whether a contract to adopt, and other elements of the doctrine, have been established. As discussed earlier,⁷⁷ courts have assumed

⁷⁵ For a discussion of the treatment of steprelatives under existing intestacy statutes, see *supra* text accompanying notes 7-34.

⁷⁶ See generally Glendon, *supra* note 4, at 1167 (discussing balance in the legal system between fixed legislative rules, which promote certainty, and the judicial discretion required for fair results in particular cases).

⁷⁷ See *supra* text accompanying notes 36-48.

the burden of making this determination when the elements of an equitable adoption claim are alleged, in order to accomplish equitable results.⁷⁸

In Pennsylvania, a statutory provision governing the rights of legally adopted children to inherit from natural family members similarly focuses on the facts surrounding the family relationships in each case. As a general rule in Pennsylvania, as in many other jurisdictions, an individual loses all inheritance rights vis a vis biological relatives upon his or her adoption into another family.⁷⁹ The statutory exception allows inheritance by the adoptee "in distributing the estate of a natural kin, other than the natural parent, *who has maintained a family relationship* with the adopted person."⁸⁰ This provision recognizes that not all adoptions terminate de facto relationships with natural family members. Especially when the child is not newborn at the time of adoption, family ties with biological relatives may continue. Thus, no single rule will produce fair results on the question of adopted child inheritance rights in all cases or even in a large majority of cases. The necessary determination is much more complex than the simple question of legal adoptive status. The Pennsylvania Legislature has therefore authorized a case by case determination when the adopted child seeks to inherit from natural relatives. The burden on the courts is justified by the just results that follow from the inquiry into de facto relationships in this limited context.

The same type of inquiry into the actual "family relationship" of the parties is the heart of the proposal for stepfamily inheritance. Just as adoption may create complexity in a child's life situation, so too stepchildren may enjoy important, easily identifiable relationships outside of the nuclear family. These relationships should be reflected in the intestacy scheme.

⁷⁸ In some jurisdictions, claims by another category of children, those born out of wedlock and seeking to inherit from their fathers, involve an investigation into the de facto relationship between parent and child. See Lovas, *supra* note 1, at 374-76. In Pennsylvania, for example, the child must prove that the father took the child into his home and openly held the child out as his son or daughter. See 20 PA. CONS. STAT. ANN. § 2107(c)(2) (Purdon 1988).

⁷⁹ See 20 PA. CONS. STAT. ANN. § 2108 (Purdon 1988); see also UNIF. PROB. CODE § 2-109(1), 8 U.L.A. 66 (1983); H. CLARK, *supra* note 39, at 928. In some jurisdictions, special inheritance rights are maintained between the child and the natural family when the child is adopted by a stepparent. See UNIF. PROB. CODE § 2-109(1), 8 U.L.A. 66 (1983); Jones, *Stepparent Adoption and Inheritance: A Suggested Revision of Uniform Probate Code Section 2-109*, 8 W. NEW ENG. L. REV. 53 (1986).

⁸⁰ 20 PA. CONS. STAT. ANN. § 2108 (Purdon Supp. 1988) (emphasis added).

An intestacy law that makes heirship determinations solely on the basis of status determinations cannot accommodate the complexity of modern family life. A stepfamily inheritance law that focuses on the facts in each case would enable courts to distinguish those cases in which inheritance rights would be consistent with the general purposes of the intestacy law. The resulting burden on the courts would be justified.

A related objection focuses on the uncertainty about property rights introduced by a stepfamily inheritance law. Under existing law, the rights of stepfamily members are clearly delineated — there are no rights, except in California.⁸¹ The rights of natural family members are also clear. Once the biological relationship (or marriage relationship or relationship by adoption) is established, inheritance rights follow, and are not subject to the competing claims of stepfamily members. Under the proposal, unprecedented discretion would be conferred upon judges to determine stepfamily inheritance rights. Thus, family members' property rights would become less certain.

The first requirement for stepfamily inheritance, that the stepmarriage begin before the child reaches majority, would generate little controversy since the circumstance is readily ascertainable. However, the second and third requirements relate to the quality of the stepparent-child relationship and would be subject to judicial interpretation of surrounding facts. As discussed in the previous Part, there is precedent in existing case law for making determinations about *in loco parentis* relationships during the minority of stepchildren⁸² and about the existence of continuing family ties between adult stepchildren and stepparents.⁸³ The judicial discretion involved in applying these tests is limited by fairly concrete standards. The elements of the test are sufficiently objective that family members should be able to predict their rights in most cases.⁸⁴ The limited amount of uncertainty generated by the stepfamily inheritance law would be a fair price to pay for the just recognition of stepfamily rights.

The stepfamily inheritance proposal obviously would encroach upon the property rights of natural family members under existing law. For example, in the case of the intestate decedent who is survived by one

⁸¹ See *supra* text accompanying notes 7-13.

⁸² See *supra* text accompanying notes 58-61.

⁸³ See *supra* text accompanying notes 63-64.

⁸⁴ For example, on the facts of *In re Berge's Estate*, 47 N.W.2d 428 (Minn. 1951), discussed earlier *supra* text accompanying notes 43-48, stepchild inheritance would clearly be permitted under the proposed test.

natural child and one qualifying stepchild, the natural child would receive the entire estate under existing law. Under the proposal, one-half of the estate would be distributed to each child. In other cases the proposed change in the law would totally exclude the natural family member from inheritance. For example, when the decedent is survived only by a natural brother and a qualifying stepchild, the brother would be the sole heir under existing doctrine, but would be excluded from inheritance by the stepchild under the proposal.

The proposed re-allocation of property rights is consistent with the goals of the intestacy laws. The focus in the law of descent is on the property owner and not on the expectations of surviving family members. If the determination is made that most owners in qualifying stepfamilies would prefer to include stepchildren in the category of children as heirs, then distribution of property to the stepchildren in the examples above is the right result.

The proposal for stepfamily inheritance would shake the family tree in some cases, with results that defy traditional inheritance patterns. For example, some individuals would be able to inherit from more than two "parents" under the proposed intestacy law. The child who belongs to a qualifying stepfamily would be eligible to inherit as the "child" of both natural parents as well as from the stepparent.⁸⁵ This result is consistent with the purpose of the intestacy laws in light of the complexity of modern families. By virtue of the stepmarriage, the child may become the natural object of bounty of more than two "parents." The stepfamily inheritance proposal acknowledges this reality.⁸⁶

Existing intestate succession statutes are designed to accomplish testamentary intent for members of traditional families. The proposal for stepfamily inheritance broadens the definition of family relationships to include stepparents and stepchildren, when real family ties exist between the parties. As discussed in this Part, the burdens imposed by

⁸⁵ Conversely, upon the child's death intestate, survived by both natural parents and the stepparent, but not by a spouse or issue, the estate would be divided among the three "parents." Furthermore, the child who lives in more than one stepfamily during his or her minority raises the possibility of more than one qualifying steprelationship. It is unlikely that more than one stepparent will be able to satisfy the *in loco parentis* requirement during the period between the stepmarriage and the child's age of majority, and to sustain a continuing family relationship following the age of majority. However, if these requirements could be satisfied as to the child and more than one stepparent, then more than one qualifying steprelationship would exist under the proposal.

⁸⁶ See generally Bartlett, *supra* note 1, at 882 ("challeng[ing] the law's adherence to the exclusive view of parenthood when the premise of the traditional nuclear family has failed").

this case by case determination of eligibility are necessary and justified. The proposal would achieve the fair distribution of intestate property to stepfamily members, in a manner consistent with the wishes of most property owners.

II. THE LAW OF WILLS

A. Introduction

Unlike the law of inheritance, which must construct a testamentary plan for all intestate decedents in the jurisdiction, the law of wills is designed to effectuate testamentary intent on a case by case basis. Express gifts to stepfamily members, like specific gifts to any designated legatee, are generally enforced. As discussed in this Part, however, various doctrines in the law of wills embody a general assumption that testators do not regard stepfamily relationships as family relationships. When steprelatives form close family ties, the assumption may operate to defeat testamentary intent. This result is unjustifiable in a system designed to distribute devised property according to the wishes of the individual owner. A negative attitude toward stepfamily beneficiaries has appeared in two types of testamentary situations. First, as discussed in Part II.B., some courts have revealed an unwillingness to include stepfamily members in class gifts to the testator's relatives. Second, some courts have favored natural relatives over stepfamily members in will construction cases that arise due to changed family circumstances prior to the testator's death. This matter is explored in Part II.C.

B. Class Gifts

The *Restatement of Property* rule regarding steprelatives as the beneficiaries of class gifts provides that “[w]hen a limitation is in favor of the ‘children’ of a designated person, all stepchildren, . . . and other persons similarly related to such person only by affinity, are excluded from the possible takers thereunder except when a contrary intent of the conveyor is found from additional language or circumstances.”⁸⁷

⁸⁷ RESTATEMENT (FIRST) OF PROPERTY § 289 (1940). This rule of construction also affects the eligibility of steprelatives as objects of a special power of appointment. According to the *Second Restatement*, if the donor has not clearly indicated whether steprelatives are to be included in the class of objects of a non-general power designated by terms like children or issue, then “the rules of construction operative in the controlling jurisdiction that give preciseness of meaning to these terms when used in beneficial gifts to such groups are relevant as an aid in determining the objects of the power.” RESTATEMENT (SECOND) OF PROPERTY § 20.1 comment d (1986).

Most courts confronted with claims by steprelatives for inclusion in a designated class of relatives have employed a similar rule of construction, imposing the burden on the steprelatives to establish the boundaries of the class.⁸⁸ Steprelative claimants have succeeded in some cases,⁸⁹ but in others the assumption that steprelatives are not the natural objects of each other's bounty has prevailed.⁹⁰ Testamentary intent regarding class gifts can be properly ascertained only when the probate courts open-mindedly consider evidence from the will and the circumstances surrounding its execution, including the nature of the relationship between the testator and the steprelatives.

The intent to include steprelatives in a class gift may, according to the *Restatement*, appear in "additional language" of the will instrument,⁹¹ other than the language creating the class gift. In *Von Fell v. Spirling*,⁹² for example, the testator left his residuary estate "to my children and grandchildren mentioned above."⁹³ An earlier clause of the will conveyed individual gifts to the testator's stepdaughter and four stepgrandchildren, along with his natural children and grandchildren, describing each individually as his child, grandson, or granddaughter. The court held that this language clearly expressed the intent to include the steprelatives, along with the testator's natural family members, in the class gift of the residuary estate.

The *Von Fell* court's ability to identify the necessary intent from within the four corners of the will is unusual.⁹⁴ In most cases, reference must be made to the testator's circumstances at the time of the will's execution to establish the intent to include steprelatives as class gift

⁸⁸ See *Coon v. McNelly*, 254 Ill. 39, 98 N.E. 218 (1912); *Davis v. Mercantile Trust Co.*, 206 Md. 278, 111 A.2d 602 (1955); *Von Fell v. Spirling*, 96 N.J. Eq. 20, 124 A. 518 (Ch. 1924), *rev'd on other grounds*, 97 N.J. Eq. 527, 128 A. 611 (1925); *In re Sulzbacher's Estate*, 169 Misc. 1, 6 N.Y.S.2d 683 (Sur. Ct. 1938); *Herrick v. Snyder*, 27 Misc. 462, 59 N.Y.S. 229 (Sup. Ct. 1899); *In re Kurtz's Estate*, 145 Pa. 637, 23 A. 322 (1892) (per curiam); *In re Estate of Gehl*, 39 Wis. 2d 206, 159 N.W.2d 72 (1968).

⁸⁹ See *Coon*, 254 Ill. 39, 98 N.E. 218; *Von Fell*, 96 N.J. Eq. 20, 124 A. 518; *Sulzbacher*, 169 Misc. 1, 6 N.Y.S.2d 683; *Herrick*, 27 Misc. 462, 59 N.Y.S. 229; *Gehl*, 39 Wis. 2d 206, 159 N.W.2d 72.

⁹⁰ See *Davis*, 206 Md. 278, 111 A.2d 602; *Kurtz*, 145 Pa. 637, 23 A. 322.

⁹¹ RESTATEMENT (FIRST) OF PROPERTY § 289 (1940).

⁹² 96 N.J. Eq. 20, 124 A. 518 (Ch. 1924), *rev'd on other grounds*, 97 N.J. Eq. 527, 128 A. 611 (1925).

⁹³ *Id.* at 22, 124 A. at 519.

⁹⁴ In *Von Fell*, the drafter of the will testified that the testator intended to include the stepchild and stepgrandchildren in the class gift. The court did not resolve the issue of the admissibility of this testimony, because the evidence derived from the face of the will was sufficient to establish the testator's intent. *Id.* at 21, 124 A. at 519.

beneficiaries.⁹⁵

In some cases, language of the class gift makes no sense unless steprelatives must be treated as family members. For example, a gift “unto the children of my first and second marriage [sic]” by a woman who had stepchildren but no natural or adopted children in her second marriage, was held to include the stepchildren.⁹⁶ The limitation of the class gift to her natural children would have resulted in “no meaning or significance” to the language regarding children of the second marriage.⁹⁷ Similarly, a residuary gift “to my grandchildren” by a man who never had natural or adopted children or grandchildren, was construed to mean the grandchildren of testator’s wife.⁹⁸ The nouns employed in class gift terminology are generally plural nouns, such as “children” or “nieces and nephews.” The fact that the testator had just one natural family member in the named class, and knew at the time of will execution that this would be true at the time of death, has been accepted as evidence of the intent to include steprelatives.⁹⁹ In this category of cases, evidence about the testator’s family tree, coupled with the testamentary language, has established the testator’s intent to benefit steprelatives.

Other types of evidence relate more directly to the nature of the relationship between the testator and the stepfamily members included in the class gift. For example, the steprelatives may be able to prove that the testator referred to them in normal conversation as members of the designated class. In *In re Estate of Gehl*,¹⁰⁰ for example, the testator’s six stepchildren proved that she frequently referred to them during her lifetime, along with her natural child, as her “children.” The testator referred to the stepchildren individually as her “son” or “daughter.” This evidence supported the conclusion that testator used the term “children” in the residuary clause of her will in the same manner that

⁹⁵ As a general rule, evidence regarding the testator’s circumstances at the time the will was executed, that sheds light on the meaning of testamentary language, is admissible in a probate proceeding. See T. ATKINSON, *supra* note 71, at 810. The types of evidence introduced in the stepfamily cases, regarding the testator’s family tree and the manner in which the testator regarded stepfamily members during life, have generally raised no question of admissibility.

⁹⁶ *Herrick v. Snyder*, 27 Misc. 462, 59 N.Y.S. 229 (Sup. Ct. 1899).

⁹⁷ *Id.* at 468, 59 N.Y.S. at 234.

⁹⁸ *Coon v. McNelly*, 254 Ill. 39, 98 N.E. 218 (1912).

⁹⁹ See *In re Sulzbacher’s Estate*, 169 Misc. 1, 6 N.Y.S.2d 683 (Sur. Ct. 1938) (gift to nephews and nieces; testator had only one natural nephew and one natural niece); *In re Estate of Gehl*, 39 Wis. 2d 206, 159 N.W.2d 72 (1968) (residuary gift to children of testator who had only one child).

¹⁰⁰ 39 Wis. 2d 206, 159 N.W.2d 72 (1968).

she used it during her lifetime.

Furthermore, in *Gehl*, the court regarded the testator's reference to her husband's children as her "children" as proof that a real parent-child relationship had been established. Other evidence of this relationship included a showing that the testator had raised the stepchildren, along with her own child, as a single family unit. "The entire record is indicative of a family situation, of a mutual exchange of parent-child love, with [testator] exercising all the disciplinary prerogatives of a parent."¹⁰¹ In the court's assessment, this family status continued after the stepchildren reached adulthood, at the time the will was executed, as evidenced by lengthy visits between the parties and other types of loving interaction. The *Gehl* court relied upon this evidence of the de facto parent-child relationship in concluding that the testator intended to include the stepchildren in the gift to her children.¹⁰²

In other cases, this type of evidence has not convinced the courts that the testator intended a broad meaning for class gift terminology. In *In re Kurtz's Estate*,¹⁰³ for example, the decedent bequeathed specific legacies to his wife and his natural children, and to his two stepchildren, who were designated as his children "which came to [him] by [his] marriage with [his] wife." The testator left the residuary estate to his "wife and children." In a per curiam opinion, the Pennsylvania Supreme Court affirmed the limitation of the residuary beneficiaries to the natural children. The court's justification for excluding the stepchildren, who had earlier been referred to as children, was simply that "[the testator] left children of his own which answer this description."¹⁰⁴ Thus, the existence of the natural children was the only fact that the court deemed relevant in determining the testator's intent.¹⁰⁵

¹⁰¹ *Id.* at 214, 159 N.W.2d at 75.

¹⁰² See *Coon*, 254 Ill. 39, 98 N.E. 218 (residuary gift to "grandchildren" distributed to twelve grandchildren of testator's wife based on evidence that her three children had lived in the family home as members of the testator's family, the stepgrandchildren called testator grandfather, and testator had no natural grandchildren); *In re Sulzbacher's Estate*, 169 Misc. 1, 6 N.Y.S.2d 683 (Sur. Ct. 1938) (residuary gift to testator's "nieces and nephews" included stepniece and stepnephew, based on "proof as to relationship in which he held [them]," including visits, and his use of terms "niece" and "nephew" to describe them).

¹⁰³ 146 Pa. 63, 23 A. 322 (1892) (per curiam).

¹⁰⁴ *Id.*

¹⁰⁵ The per curiam opinion in *Kurtz* does not recite many facts regarding the de facto relationships in the case. The opinion reveals that the appellant stepchild shared the decedent's last name and that the testator called the stepchildren "his children" in the earlier provision in the will. *Id.* The court foreclosed consideration of this evidence and any other evidence regarding the testator's intent to benefit the stepchildren.

The same reluctance to regard steprelatives as family members dictated the result in *Davis v. Mercantile-Safe Deposit & Trust Co.*¹⁰⁶ The testator in *Davis* devised the remainder interest in a residuary trust to the seven unnamed children of his nieces and nephews. The seven included a stepgrandnephew whom the testator mistakenly believed was the natural child of testator's nephew. The nephew had always treated the stepchild, and had held him out to the testator, as his own son. According to the *Davis* court, "it [was] clear that the testator had [the stepnephew] in mind as one of the seven children who would take, although deceived as to his true status. . . . [T]he crucial question is whether this designation can prevail over the description as 'child' of a nephew or niece."¹⁰⁷ The court answered the question by reference to its own view of the testamentary scheme:

[W]e cannot find, under the circumstances, that the testator was indifferent to ties of blood, or had any desire to provide for a putative stepchild whom his nephew was under no legal or moral obligation to support. We think the description in this case is a stronger indication of intent than the numerical designation.¹⁰⁸

The dissenting opinion in *Davis* expressed concern that this focus on blood ties had in fact defeated the testator's intent: "How, except by speculation, can it be decided that the controlling motive for the gift to [the stepgrandnephew] was that he was thought to be a blood relative and not because [testator] thought of him in the same way as did the nephew."¹⁰⁹

Clearly, the testator who wishes to benefit steprelatives should expressly name them in the will. When class designations are used, a determination must be made whether the testator intended to include steprelatives in the class. In making this determination, courts must consider relevant evidence of intent from the language of the will and from the testator's family circumstances, including the nature of the steprelationships. The failure to consider such evidence can defeat testamentary intent in the stepfamily setting.

¹⁰⁶ 111 A.2d 602 (Md. 1955).

¹⁰⁷ *Id.* at 604.

¹⁰⁸ *Id.* at 605. In a subsequent case involving distribution of the stepgrandnephew's one-seventh interest, the court held that the interest passed to the six grandnephews and grandnieces. *See Davis v. Mercantile-Safe Deposit & Trust Co.*, 235 Md. App. 266, 201 A.2d 373 (Ct. Spec. App. 1964).

¹⁰⁹ *Davis*, 111 A.2d at 607 (Hammond, J., dissenting).

C. Express Gifts to Stepfamily Members

Express gifts to individual beneficiaries can be frustrated by various changes in the parties' circumstances between the time the will is executed and the time of testator's death. Most notably, the law of lapse voids the gift to any beneficiary who predeceases the testator.¹¹⁰ Many states have enacted antilapse statutes, which save the bequest for the predeceased beneficiary's issue.¹¹¹ The antilapse statutes generally apply only to certain categories of the decedent's relatives.¹¹² Courts generally have refused to apply the antilapse statutes to gifts to stepchildren, because stepfamily members are not considered relatives of the decedent for this purpose.¹¹³

Antilapse statutes embody an assumption that, as to certain family members, testators generally would prefer to substitute the predeceased beneficiary's issue rather than see the beneficiary's legacy lapse. Not every testator will desire this result as to every beneficiary designated in the antilapse statute. The cure in such cases is a specific will provision creating a gift over to another beneficiary. The antilapse statutes are designed to accomplish testamentary intent in the majority of cases when no gift over has been created. The statutes reflect the belief that testamentary intent will be served for most testators by saving lapsed gifts for the issue of designated family members, but not for others.

Automatic exclusion of steprelatives from this category of family members ignores the reality of stepfamilies. The treatment of

¹¹⁰ See T. ATKINSON, *supra* note 71, at 777. As a general rule, void gifts pass to residuary estate beneficiaries or to the testator's heirs. *Id.*

¹¹¹ See *id.* at 779-83.

¹¹² *Id.*

¹¹³ See *In re Estate of Cook*, 44 N.J. 1, 206 A.2d 865 (1965); *Sands v. Ross*, 89 N.E.2d 99 (P. Ct. Ohio 1949); Annotation, *Who Are Within Terms "Relation," "Descendant," "Child," "Brother," "Sister," etc. Describing the Legatee or Devisee, in Statute Providing Against Lapse Upon Death of Legatee or Devisee Before Testator*, 63 A.L.R.2d 1195 (1959).

In some jurisdictions another type of antilapse provision applies to all residuary estate legatees and provides that the gift to a legatee who fails to survive the testator passes to the surviving residuary estate legatees, if any. See T. ATKINSON, *supra* note 71, at 784. In the absence of such a statute, the lapsed share of the residuary estate passes to the testator's heirs. *Id.* at 785. In *In re Marquet's Will*, 178 N.Y.S.2d 783 (Sur. Ct. 1958), for example, the residuary clause named three beneficiaries, the sister, the brother, and the stepdaughter of the testator. When the sister predeceased the testator, her one-third interest lapsed and was distributed to the testator's sole heir, the brother. The stepdaughter did not share in the lapsed legacy because, as discussed *supra* text accompanying notes 7-34, the intestacy laws do not recognize stepchildren as heirs.

stepfamily members under the antilapse statutes should be reconsidered in light of the changing nature of families and the purpose of the statutes.

Extension of antilapse statutes to steprelative beneficiaries could be accomplished in one of two ways. First, the categories of relatives described in the antilapse statutes could be expanded to include automatically all stepfamily members in the corresponding degrees of relationship to the testator. For example, a statute that applied to children of the testator would be extended to all stepchildren. In the alternative, extension of the antilapse statute could be limited to cases in which the steprelative stood in a de facto family relationship to the testator.

The Ohio antilapse statute applied in *Sands v. Ross*¹¹⁴ provides a reference for analyzing how the above proposals would apply in a typical case. In *Sands* the testator devised the residuary estate to his two stepdaughters and a niece. One stepdaughter predeceased the testator, leaving two children. The Ohio antilapse statute applied to "children and other relatives" who leave issue. The court summarily refused to apply the statute to the lapsed gift "since stepdaughters are not considered 'children.' . . ."¹¹⁵ The one-third interest in the residuary estate descended to the testator's (unnamed) heirs under the intestacy statute. The *Sands* opinion contains no information about the de facto relationship between the testator and the predeceased stepdaughter.

Under the first proposal set out above, the stepdaughter in *Sands* would be automatically included in the antilapse statute, and the one-third interest saved for her issue. The result would be premised on an assumption that the testator who benefits a steprelative does so by virtue of the family relationship between them. Because of this existing family relationship, equal treatment as to steprelatives and other relatives would be appropriate under the antilapse statute. The risk involved in this formula is overbreadth. As noted earlier, the antilapse statutes involve a degree of overbreadth even as they apply to natural relatives, based on a generalization that testators would desire to substitute the issue of a predeceased beneficiary.¹¹⁶ The proposed extension to stepfamily members requires a second generalization, namely, that testators generally regard steprelative beneficiaries in the same manner as natural relative beneficiaries for this purpose.

The narrower alternative proposal avoids the problem of potential overbreadth in the antilapse statute. Stepfamily members would be

¹¹⁴ 89 N.E.2d 99 (P. Ct. Ohio 1949).

¹¹⁵ *Id.* at 99.

¹¹⁶ See *supra* text accompanying notes 110-13.

treated like relatives only on the basis of a determination that the steprelative beneficiary was regarded as a family member by the testator. In *Sands*, for example, the issue of the testator's stepdaughter would receive their mother's share only if they could establish a de facto parent-child relationship between the testator and their mother. On the basis of this determination, the stepdaughter would be properly included in the category of "children and other relatives" under the Ohio antilapse statute. The downside of this alternative proposal is the inconvenience and uncertainty of property rights introduced by the requirement of a case by case determination of family relationships.¹¹⁷

The possible overbreadth of the first proposal, and the inconvenience of the refined proposal, do not lead to the conclusion that the status quo should be maintained. The automatic exclusion of stepfamily members from the benefit of antilapse statutes in the current law is a harsh rule in a society where steprelationships are important family relationships for so many people. Antilapse statutes should be modified, according to one of these two proposals, in order to recognize family relationships created by marriage.¹¹⁸

Another change in family circumstances that may affect bequests to steprelatives is the testator's divorce following execution of the will. In many states, the testator's divorce revokes testamentary gifts to the former spouse.¹¹⁹ A common testamentary scheme devises property to the testator's spouse, and names a substitute beneficiary in the event that the spouse fails to survive the testator. If the testator dies following

¹¹⁷ The proposed test for stepfamily inheritance set out earlier, *see* text accompanying *supra* notes 53-67, requires a similar determination of de facto family relationships. Precedent also exists in the law of class gifts for probate courts to enquire about the nature of individual stepfamily relationships. In the law of class gifts, *see supra* text accompanying notes 87-109, proof of the de facto family relationship between steprelatives is relevant in determining testator's intent to include stepfamily members in a class gift.

¹¹⁸ In *In re Estate of Cook*, 44 N.J. 1, 206 A.2d 865 (1965), the residuary clause named testator's sister and her stepson, "their heirs and assigns, share and share alike." 44 N.J. at 2, 206 A.2d at 866. When the stepson predeceased the testator, the New Jersey antilapse statute did not apply because the stepson was not a relative of the testator; furthermore, the stepson left no surviving issue. The *Cook* court construed the will language referring to heirs to create a gift over to the stepson's surviving wife. The court relied upon extrinsic evidence that the testator continued a relationship with her stepdaughter-in-law, and that much of the residuary estate had been inherited from her husband, the stepson beneficiary's father. The *Cook* court understood the testator's intent to benefit her stepson to be the broader intent to benefit him and his family. The antilapse statutes enforce precisely this type of donative intent, but not for steprelatives.

¹¹⁹ *See* 5B G. THOMPSON, *supra* note 7, § 2626, at 121.

divorce without changing the will provision, a determination must be made whether the substitutionary gift is effective.¹²⁰ Courts have treated substitutionary gifts to natural children and to stepchildren in these circumstances in an evenhanded manner.

In some jurisdictions, by statute, the property prevented from passing to the former spouse because of revocation by divorce must pass as if the former spouse predeceased the testator.¹²¹ This type of statute has been applied in cases in which the substitutionary beneficiaries were the former spouse's children — the testator's stepchildren.¹²² A similar judicial rule of construction was applied in a case involving a devise of the entire estate to testator's wife, but if she failed to survive, then to her sons.¹²³ When divorce revoked the gift to the wife, the rule of construction passed the estate to the testator's stepsons, even though their mother survived the testator.

In other jurisdictions, in the face of a primary gift to the former spouse revoked by divorce, courts have determined the effectiveness of the substitutionary gift without the aid of a rule of construction. In these cases, courts have focused on the testator's implied intent.¹²⁴ For example, in *Porter v. Porter*,¹²⁵ the Iowa Supreme Court held that the relationship of affinity between the testator and the alternative beneficiary stepchild was not relevant in determining testamentary intent. The court properly concluded that "[t]here is no reason to assume that in all or even most cases a testator estranged from his spouse will also be estranged from alternative beneficiaries under the will, even if they are relatives of that spouse."¹²⁶ On the basis of other evidence of intent in the will, the *Porter* court held that the testator would prefer to benefit the stepson over an intestate distribution of the estate.¹²⁷

¹²⁰ See Annotation, *Devolution of Gift Over upon Spouse Predeceasing Testator Where Gift to Spouse Fails Because of Divorce*, 74 A.L.R.3d 1108 (1976).

¹²¹ See, e.g., MO. ANN. STAT. § 474.420 (Vernon 1956); UNIFORM PROB. CODE § 2-508, 8 U.L.A. 122 (1983).

¹²² See *In re Estate of Zimmerman*, 28 Ill. App. 3d 107, 328 N.E.2d 199 (1975); *In re Estate of Shelton*, 19 Ill. App. 3d 542, 311 N.E.2d 780 (1974); *Steele v. Chase*, 281 N.E.2d 137 (Ind. Ct. App. 1972).

¹²³ See *Lamontagne v. Hunter*, 341 So. 2d 1074 (Fla. Dist. Ct. App. 1977).

¹²⁴ See, e.g., *Porter v. Porter*, 286 N.W.2d 649 (Iowa 1979); *In re Estate of McLaughlin*, 11 Wash. App. 320, 523 P.2d 437 (1974).

¹²⁵ 286 N.W.2d 649 (Iowa 1979).

¹²⁶ *Id.* at 655; see also *McLaughlin*, 11 Wash. App. 320, 523 P.2d 437 (gift over to stepson in event of mother's death before testator held ineffective; no reliance placed on fact that alternative beneficiary was stepson rather than natural child).

¹²⁷ The dissenting opinion in *Porter* strongly objected to the court's activism in effectuating a gift that had not been expressed in the will. *Porter*, 286 N.W.2d at 657-58

In these revocation by divorce cases, the effectiveness of the gift over has been determined with no apparent reliance on the fact that the alternative beneficiaries were stepchildren rather than natural children of the testator. This evenhanded approach to the treatment of stepfamily beneficiaries is laudable.

The primary goal in both the construction of class gift terminology and the construction of express gifts to steprelatives is the effectuation of testamentary intent. To enhance and further this goal, legislatures and courts must recognize that stepfamily relationships in many cases are true family relationships. Thus, courts should look to the nature of individual steprelationships to determine whether the testator intended to include steprelatives in a class gift. State legislatures should extend antilapse statutes to steprelative beneficiaries. These approaches to testamentary gifts to steprelatives would be likely to effectuate testamentary intent for stepfamily members.

CONCLUSION

Recognition of family relationships in the wealth transmission process is an important aspect of the protection that the legal system extends to families. The stepfamily is a common variation of the traditional nuclear family in modern society. Many steprelatives form true family ties, and thereby become the natural objects of each other's bounty. These individuals are harmed when stepfamilies are excluded from the definition of "family" in the laws regulating the disposition of property at death.

The law of intestate succession embodies a fixed presumption that intestate property owners desire to benefit their closest relatives. This pattern of property distribution accomplishes the testamentary goals of most intestate owners, and provides financial protection for dependent surviving family members. However, the categories of relatives who are heirs under modern intestacy statutes do not include steprelatives. By denying inheritance rights between stepfamily members, the intestacy statutes ignore the reality of modern family life and defeat their own purpose.

This Article proposes a change in the law of intestate succession, whereby stepparents and stepchildren would inherit as parents and children, when certain conditions are met. Inheritance would be permitted in stepfamilies where real family ties exist, and the members

(McGiverin, J., dissenting). This objection would extend to analogous situations involving a natural child as the substitute beneficiary.

have become the likely objects of each other's bounty. The proposed modification would thereby promote the goals of the intestacy laws.

In the law of wills, the intention of the individual testator controls the distribution of property at death. The existence of a family relationship between testator and beneficiary may be relevant in cases where the language of the will is ambiguous. For example, the family relationship may be determinative in ascertaining membership of a class, or the disposition of a lapsed gift. The blanket failure to recognize stepfamily relationships for these and other purposes in the construction of wills, defeats testamentary intent.

Stepfamilies in which real family ties are developed deserve protection under the law. The law of intestate succession and wills confers important benefits on family members that should be extended to stepfamily members in appropriate cases.