

THE PROBATE DEFINITION OF FAMILY: A PROPOSAL FOR GUIDED DISCRETION IN INTESTACY

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Intestacy statutes may not match the wishes of many people who die intestate. Changes to the Uniform Probate Code (UPC) include or exclude potential takers, as the drafters attempt to bring the UPC provisions closer to the intent of more intestate decedents. As the UPC tries to fine-tune the intestacy statutes, however, family circumstances continue to get more and more complicated. Families headed by unmarried couples, blended families with children from multiple marriages, and families in which adults raise children who are not legally theirs, have become commonplace. For some decedents, non-family friends and caregivers may be more important than legal relatives. Given the diversity of decedents' family structures and wishes with respect to their property, constructing an intestacy statute based on fixed rules has become ever more problematic.

This Article examines the UPC's treatment of the family in the intestacy rules and looks at provisions from other state intestacy statutes. The Article analyzes the definitions of "spouse" and "child" and identifies problems created by the current definitions. The Article reviews some of the many proposals for intestacy reform, especially those that advocate a degree of judicial discretion. After discussing provisions in the UPC and a few state statutes that already permit judicial discretion, the Article proposes an intestacy statute that provides a relatively simple default rule for inheritance and permits judicial discretion, exercised within a framework of statutory guidance, to determine the proper distribution of an intestate's property.

INTRODUCTION

The UPC and statutes in all states provide default rules that direct the distribution of property when a person dies with probate property and without a will. The default rules—intestacy statutes—give the decedent's property to members of the decedent's family, following rigid relationship rules based on legal status.¹ For the most part, functional relationships do not affect inheritance,

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1. See, e.g., UNIF. PROBATE CODE §§ 2-102 to -103 (2011), 8 U.L.A. pt. I, at 36-37 (1998).

although a potential heir who murders or abuses the decedent may lose her inheritance.²

Although intestacy statutes are only default rules, avoided relatively easily by executing a will or transferring property through various nonprobate means, the intestacy rules will control the distribution of property at death for a significant number of people.³ People procrastinate when it comes to executing their wills,⁴ and a person may assume that the law will give it to her family.⁵ A person may not want to incur the cost of having a will prepared, and may dislike the idea of going to a lawyer.⁶ Complicated family dynamics may make family members reluctant to discuss estate planning.⁷ Whatever the reasons, substantial numbers of decedents will have property distributed pursuant to intestacy statutes.

Intestacy statutes are important not only because they provide rules for the transfer of property when someone dies without a will, but also because they provide the definitions for terms used in wills and trusts. The term “heirs” will be understood based on intestacy

2. See, e.g., § 2-803, 8 U.L.A. pt. I, at 172–74 (Supp. 2011) (denying a person who kills the decedent the right to inherit); § 2-114(c), 8 U.L.A. pt. I, at 91–92 (1998) (denying a parent who abandons a child the right to inherit); *infra* text accompanying notes 131–134 (discussing slayer statutes); *infra* text accompanying notes 135–139 (discussing parental abandonment of child).

3. In a March 2011 study conducted by Harris Interactive, 57 percent of the 1,000 people surveyed did not have a will. The percentage was greatest for younger people, but 22 percent of those above age sixty-five did not have a will. Jenny Greenhough, *57% of Adults Don't Have a Will*, ROCKET LAWYER INSIDER (Mar. 31, 2011), <http://insider.rocketlawyer.com/2011-wills-estate-planning-survey-9524>. For a list of surveys examining testacy, see Christy G. Lomenzo, Note, *A Goal-Based Approach to Drafting Intestacy Provisions for Heirs Other Than Surviving Spouses*, 46 HASTINGS L.J. 941, 945 (1995). Surveys from the 1960s and 1970s found, unsurprisingly, that intestacy was higher among younger, less educated, and less affluent respondents. See Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 13–14 (2000).

4. See Greenhough, *supra* note 3 (“[32] percent of Americans would rather do their taxes, get a root canal, or give up sex for a month than create or update their Will [sic.]”); see also Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 339.

5. See Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 263–64 & n.319 (2001) (citing Monica K. Johnson & Jennifer K. Robbennolt, *Using Social Science to Inform the Law of Intestacy: The Case of Unmarried Committed Partners*, 22 LAW & HUM. BEHAV. 479, 489 (1998) for a study that reported that “many [respondents] mistakenly assumed that their nonmarital partners would inherit as intestate heirs (33.3% of respondents with opposite-sex partners; 46.8% of female respondents with same-sex partners; 43.2% of male respondents with same-sex partners)”).

6. See Foster, *supra* note 5, at 263.

7. See Marjorie Engel, *Pockets of Poverty: The Second Wives Club—Examining the Financial (In)security of Women in Remarriages*, 5 WM. & MARY J. OF WOMEN & L. 309, 343–44 (1999) (describing the failure to plan in stepfamilies).

statutes and terms like “descendant” and “issue” will usually be given the meaning provided by the intestacy statutes.⁸

In addition, intestacy statutes have an expressive function.⁹ Intestacy statutes serve as a statement of what society considers family to be, because they define who counts as a family member.¹⁰ This expressive function is important in validating family members’ relationships. As Mary Louise Fellows has written, “At the same time that heirship statutes reflect social norms and values, they also shape the norms and values by recognizing and legitimating relationships.”¹¹

The primary goal of intestacy statutes, as stated by the drafters of the UPC and by scholars, is to transfer property according to the probable intent of a decedent who dies without a will.¹² The statutes try to reach the result that most intestate decedents likely would want, with an understanding that anyone can execute a will and avoid the application of the statutes. Recent revisions to the UPC represent attempts to make the intestacy statute more likely to reflect the decedent’s intent.¹³

8. See UNIF. PROBATE CODE § 2-705 (2011), 8 U.L.A. pt. I, at 141–42 (Supp. 2011); § 2-708, 8 U.L.A. pt. I, at 203 (1998). A court can interpret one of these terms differently if the decedent intended a different meaning.

9. See E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1063–76 (1999); cf. Adam Hirsch, *Default Rules in Inheritance Laws: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1053–58 (2004); Carla Spivack, *Let’s Get Serious: Spousal Abuse Should Bar Inheritance*, 90 OR. L. REV. 247, 259–61 (2011).

10. See T.P. Gallanis, *Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality*, 60 OHIO ST. L.J. 1513, 1514–16, 1529 (1999) (noting that the expressive nature of legal default rules might cause social conservatives to urge that laws not be changed to include same-sex couples); Gary, *supra* note 3, at 12–13.

11. Mary Louise Fellows, *Pride and Prejudice: A Study of Connections*, 7 VA. J. SOC. POL’Y & L. 455, 467 (2000).

12. UNIF. PROBATE CODE art. II, pt. I, general cmt. (2011), 8 U.L.A. pt. I, at 34 (Supp. 2011) (“The pre-1990 Code’s basic pattern of intestate succession, contained in Part I, was designed to provide suitable rules for the person of modest means who relies on the estate plan provided by law. The 1990 and 2008 revisions were intended to further that purpose, by fine tuning the various sections and bringing them into line with developing public policy and family relationships.”); Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 913 (1992) (“The legislature substitutes its own perception of the desires and expectations of the average person for the unexpressed subjective intent of the decedent.”); Fellows, *supra* note 4; Gary, *supra* note 3 at 7–8; see also Lomenzo, *supra* note 3, at 947 (describing the ways in which intestacy distribution serves society’s interests), Spitko, *supra* note 9, at 1066 (listing seven values that are “central” to the UPC intestacy provisions).

13. UNIF. PROBATE CODE art. II, pt. I, general cmt. (2011), 8 U.L.A. pt. I, at 34 (Supp. 2011).

Another goal for intestacy statutes may be to provide support for the decedent's dependents.¹⁴ Some commentators have proposed addressing dependency directly in intestacy statutes rather than providing for dependents' needs only when the dependents receive intestate shares as the relatives closest to the decedent. In addition, the statutes should be perceived to be fair, particularly in the view of those who survive the decedent.¹⁵ By tying intestacy statutes to "family," the drafters of these statutes hope they will carry out the intent of many decedents, while providing financial support to family members. The statutes also support the family psychologically through the recognition they provide.¹⁶ Unfortunately, for some families the statutes' definitions of family do not match the decedents' definitions.

Intestacy statutes may also have a public policy role in denying inheritance to an heir that has engaged in specified bad behavior. Murdering the decedent will result in the loss of inheritance for most heirs, and states have begun to deny inheritance to heirs who have abused or abandoned children, spouses, and elders.¹⁷ The goal of these provisions may be, in part, to conform to the intent of the decedent who was murdered or abused, while carrying out society's disapprobation of such behavior.¹⁸

The comments to the UPC note that intestacy statutes should meet these goals within a probate system that prizes "ease of administration and predictability of results."¹⁹ Increasingly it seems

14. See John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 501 (1977) (noting that Professor R. Ely had identified the four goals of intestacy statutes as "(1) continuation of the regime of private property as dominant in the social order; (2) effectuation of the wishes of the individual; (3) provision for the well-being of the family; and (4) provision for the well-being of society").

15. See Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 12 (1998) ("The question of fairness goes beyond issues of equality. Fairness also includes equity considerations of financial dependence, reliance, unjust enrichment and trust.").

16. See Jennifer Seidman, *Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession*, 75 U. COLO. L. REV. 211, 225 (2004) (noting that emotional commitment and financial interdependence are values intestacy law seeks to protect and reward); see also Jennifer R. Boone Hargis, Note, *Solving Injustice in Inheritance Laws Through Judicial Discretion: Common Sense Solutions from Common Law Tradition*, 2 WASH. U. GLOB. STUD. L. REV. 447, 451-52 (2003) (describing various goals of intestacy statutes).

17. See *infra* text accompanying notes 131-50.

18. See, e.g., Paula A. Monopoli, "Deadbeat Dads": *Should Support and Inheritance Be Linked?*, 49 U. MIAMI L. REV. 257, 277-78 (1994) (suggesting that blocking inheritance for abandonment of a child may not reflect the child's intent, because children may want to maintain a relationship with a father who abandoned them).

19. UNIF. PROBATE CODE art. II, pt. II, general cmt. (2011), 8 U.L.A. pt. I, at 69 (Supp. 2011) (explaining the decision to use a mechanically determined elective share, rather than an elective share that would require judicial discretion in determining whether property held by the spouses was marital property or separate property). When a surviving domestic

that ease of administration and predictability supersede intent and need as goals of intestacy statutes. Although ease of administration is achieved, intestacy statutes likely do not give effect to the intent of decedents in many cases, may serve to provide intestate shares to relatives who do not “deserve” or do not need the inheritance, and may deny shares to persons who were dependent on the decedent or who were close and helpful to the decedent. Despite many articles advocating better alignment between intestacy statutes and the likely wishes of property owners or the needs of surviving family members,²⁰ the existing body of statutes has become increasingly “antiquated”²¹ and more “like a museum.”²²

Part I of this Article examines the development of U.S. intestacy law and reviews the current state of the UPC and intestacy statutes around the country. Part I analyzes the definitions of “spouse” and “child,” looking at the UPC definitions and state statutes. Part I also considers statutory limits on inheritance based on behavior. Part II then identifies problems created by the current statutes and argues that guided discretion might provide several advantages over current law. This part explains that some intestacy statutes already use a limited degree of judicial discretion and explains the application of family maintenance, a form of judicial review used in Commonwealth countries. This part reviews scholarly proposals that have advocated the use of discretion in specific aspects of intestacy statutes. Part III presents a proposal for guided discretion, explaining the structure of the statute and the guidance the statute would provide. This part addresses potential criticisms of the proposal and concludes that guided judicial discretion in intestacy

partner challenged the constitutionality of the New York intestacy statute because it denied him a share of his partner’s estate, the court upheld the statute and said:

The state has a substantial, if not overwhelming, interest in having its descent and distribution scheme clear, simple, predictable and capable of determining heirs at the moment of death. Determination of distributees must be accomplished with a minimum of hearings, investigations and collateral litigation. This can only be accomplished by the establishment of a licensing procedure for the creation of the marital relationship.

In re Petri, N.Y.L.J., Apr. 4, 1994, at 29 (N.Y. Cnty. Surr. Ct. Apr. 3, 1994).

20. See *infra* text accompanying notes 184–211.

21. Peter J. Harrington, *Untying the Knot: Extending Intestacy Benefits to Non-Traditional Families by Severing the Link to Marriage*, 25 ST. JOHN’S J. C.R. & ECON. DEV. 323, 323 (2011) (“[N]umerous changes to the traditional family structure have left the UPC intestacy system antiquated. As a result, the inheritance rights of non-traditional families are vulnerable.”).

22. Seidman, *supra* note 16, at 211 (quoting MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE*, 289–90 (1989)).

may provide better results for more families than the current statutes.

I. CURRENT U.S. INTESTACY LAW

A. Early Development

Over the years, American intestacy statutes have responded to changes in dispositive preferences.²³ Most American jurisdictions adopted something similar to the Statute of Distribution of 1670, which in England applied to personal property.²⁴ The British custom of primogeniture never took hold in the United States, so U.S. statutes applied the same rules to real as well as personal property.²⁵ These statutes provided a one-third share for the surviving spouse if the decedent left descendants, and a one-half share if the decedent left no descendants.²⁶ The part of the estate not distributed to the spouse went to the descendants, or, if there were none, to collateral relatives.²⁷ Descendants and collateral relatives were those related by blood, not adoption.²⁸ States began to adopt formal rules on adoption in the mid-nineteenth century, and by the twentieth century, adoption created a parent-child relationship that was treated as a legal relationship for intestacy as well as other purposes.²⁹ Thus, by the end of the twentieth century, intestacy's definition of "family" was primarily based on legal status: blood, marriage, or adoption.³⁰

23. See MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 17–36 (1981) (discussing the effects of changes in marriage and family on intestacy statutes); MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 238–40 (1989) (describing the development of the law of inheritance); MARVIN B. SUSSMAN ET AL., *THE FAMILY AND INHERITANCE* 16–23 (1970).

24. See Martin L. Fried, *The Uniform Probate Code: Intestate Succession and Related Matters*, 55 ALB. L. REV. 927, 936–39 (1992) (discussing Statute of Distribution, 1670, 22 & 23 Car. 2, c. 10 (Eng.)).

25. See *id.* at n.2.

26. See *id.* at 927.

27. See *id.*

28. See Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 714–15 (1984).

29. See *id.* at 716–17.

30. See UNIF. PROBATE CODE §§ 2-102, -103, -114 (1990) (amended 2008). By the end of the century, a new status category for domestic partners was being developed. Hawaii adopted its reciprocal beneficiary statute in 1997, creating intestacy rights for someone registered as a reciprocal beneficiary. See HAW. REV. STAT. ANN. § 572C-1 (LexisNexis 2010). A number of other states now have registration statutes for domestic partners. See *infra* text accompanying notes 74–83. All of the registration statutes create a legal status based on registration. *Id.*

The Uniform Law Commission (ULC)³¹ promulgated the first Uniform Probate Code in 1969.³² The ULC revised the UPC in subsequent years, and then in 1990 the ULC approved a significant revision to Article II, the article that covers intestacy, wills, and donative transfers.³³ The 1990 UPC has been revised several times, with a significant revision to Article II completed in 2008.³⁴

The 1990 UPC, as amended, gave a larger share to the surviving spouse, and also tried to identify situations in which the decedent would want parents or children to take some share of the estate and not have the entire estate go to the surviving spouse.³⁵ The 2008 Amendments added stepchildren as a category of potential takers for a decedent who leaves no other heirs.³⁶ Although the goal of the 1990 UPC and the 2008 Amendments was to reflect dispositive wishes of more decedents, the revisions left gaps in coverage. The UPC does not cover unmarried partners or non-genetic children who have not been adopted by the decedent, except for the limited provision for stepchildren. For example, if two women in a long-term, unmarried relationship raise a child that is genetically related to one of them and not adopted by the other, the two women will not inherit from each other and the child will inherit only from his genetic mother and not from his other mother. In addition, the UPC ignores other relationships the decedent may have had that fall outside the definition of family followed by the UPC.

This part examines provisions in the probate codes (the UPC and state statutes) that apply (1) to spouses and partners, (2) to children, and (3) to any potential heir who engaged in behavior

31. The Uniform Law Commission (ULC) is also known as the National Conference of Commissioners on Uniform States Laws (NCCUSL). This Article uses the name ULC, because NCCUSL now prefers that name. See UNIF. LAW COMM'N, <http://www.nccusl.org/> (last visited Apr. 1, 2012).

32. See UNIF. PROBATE CODE (1969), available at http://www.law.upenn.edu/bll/archives/ulc/upc/upc_1969.pdf.

33. Revisions to the 1969 UPC (although not necessarily to the intestacy provisions) occurred in 1975, 1982, 1987, and 1989. In 1990 the entire UPC was updated, and the new baseline became the 1990 UPC. That version was revised in 1991, 1997, 1998, 2002, 2003, 2008, and 2011. This Article will use "1990 UPC" to mean the 1990 UPC as amended. The Article will identify the 2008 and 2011 Amendments separately.

34. The ULC website lists seventeen states as having adopted the UPC. *Legislative Fact Sheet—Probate Code*, UNIF. LAW COMM'N, www.nccusl.org/LegislativeFactSheet.aspx?title=Probate%20Code (last visited Sept. 4, 2011).

35. If the estate is large, the UPC creates a share for parents when no descendant survives. UNIF. PROBATE CODE § 2-102(2) (2011), 8 U.L.A. pt. I, at 36–37 (Supp. 2011).

36. The Uniform Probate Code provides that if no spouse and no grandparents or descendants of grandparents survive the decedent, any descendants of a deceased spouse or spouses (step-descendants of the decedent) will take. § 2-102(1)(B), 8 U.L.A. pt. I, at 36 (Supp. 2011).

that causes the heir to lose an inheritance. In connection with each of these aspects of the intestacy statute, this Article discusses scholarly proposals for changes.

B. Spouses and Partners

1. Spousal Share Under the UPC

Mid-twentieth century studies showed that testators who executed wills gave more property to their surviving spouses than the intestacy statutes would have provided.³⁷ In response to these changes in the way people viewed their families and relationships, the 1969 UPC increased the spousal share from the share many intestacy statutes provided at the time.³⁸ The 1969 UPC gave the spouse the entire estate if the decedent left no descendants or parents, and gave the spouse the first \$50,000 and then one-half of the remainder if the decedent had descendants all of whom were descendants of the surviving spouse, or if one or both parents survived the decedent.³⁹ If the decedent left descendants who were not descendants of the surviving spouse, then the spouse received one-half and the descendants divided the other half.⁴⁰

Despite the increases in the spousal share, a study published in 1978 suggested that an even greater share would be more likely to match decedent wishes.⁴¹ When the UPC drafters revised the UPC in 1990,⁴² they increased the share of the surviving spouse, based on a growing acceptance of the idea that most decedents would prefer that result.⁴³ Under the 1990 UPC, as amended, the surviving spouse receives the entire estate if (1) the decedent left descendants all of whom were descendants of the spouse, (2) the decedent left no descendants or parents, or (3) the estate was “small.”⁴⁴ If the decedent left parents but no descendants, the spouse receives the first \$300,000 plus three-fourths of the rest of

37. SUSSMAN, *supra* note 23, at 83; Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 251–55 (1963); see Edward H. Ward & J.H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393, 412–15 (1950).

38. UNIF. PROBATE CODE art. II, pt. 1, general cmt. (1969).

39. § 2-102.

40. §§ 2-102(4), 2-103(1) (1969).

41. See Fellows, *supra* note 4.

42. See *supra* note 33.

43. See UNIF. PROBATE CODE § 2-102 cmt. (1990) (citing numerous empirical studies). See also Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 229–35 (1991) (describing the theory behind the revisions).

44. UNIF. PROBATE CODE § 2-102A(a)(1) (1990) (amended 2008).

the estate.⁴⁵ If the decedent left descendants all of whom are descendants of the surviving spouse and the spouse has one or more descendants who are not descendants of the decedent, the spouse receives \$225,000 plus one-half of the balance of the estate.⁴⁶ If the decedent left descendants who are not descendants of the spouse, the spouse receives \$150,000 plus half of the remaining estate of the decedent.⁴⁷ Thus, if an estate is less than \$150,000, the spouse will take the entire estate.

2. Proposals for Unmarried and Unregistered Partners

The number of unmarried partners in the U.S. continues to grow.⁴⁸ Unmarried couples may choose not to marry for many reasons given the decreasing social stigma of unmarried cohabitation. Some couples may consider marriage a patriarchal institution that they prefer to avoid.⁴⁹ Other couples may not be legally permitted to marry because the partners are the same sex.⁵⁰ Still other couples may choose not to marry because marriage will cause the loss of Social Security or other government benefits.⁵¹ Some unmarried couples may be in short-term relationships, but many couples are in long-term, committed relationships with as much stability as many marriages, if not more.⁵²

45. § 2-102(a)(2).

46. § 2-102(a)(3).

47. *Id.*

48. Data from the 2000 census shows 4,881,377 households headed by opposite-sex partners and 594,391 headed by same-sex partners. Tavia Simmons & Martin O'Connell, *U.S. Census Bureau, Married Couple and Unmarried Partner Households: 2000*, CENSUS 2000 SPECIAL REPORT 1, 4 tbl.2 (Feb. 2003), <http://www.census.gov/prod/2003pubs/censr-5.pdf>. A similar report based on the 2010 Census has not yet been published. See 2010 CENSUS DATA PRODUCTS: UNITED STATES, http://www.census.gov/population/www/cen2010/glance/files/At_A_Glance-v1.8.pdf (last visited Dec. 15, 2011). But, estimates of cohabiting couples in 2010 based on sampling, with a 90% confidence level, show 7,529,000 opposite-sex couples and 620,000 same-sex couples. Rose M. Kreider, *Increase in Opposite-Sex Cohabiting Couples from 2009 to 2010 in the Annual and Economic Supplement (ASEC) to the Current Population Survey (CPS) 1* (Household Econ. Statistics Div., U.S. Bureau of the Census, Working Paper, 2010) available at <http://www.census.gov/population/www/socdemo/Inc-Opp-sex-2009-to-2010.pdf>.

49. See Fellows et al., *supra* note 15, at 9 (explaining that opposite-sex couples may have rejected marriage "because of its patriarchal roots").

50. As of August 2011 only Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, New York, and Vermont permitted same-sex couples to marry. See *infra* text accompanying notes 75–83. Since then Maryland and Washington have both legalized same-sex marriage. See http://articles.cnn.com/2012-02-23/us/us_maryland-same-sex-marriage_1_marriage-bill-marriage-law-civil-unions?_s=PM:US.

51. For other reasons couples choose not to marry, see T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55, 83 (2004).

52. See *id.*

Several scholars have published proposals for an intestacy provision for a domestic partner.⁵³ In 1994, Lawrence Waggoner published a multi-factor test that a court would apply to determine whether a person meets the definition of de facto partner.⁵⁴ To be a de facto partner under the test, the surviving person must have been “regularly living in the same household with the decedent in a marriage-like relationship.”⁵⁵ The proposed statute lists factors the court should consider to determine the existence of a marriage-like relationship.⁵⁶ The test involves some fact-finding, but is sufficiently specific and nuanced to permit the determination with reasonable ease of whether a person fits the description.⁵⁷ The proposal also provides that the relationship should be presumed to be marriage-like if one or more factors exist.⁵⁸ The existence of the presumption streamlines the process of determining whether an intestacy share should be created for the surviving partner.

Gary Spitko published his proposal in 2002.⁵⁹ Professor Spitko’s proposal also creates a share for a committed partner who either had registered with the decedent as a domestic partner under the law of the state or demonstrates to the probate court, by clear and convincing evidence, that the partner and decedent had lived to-

53. In addition to the three proposals described here, other articles have advocated creating an intestate share for unmarried partners. *See, e.g.*, Harrington, *supra* note 21. This Article uses the term “domestic partner” rather than “committed partner,” except when describing proposals that use the other term. The American Law Institute’s Principles of the Law of Family Dissolution use the term domestic partner, AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch. 6 (2002), as do at least some of the registration statutes, *see, e.g.*, OR. REV. STAT. §§ 106.300–344 (2011).

54. Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 79–80 (1994).

55. *Id.* at 79.

56. *Id.* at 79–80.

57. *Id.* (noting that the factors are “(1) the purpose, duration, constancy, and exclusivity of the relationship; (2) the degree to which the parties pooled their financial resources . . . ; (3) the procreation or adoption of children and the degree of mutual care and support given them; (4) whether the couple went through a marriage ceremony; and (5) the degree to which the couple held themselves out to others as married or the degree to which the couple held themselves out to others as emotionally and financially committed to one another on a permanent basis, as exhibited by their acknowledging mutual rights, duties, and obligations toward one another”).

58. *Id.* at 80 (noting that a presumption applies if “(1) during the [six] year period next preceding the decedent’s death, the decedent and the individual lived together for periods totaling at least [five] years; (2) the decedent and the individual registered as domestic partners with and under procedures established by an organization and neither partner executed a document terminating or purporting to terminate the registration; or (3) the individual is the parent of a child of the decedent who, at the decedent’s death, was regularly living in the same household with the decedent and was younger than 18 years of age.”).

59. E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255, 345–49 (2002).

gether “as a couple in an emotionally and physically intimate partnership such that the intestacy scheme should protect the decedent’s interest in donative freedom, or the surviving committed partner’s reciprocity or reliance interests, by awarding to the survivor a portion of the decedent’s intestate estate.”⁶⁰ As with Professor Waggoner’s proposal, the proposed statute provides factors for the court to consider in determining whether the survivor was a committed partner of the decedent.⁶¹

In Professor Spitko’s proposal, the size of the intestate share increases based on the length of time the decedent and surviving committed partner cohabited before the decedent’s death.⁶² The share is 100 percent after fifteen years of cohabitation, except that if the decedent left children who are not children of the surviving partner, the share is reduced by one-half, and if the decedent had no descendants but is survived by a parent, the share is reduced by one-quarter.⁶³ The share continues, but is reduced, if the partnership fractured within two years of the decedent’s death, unless the partners’ assets had been distributed pursuant to a contract or statute when the partnership fractured.⁶⁴

In 2002 the Joint Editorial Board for Uniform Trust and Estate Acts (JEB-UTEA) asked Thomas Gallanis to prepare a study and draft statutory language to create an intestate share for unmarried partners.⁶⁵ Although the JEB-UTEA decided not to recommend that the Uniform Law Commission consider a change to the Uniform Probate Code, they encouraged Professor Gallanis to publish the proposal, which he did in 2004.⁶⁶ Professor Gallanis starts with a working draft written by Professor Waggoner in 2002, and modifies it by changing “committed partner” to “domestic partner” and “marriage-like relationship” to “qualified relationship.”⁶⁷ The proposal uses the factor and presumption approach developed in Professor Waggoner’s proposal, with some changes in language and the removal of the duration of the relationship as a factor.⁶⁸

60. *Id.* at 346.

61. *Id.* at 346–48.

62. *Id.* at 345. The assumption is that basing the size of the share on the length of the relationship will be more likely to reflect the decedent’s intent. The UPC uses a phased-share based on the length of marriage in determining the elective share. UNIF. PROBATE CODE § 2-203, 8 U.L.A. pt. I, at 77–78 (Supp. 2011).

63. Spitko, *supra* note 59, at 345–46.

64. *Id.* at 346.

65. Gallanis, *supra* note 51, at 56.

66. *Id.*

67. *Id.* at 86–87. The term “domestic partner” was used to be consistent with AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch. 6 (2002). *Id.* at 56 n.3.

68. *Id.* at 87–90.

Professor Gallanis notes that the factors draw from a study conducted by Mary Louise Fellows⁶⁹ and from the American Law Institute's Principles of the Law of Family Dissolution.⁷⁰ He adds, "The proposal maintains Professor Waggoner's emphasis on factors that rely on tangible, as opposed to oral, evidence in order to reduce groundless litigation."⁷¹ The Gallanis proposal not only creates an intestacy share for a survivor in a "qualified relationship," but also provides that wherever the word "spouse" appears in the UPC, the words "or domestic partner" are added.⁷²

Despite the existence of these proposals, the UPC does not yet include an intestacy provision for a surviving committed partner. One reason the UPC does not include a provision for committed partners may be political.⁷³ Recognition of unmarried partners, particularly same-sex partners, was, and continues to be, controversial throughout the United States. The Uniform Law Commissioners who vote to approve new uniform acts or revisions to uniform acts come from all fifty states plus the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Although Commissioners representing some states might view this provision as a good addition to the UPC, others likely would not. Even if the ULC approved the provision, many states would likely refuse to adopt it. A second reason may be that some states now provide for status-based inheritance by same-sex couples.⁷⁴ In those states, a couple can register or enter into a civil union and receive an intestate share based on that status. As indicated in this Article, status-based inheritance is easier to administer than inheritance

69. Fellows et al., *supra* note 15, at 55.

70. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch. 6 (2002).

71. Gallanis, *supra* note 51, at 90.

72. *Id.* Under the Gallanis proposal, a domestic partner would be covered by the elective share, UNIF. PROBATE CODE § 2-202 (2011), 8 U.L.A. pt. I, at 74–75 (Supp. 2011); the omitted spouse provision, § 2-301, 8 U.L.A. pt. I, at 317 (1998); and other protections for a surviving spouse such as a homestead allowance, § 2-402, 8 U.L.A. pt. I, at 96 (Supp. 2011); exempt property, § 2-403, 8 U.L.A. pt. I, at 97 (Supp. 2011); or family maintenance, § 2-404, 8 U.L.A. pt. I, at 98 (Supp. 2011).

73. Prof. Gallanis writes that the Joint Editorial Board for Uniform Trust and Estate Acts (JEB-UTEA) decided it did not have the authority "to approve statutory language or even to circulate such language for broader consideration." Gallanis, *supra* note 51, at 56. Although the JEB-UTEA acting on its own might not be able to approve statutory language, it could have recommended that the ULC appoint a drafting committee to continue work on the idea. The JEB-UTEA did so with respect to the changes to the parent-child definition that became the focus of the 2008 Amendments. These changes were also the subject of study by the JEB-UTEA before being considered by the Drafting Committee to Amend the Uniform Probate Code. See Memorandum from Susan N. Gary to Joint Editorial Board, Summary of Issues: Parent-Child Relationship (Oct. 25, 2003) (hereinafter Memorandum) (on file with author).

74. See *infra* text accompanying notes 75–83.

based on a judicial determination of the existence of a relationship.

From 2004, the date of the last of the three proposals, until 2011, the landscape for same-sex partners changed, at least in some states. In 2004, three states—Hawaii (reciprocal beneficiaries),⁷⁵ Vermont (civil unions),⁷⁶ and California (registered domestic partners)⁷⁷—provided some type of registration that, among other legal consequences, granted intestacy rights for the registered persons.⁷⁸ Massachusetts began issuing marriage licenses to same-sex couples in 2004.⁷⁹ By August 2011, eighteen states plus the District of Columbia provided for intestacy rights for same-sex couples through marriage,⁸⁰ civil union,⁸¹ registered domestic partnership,⁸² or a designated beneficiary agreement.⁸³

Although more same-sex couples now have the option of marrying or registering, the availability of marriage or registration does not eliminate the need for an intestacy share for unmarried or unregistered partners. First, the majority of unmarried partners are different-sex couples.⁸⁴ They have chosen not to marry for reasons that probably do not include a preference that the surviving partner not inherit. For same-sex couples, the public nature of registration may lead to a decision not to register, even in states

75. HAW. REV. STAT. ANN. § 572C-1 (LexisNexis 2010).

76. VT. STAT. ANN. tit. 15, § 1204(a) (2010) (explaining that parties to a civil union have the same benefits and responsibilities as spouses in a marriage).

77. CAL. FAM. CODE § 297(a) (West 2004 & Supp. 2012) (defining domestic partner). Other sections throughout the California statutes codify the rules.

78. For a history of these registration statutes, see Gallanis, *supra* note 51, at 63–70.

79. *Id.* at 71–72 (describing the history of the Massachusetts decision to permit same-sex marriage).

80. See CONN. GEN. STAT. ANN. § 46b-20 (West 2011); D.C. CODE § 46-401 (2005 & Supp. 2011); IOWA CODE ANN. § 633.211 (West 2003); MASS. GEN. LAWS ANN. ch. 190B § 2-102 (West 2011); N.H. REV. STAT. ANN. § 457:1-a (2004 & Supp. 2011); N.Y. DOM. REL. LAW § 10-a (McKinney 1998 & Supp. 2012); VT. STAT. ANN. tit. 15, § 1202 (2010); *Varnum v. Brien*, 763 N.W.2d 862, 906–07 (Iowa 2009) (extending full access to the institution of civil marriage to same-sex couples); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003) (declaring that exclusion of “qualified same-sex couples from access to civil marriage violates Massachusetts law”).

81. DEL. CODE ANN. tit. 13, §§ 201–217 (West 2009); HAW. REV. STAT. §§ 572B-1 to 572B-11 (LexisNexis 2010); 750 ILL. COMP. STAT. ANN. 75 (2009 & Supp. 2011); N.J. STAT. ANN. §§ 37:1-31(a) (West 2002 & Supp. 2011); R.I. GEN. LAWS § 15-3.1 (2003 & Supp. 2011).

82. CAL. FAM. CODE § 297 (West 2004 & Supp. 2012); CAL. PROB. CODE § 6401 (West 2002); ME. REV. STAT. ANN. tit. 22, § 2710 (2004 & Supp. 2011); ME. REV. STAT. ANN. tit. 18-A, § 2-102 (2011); NEV. REV. STAT. § 122A.100 (2011); OR. REV. STAT. §§ 106.300–.340 (2011); WASH. REV. CODE § 26.60.015 (2005 & Supp. 2012); WIS. STAT. ANN. § 770.001 (West 2009 & Supp. 2011).

83. Colorado permits a designated beneficiary to take an intestate share. See CO. REV. STAT. §§ 15-11-102.5, 15-22 (2011).

84. See *supra* text accompanying note 48.

that permit registration.⁸⁵ Other couples may view registration or marriage as heteronormative and avoid it for that reason.⁸⁶ And, of course, many states do not permit marriage or registration for same-sex couples. For many couples, both different-sex and same-sex, intestacy statutes based on status will not carry out their wishes.

C. Children

Although increased shares for spouses have meant decreased shares for children in some situations, children and further descendants continue to be important takers in all intestacy schemes. When a decedent does not leave a spouse or domestic partner, descendants may take the entire estate, to the exclusion of parents or other collateral relatives.⁸⁷ Thus, determining who will be considered a child and a descendant is important.

1. Adopted Children

a. UPC

The UPC has always included adopted children as children of the adoptive parents.⁸⁸ For inheritance purposes, the UPC provides that adoption cuts off the right of inheritance between the genetic⁸⁹ parent and child, replacing it with inheritance between the adoptive parent and child,⁹⁰ subject to an exception for adoption by a stepparent. If “the spouse of either genetic parent” adopts a child, the adoption will not cut off rights the child has to inherit from and through the parent who is no longer a parent.⁹¹ For example, assume that Mother and Father have a child, Son, and then Mother and Father divorce. Mother marries Stepfather and Stepfather adopts Son. Under the UPC, Son can inherit from and through Mother, Father, and Stepfather. Only Mother and Stepfa-

85. See Spitko, *supra* note 59, at n.17.

86. See Fellows, *supra* note 15, at 9–10.

87. UNIF. PROBATE CODE § 2-103(a) (2011), 8 U.L.A. pt. I, at 40 (Supp. 2011).

88. See UNIF. PROBATE CODE § 2-109 (1969) (amended 2008).

89. The 1969 UPC uses the term “natural parent” to mean birth parents, who were, in 1969, the genetic parents. *See id.* The 1990 UPC, as amended, uses the term “genetic parent” to mean the parents who contributed genetic material to create the child. *See* UNIF. PROBATE CODE § 2-115(7) (2011), 8 U.L.A. pt. I, at 51 (Supp. 2011). This article uses the term “genetic parent” with the meaning used in the 1990 UPC, as amended.

90. See UNIF. PROBATE CODE § 2-118 to -119 (2011), 8 U.L.A. pt. I, at 53–55 (Supp. 2011); UNIF. PROBATE CODE § 2-109 (1969) (amended 2008).

91. UNIF. PROBATE CODE § 2-119(a)-(b) (2011), 8 U.L.A. pt. I, at 55 (Supp. 2011).

ther and their relatives can inherit from Son. Some states apply the stepparent adoption provision only if the adoption occurs after the death of Father.⁹² In that case, it may be more likely that Father's relatives will remain in contact with Son. If Father is alive and gives up parental rights in order for Stepfather to adopt Son, it seems less likely that Father and his relatives will stay in contact. The UPC drafters took the view that over-inclusion is better than under-inclusion and chose to provide inheritance rights for Son even if Father voluntarily gave up parental rights.⁹³

The structure of the UPC's adoption provision, combined with the stepparent exception, creates a problem if an unmarried partner adopts the couple's child. For example, if Genetic Mother (GM) has a child and Adoptive Mother (GM's partner) adopts the child, that adoption will cut off the rights of inheritance between GM and the child. The problem is that the language of UPC § 2-119(b) says that adoption cuts off inheritance rights between genetic parents and the adopted child, with the stepparent adoption being an exception to that general rule.⁹⁴ The stepparent exception applies only if the adoptive parent is "the spouse" of the genetic parent.⁹⁵ Thus, if the same-sex couple agrees to co-parent but is not legally married, adoption by one parent cuts off inheritance rights for the other parent. The solution is for the genetic parent to adopt her own child—or execute a will.

The committee that drafted the 2008 Amendments was aware of the problem,⁹⁶ but decided not to address the issue with a specific exception. Without a status category for a domestic partner, an exception comparable to the stepparent exception was not feasible. The result is that, although someone who functions as a parent can be considered a parent for inheritance purposes,⁹⁷ a genetic parent whose child is adopted by anyone other than a spouse is specifically excluded from being considered a parent.⁹⁸

The 2008 Amendments added a number of new exceptions to the adoption provisions.⁹⁹ A person will continue to be treated as the

92. See, e.g., OR. REV. STAT. § 112.175(2)(b) (2011).

93. Neither type of statute actually considers whether the parent and the parent's family have continued to have a relationship with the child.

94. UNIF. PROBATE CODE § 2-119(b) (2011), 8 U.L.A. pt. I, at 55 (Supp. 2011).

95. *Id.*

96. See Memorandum, *supra* note 73.

97. See, e.g., UNIF. PROBATE CODE § 2-121(d) (2011), 8 U.L.A. pt. I, at 62–63 (Supp. 2011).

98. § 2-119, 8 U.L.A. pt. I, at 55 (Supp. 2011).

99. See Susan N. Gary, *We Are Family: The Definition of Parent and Child for Succession Purposes*, 34 ACTEC J. 171, 176 (2008); Sheldon F. Kurtz & Lawrence W. Waggoner, *The UPC Addresses the Class-Gift and Intestacy Rights of Children of Assisted Reproduction Technologies*, 35 ACTEC J. 30, 30–33 (2009); Lee-Ford Tritt, *Sperms and Estates: An Unadulterated Functionally*

child of his genetic parents (or parents as determined under the UPC rules for determining the parent-child relationship of a child conceived using assisted reproductive technology or original adoptive parents) if a relative or the spouse of a relative of either of his genetic parents adopts him.¹⁰⁰ “Relative” is defined to mean a descendant of the grandparent of the child.¹⁰¹ Parental status will also continue if a child is adopted after the death of her parents, even if the adoption is a stranger adoption.¹⁰² In both cases the reason for the exception is an assumption that a relationship will continue between the child and the relatives of the former parent, but the statute does not require evidence of a functional relationship.

b. State Intestacy Statutes

The intestacy statute in Texas provides that adoption does not cut off inheritance rights between a child and his genetic parents. This statute goes beyond the UPC and provides for inheritance through genetic parents regardless of whether the adoptive parents are related to the genetic parents. A child adopted at birth by persons unrelated to her genetic parents, sometimes referred to as an adopted-out child, can still inherit from her genetic parents if she can identify them.¹⁰³

Pennsylvania’s intestacy statute considers the functional nature of an adopted child’s relationship with his genetic family. The Pennsylvania statute limits inheritance by an adopted-out child to situations in which the person whose estate is being distributed “maintained a family relationship with the adopted person.”¹⁰⁴ The Pennsylvania statute applies to stepparent adoptions and to adoptions by a relative of the child’s legal parent.¹⁰⁵ Pennsylvania does not include a provision similar to UPC § 2-119(d) that provides for continuing inheritance rights if a non-relative adopts a child after the death of both parents. The Pennsylvania statute does not provide a bright-line rule but instead allows a court to limit

Based Approach to Parent-Child Property Succession, 62 SMU L. REV. 367, 407–13 (2009) [hereinafter Tritt, *Functionally Based Approach*] (“The fixation on providing for as many children as possible has created a complicated, inconsistent system.”); Lee-Ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories under the New Uniform Probate Code*, 61 ALA. L. REV. 273, 300–12 (2010) [hereinafter Tritt, *Competing Theories*].

100. UNIF. PROBATE CODE § 2-119(c) (2011), 8 U.L.A. pt. I, at 55 (Supp. 2011).

101. § 2-115(9), 8 U.L.A. pt. I, at 51 (Supp. 2011).

102. § 2-119(d), 8 U.L.A. pt. I, at 55 (Supp. 2011).

103. TEX. PROB. CODE ANN. § 40 (West 2011).

104. 20 PA. CONS. STAT. ANN. § 2108 (West 2005 & Supp. 2011).

105. *Id.*

inheritance to situations in which the child and a relative of the child's genetic parent had maintained contact. If the goal is to carry out the intent of the hypothetical decedent, Pennsylvania's statute may be more likely to do so than the UPC.

2. Assisted Reproductive Technology

In an attempt to address new ways of creating a child using assisted reproductive technology, the 2008 Amendments adopted a complicated set of rules to determine whether a person involved in the creation of a child—a genetic donor, a surrogate mother, or an intentional parent—will be considered a parent for purposes of the intestacy statutes.¹⁰⁶ The rules are similar to those that apply under the Uniform Parentage Act, but they are not identical. The consequence is that a child could be a child under one statute but not under the other.¹⁰⁷

A particular issue within the subject of assisted reproductive technology is the conception of a child after the death of the child's genetic mother or father.¹⁰⁸ Three early cases involving posthumously conceived children determined that the child or children qualified under the state intestacy statutes as children of the deceased parent for purposes of determining eligibility for Social Security benefits.¹⁰⁹ The cases addressed three elements: proof

106. For analyses of the new parent-child definition, see Gary, *supra* note 99; Kurtz & Waggoner, *supra* note 99; Tritt, *Functionally Based Approach*, *supra* note 99. See also Kristine S. Knaplund, *Children of Assisted Reproduction*, 45 U. MICH. J.L. REFORM 899 (2012).

107. See Gary, *supra* note 99, at 174–77, 180–84 (identifying differences between the UPA and the 2008 Amendments).

108. Numerous articles discuss legal issues relating to posthumously conceived children. See, e.g., Ronald Chester, *Freezing the Heir Apparent: A Dialog on Postmortem Conception, Parental Responsibility, and Inheritance*, 33 HOUS. L. REV. 967 (1996); Joseph H. Karlin, Comment, "Daddy, Can You Spare A Dime?": *Intestate Heir Rights of Posthumously Conceived Children*, 79 TEMP. L. REV. 1317 (2006); Robert J. Kerekes, *My Child . . . But Not My Heir: Technology, the Law and Post-Mortem Conception*, 31 REAL PROP. PROB. & TR. J. 213 (1996); Charles P. Kindregan, *Dead Dads: Thawing an Heir from the Freezer*, 35 WM. MITCHELL L. REV. 433 (2009); Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 ARIZ. L. REV. 91 (2004); Browne Lewis, *Graveside Birthday Parties: The Legal Consequences of Forming Families Posthumously*, 60 CASE W. RES. L. REV. 1159 (2010); Kathryn Venturatos Lorio, *Conceiving the Inconceivable: Legal Recognition of the Posthumously Conceived Child*, 34 ACTEC J. 154 (2008); see also Knaplund, *supra*, at 102–03 (citing numerous additional articles concerning posthumous conception and inheritance).

109. See *Gillett-Netting v. Barnhart*, 231 F. Supp. 2d 961 (D. Ariz. 2002); *Woodward v. Comm'r of Soc. Sec.* 760 N.E.2d 257 (Mass. 2002); *In re Estate of Kolacy*, 753 A.2d 1257, 1263–64 (N.J. Super. Ct. Ch. Div. 2000). In one case, *In re Martin B.*, 841 N.Y.S. 2d 207 (N.Y. Cnty. Surr. Ct. 2007), the determination of a parent-child relationship was necessary to determine a child's right to receive distributions under a trust that provided for distributions to "issue" of the grantor, whose son was the deceased father of the posthumously conceived children. *Id.* at 208.

of the genetic relationship, consent of the deceased parent to the use of the genetic material to create a child, and the length of time between the death of the parent and the birth of the child. Several more recent cases have determined that the posthumously conceived child is not a child of the deceased father.¹¹⁰ All of these cases depend on interpretations of state intestacy statutes. As Charles Kindregan has written, “at least for Social Security purposes state inheritance law must either expressly allow for posthumous conception of a child or contain language which is sufficiently vague to permit such an interpretation.”¹¹¹

The 2008 Amendments provide that a child conceived posthumously will be considered a child of the deceased parent if (1) the decedent deposited the sperm or eggs used to create the child (the genetic relationship), and (2) the child is in utero not later than thirty-six months after the parent’s death or is born not later than forty-five months after the parent’s death.¹¹² The element of consent is also required, but if the genetic parents were married—and if the surviving parent is the birth mother or if the surviving parent functions as a parent within two years of the child’s birth—then consent is presumed. Hence, unless there is clear and convincing evidence that a deceased genetic parent did not intend to be treated as a parent of the child, he or she will be treated as a parent.¹¹³ If the presumption does not apply, consent can be established by facts and circumstances that establish the deceased parent’s intent.¹¹⁴ If the survivor is the birth mother and the parents were not married, then the survivor can show that the father intended to function as a parent to the child but was prevented from doing so by death.¹¹⁵ Evidence that the decedent deposited genetic material, combined with testimony of the survivor that the two of them had

110. See, e.g., *Stephen v. Comm’r of Soc. Sec.*, 386 F. Supp. 2d 1257, 1265 (M.D. Fla. 2005); *Finley v. Austrue*, 270 S.W.3d 849, 854–55 (Ark. 2008) (involving implantation of an embryo after a husband’s death); *Khabbaz v. Comm’r of Soc. Sec.*, 930 A.2d 1180, 1180–81 (N.H. 2007).

111. Kindregan, *supra* note 108, at 446.

112. The comments explain, “The 36-month period in subsection (k) is designed to allow a surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy. The 36-month period also coincides with Section 3-1006, under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent’s death or one year after distribution.” UNIF. PROBATE CODE § 2-120(k) cmt. (2011), 8 U.L.A. pt. I, at 62 (Supp. 2011). The 45-month period creates certainty if the date of conception is uncertain.

113. UNIF. PROBATE CODE §§ 2-120(h)(2), -121(f) (2011), 8 U.L.A. pt. I, at 58, 63 (Supp. 2011).

114. § 2-121(e)(2), 8 U.L.A. pt. I, at 63 (Supp. 2011).

115. § 2-120(f)(2)(B), 8 U.L.A. pt. I, at 58 (Supp. 2011).

talked about using the material to have children, will probably suffice. The UPC does not require evidence that the decedent considered or consented to being treated as a parent of a child conceived posthumously.

The UPC definition of “child conceived posthumously” will likely result in a finding of parentage in any posthumous conception case.¹¹⁶ The relative ease of finding consent under the UPC differs from the requirement in the Uniform Parentage Act and the American Bar Association’s Model Act Governing Assisted Reproductive Technology (February 2008) that the deceased parent give consent, in writing, specifically for posthumous conception.¹¹⁷

3. Stepchildren

Under a provision added in the 2008 Amendments, step-descendants will be intestate heirs if the decedent left no other heirs; otherwise, the property will escheat to the state.¹¹⁸ Five states have a similar provision¹¹⁹ and seven states provide that the deceased spouse’s heirs will take to avoid escheat.¹²⁰ Only one state, California, gives a stepchild a child’s intestate share, and even then only under limited circumstances.¹²¹ The California statute provides that a stepchild (or foster child) will be treated as a child of the stepparent if the parent-child relationship began while the child was a minor, the relationship continued through the joint lifetimes of the parent and child, and adoption would have occurred but for

116. See Knaplund, *supra* note 108, at 100 (explaining that the RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5 cmt. 1 (1999) reaches this result); see also Knaplund, *supra* note 106 (pointing out that the presumption of consent if the decedent was married to the living parent applies even if genetic material was harvested post-mortem).

117. UNIF. PARENTAGE ACT § 707 (2002), 9B U.L.A. 73 (Supp. 2011); MODEL ACT GOVERNING ASSISTED REPROD. TECHS. § 607 (2009), available at <http://apps.americanbar.org/family/committees/artmodelact.pdf>.

118. UNIF. PROBATE CODE § 2-103(b) (2011), 8 U.L.A. pt. I, at 40 (Supp. 2011).

119. See CAL. PROB. CODE § 6402(e) (West 2002); CONN. GEN. STAT. ANN. § 45a-439(a)(4) (West 2004); MD. CODE ANN., EST. & TRUSTS § 3-104(e) (LexisNexis 2011); OHIO REV. CODE ANN. § 2105.06(J) (LexisNexis 2011); S.C. CODE ANN. § 62-2-103(6) (2009).

120. See ARK. CODE ANN. § 28-9-215(2) (2011); FLA. STAT. ANN. § 732.103(5) (West 2010); IOWA CODE ANN. § 633.219(6) (West 2003); KY. REV. STAT. ANN. § 391.010(6) (LexisNexis 2010); MO. REV. STAT. § 474.010(3) (2000); R.I. GEN. LAWS § 33-1-3 (2011); VA. CODE ANN. § 64.1-1(11) (2007). The Washington statute provides that if a person leaves property to his surviving spouse, and the surviving spouse later dies intestate and without heirs, the property received from the first spouse to die will go to that spouse’s descendants (the step-descendants of the second spouse to die). See WASH. REV. CODE ANN. § 11.04.095 (West 2005 & Supp. 2012).

121. CAL. PROB. CODE § 6454 (West 2002).

a legal barrier to adoption.¹²² Usually the legal barrier is the other parent's refusal to relinquish parental rights; after the child reaches age eighteen, the barrier vanishes. After the age of eighteen, the stepparent and child may no longer be concerned about adoption, so this statute applies primarily when a child is still under the age of eighteen when the stepparent dies.¹²³

Most intestacy statutes ignore other step-relatives.¹²⁴ A stepparent may have played a significant parental role in a child's life, but if the stepparent did not adopt the child and the child dies, the stepparent will not inherit. Other step-relatives of the child, such as siblings, aunts and uncles, and grandparents, do not come within any intestacy statute.¹²⁵

4. Grandchildren

Assuming that a grandchild fits the statutory definition of "child" with respect to his parent, and assuming that the parent fits that definition with respect to his own parent, the grandchild will be a descendant of the grandparent. Thus, if the grandchild's parent predeceases the grandparent, the grandchild will receive an intestate share of the grandparent's estate.¹²⁶ A problem for some families, however, is that a grandparent may be raising a grandchild because the parent is incarcerated or is an unfit parent because of drug use or other issues.¹²⁷ The arrangement may be informal, but it may last for many years. The grandparent may prefer that any assets she has go to the grandchild rather than to the parent. The grandchild's needs for the assets may be greater than

122. See *Estate of Joseph v. Joseph*, 949 P.2d 472, 475 (Cal. App. Dep't Super. Ct. 1998) (construing the requirement of a legal barrier to adoption as an ongoing requirement).

123. For an explanation of the California statute, see Gary, *supra* note 3, at 58–63; Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917, 925 (1989).

124. Carolyn R. Glick, Note, *The Spousal Share in Intestate Succession: Stepparents Are Getting Shortchanged*, 74 MINN. L. REV. 631, 646 (1990) (explaining that laws that provide for inheritance for biological family members typically are not extended outside of those immediate family members, and do not include individuals such as stepparents).

125. *Id.*

126. See, e.g., UNIF. PROBATE CODE § 2-103(a)(1) (2011), 8 U.L.A. pt. I, at 40 (Supp. 2011).

127. See Kristine S. Knaplund, *Grandparents Raising Grandchildren and the Implications for Inheritance*, 46 ARIZ. L. REV. 1, 2–5 (2006) (providing statistics regarding grandparents raising grandchildren, including numbers, demographics, and the duration of the arrangements); Michelle Harris, *Why a Limited Family Maintenance System Could Help American "Grandfamilies": A Response to Kristine Knaplund's Article on Intestacy Laws and Their Implications for Grandparents Raising Grandchildren*, 3 NAELA STUDENT J. 239, 243–45 (2007) (providing data about grandfamilies showing their numbers are increasing).

the needs of the parent, and the grandchild may be left without support if the grandchild is a minor when the grandparent dies. Grandparents often choose not to adopt the grandchildren, perhaps because they assume the arrangement will be temporary, because they do not want to force a child to give up parental rights, or simply because doing so does not seem necessary. To further complicate this situation, many of the families operating in this informal way may have modest or low incomes and may not have a will.¹²⁸

5. Other Informal Child-Rearing

Some ethnic and racial groups have family norms that involve caring for children who are extended family members. Informal adoption without legal documentation developed among African American families as a way to deal with impoverished circumstances in the years following the abolition of slavery.¹²⁹ A family might care for a niece, nephew, grandchild, or other child who needs assistance. American Indian and Latino cultures in the United States also have strong traditions of “kinship caregiving.”¹³⁰ Adults in these cultures often choose to adopt caregiving roles without taking legal steps to adopt children who need care.

D. Limits on Inheritance—Bad Behavior

1. Slayer Statutes

One way in which statutes incorporate a functional element into the definition of intestate heirs is to eliminate intestate shares based on certain types of bad behavior. UPC § 2-803 provides that an heir who “feloniously and intentionally kills the decedent” will be treated as if the heir disclaimed the intestate share.¹³¹ The statute requires a civil determination of felonious and intentional

128. See Harris, *supra* note 127, at 244–45 (noting that many grandparent caregivers are members of racial minority groups, particularly African Americans, and that fact “is probably indicative of increased intestacy rates” among grandparent caregivers). Harris cites statistical data with respect to age and poverty that may also indicate a greater likelihood of intestacy among grandparent caregivers. See *id.* at 243–44.

129. See ROBERT B. HILL, *INFORMAL ADOPTION AMONG BLACK FAMILIES* 24 (1977); Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACKLETTER L.J. 39, 43–44 (1993); Harris, *supra* note 127, at 245.

130. See Foster, *supra* note 5, at 246 (citing, among other sources, Elvia R. Arriola, *Law and the Family of Choice and Need*, 35 U. LOUISVILLE J. FAM. L. 691, 696–97 (1997)).

131. UNIF. PROBATE CODE § 2-803(b) (2011), 8 U.L.A. pt. I, at 173 (Supp. 2011).

killing, not a criminal conviction.¹³² Thus, the court will consider evidence based on a preponderance of the evidence standard.¹³³ All states have case law or statutes that bar a “slayer” from inheriting from the decedent he killed.”¹³⁴

2. Parental Abandonment of Child

A second type of behavior-based statute denies inheritance to a parent who abandoned or refused to support a child. The 2008 Amendments added a provision that bars a parent from inheriting from or through a child if the child dies before age eighteen, and if there is clear and convincing evidence that the parent’s parental rights could have been terminated for “nonsupport, abandonment, abuse, neglect, or other actions or inactions” under the law of the state.¹³⁵ The new provision prevents a parent who refuses to support a child from inheriting, but only if the child dies before the child reaches age eighteen.¹³⁶ The requirement that the child die before age eighteen probably relates to the difficulty of proving that the parent’s parental rights would have been terminated at some point long before the child’s death, and also to the fact that after age eighteen, the child can execute a will disinheriting the parent. This limitation means that a genetic parent who abandoned a child at birth could, unless parental rights were terminated at some point, surface at the child’s death thirty years later and inherit a share of the child’s estate.

Twenty-three states have statutes that bar inheritance by a parent who abandons or refuses to support a minor child.¹³⁷ Most of these statutes deny inheritance in the case of abandonment, assuming the conditions for denial exist, but two states give the court discre-

132. § 2-803(g), 8 U.L.A. pt. I, at 173 (Supp. 2011). A judgment of conviction for felonious and intentional killing conclusively establishes the convicted person as the decedent’s killer for purposes of losing the inheritance. *Id.*

133. *Id.*

134. See Anne-Marie Rhodes, *Consequences of Heirs’ Misconduct: Moving from Rules to Discretion*, 33 OHIO N.U. L. REV. 975, 979–82 (2007) (describing the history of slayer statutes and citing statutes or cases in all states that bar inheritance by a slayer); see also Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 496–504 (1986); William M. McGovern, Jr., *Homicide and Succession to Property*, 68 MICH. L. REV. 65, 65–75 (1969).

135. UNIF. PROBATE CODE § 2-114(a)(2) (2011), 8 U.L.A. pt. I, at 48 (Supp. 2011).

136. *Id.*

137. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5 cmts. 2, 14 (1999). See also Monopoli, *supra* note 18, at 267–70 (1994) (describing statutes barring parents from inheritance in cases of abandonment or failure to support); Rhodes, *supra* note 134, at 983–85.

tion to determine whether the parent's share should be reduced. In Illinois, the parent's share will be reduced unless the court decides, based on the effect of the abandonment on the child, to give the parent a reduced benefit "as the interests of justice require."¹³⁸ In South Carolina, the denial of inheritance occurs only if the other parent or some other interested party petitions the court to reduce or deny the inheritance.¹³⁹ Thus, in these two states, judicial discretion already exists with respect to parental abandonment.

3. Spousal Abandonment

Several states bar inheritance if the decedent's spouse lived in adultery, abandoned the decedent, or refused to support the decedent.¹⁴⁰ These statutes derive from early English statutes that barred a woman living in adultery from obtaining dower.¹⁴¹ The statutes typically provide that if one spouse abandoned the other spouse for a period of time, but they then resumed their marital relationship, the denial of inheritance will not apply.¹⁴² Now that spouses can dissolve their marriage and cut off inheritance rights, most states have removed these statutes and the UPC does not include this provision.¹⁴³

4. Elder Abuse

Four states have statutes barring inheritance by someone who abused an elder or dependent adult. The California, Illinois, and Oregon rules all apply to both financial and physical abuse, while the Maryland statute applies only to financial abuse.¹⁴⁴ The statutes also vary as to whether a conviction of abuse is required for application of the statute. The California statute defines abuse to

138. 755 ILL. COMP. STAT. ANN. 5/2-6.5 (West 2007).

139. S.C. CODE ANN. § 62-2-114 (2009).

140. For an excellent analysis of the adultery statutes and the abandonment statutes, see Rhodes, *supra* note 134, at 978–79. Professor Rhodes cites five states—Indiana, Kentucky, Missouri, North Carolina, and Ohio—with adultery statutes. *See id.* at 978 n.15. She cites nine states with abandonment statutes—Connecticut, Indiana, Michigan, Missouri, New Hampshire, New York, North Carolina, Pennsylvania, and Virginia—and adds that Hawaii and Massachusetts acknowledge spousal abandonment. *See id.* at 982 n.35.

141. *See id.* at 978.

142. *See id.* at 983.

143. *See id.* at 979, 983.

144. *See* CAL. PROB. CODE § 259 (West 2002 & Supp. 2012); 755 ILL. COMP. STAT. ANN. 5/2-6.2 (West 2007 & Supp. 2011); MD. CODE ANN., CRIM. LAW § 8-801(e) (LexisNexis 2002 & Supp. 2011); OR. REV. STAT. §§ 112.455–465 (2011).

include “physical abuse, neglect, or fiduciary abuse of the decedent, who was an elder or dependent adult.”¹⁴⁵ The California statute applies if the abuse and some additional factors are proved by clear and convincing evidence, *or* the heir was convicted of abuse under the California Penal Code.¹⁴⁶ Illinois requires a conviction of abuse, either physical or financial, and then provides that if the heir proves by clear and convincing evidence that the decedent “knew of the conviction and subsequent to the conviction expressed or ratified his or her intent to transfer the property”¹⁴⁷ to the heir, the court can decide to allow all or part of the inheritance. Oregon requires a conviction of elder abuse within five years of the decedent’s death for application of the statute.¹⁴⁸ If the conviction occurred more than five years before the decedent’s death, the statute will not apply, presumably because the legislature decided that five years is enough time for the decedent to write a will disinheriting the abuser.¹⁴⁹ Maryland’s statute denies inheritance if the heir was convicted of a financial crime against the decedent and did not fully restore the value of the property taken.¹⁵⁰

II. REASONS TO CONSIDER GUIDED DISCRETION

A. Complexity Is Not Working

The Uniform Law Commission (ULC) website lists only eighteen states as having adopted some version of the UPC. The UPC has likely influenced states not listed as “UPC states,” but the more recent changes to the intestacy provisions have not been widely

145. CAL. PROB. CODE § 259 (West 2002 & Supp. 2012).

146. CAL. PROB. CODE § 259(a)(1) (West 2002 & Supp. 2012). The other requirements for denial of inheritance are the following:

- (2) The person is found to have acted in bad faith.
- (3) The person has been found to have been reckless, oppressive, fraudulent, or malicious in the commission of any of these acts upon the decedent.
- (4) The decedent, at the time those acts occurred and thereafter until the time of his or her death, has been found to have been substantially unable to manage his or her financial resources or to resist fraud or undue influence.

147. 755 ILL. COMP. STAT. ANN. 5/2-6.2(b) (West 2007 & Supp. 2011).

148. OR. REV. STAT. § 112.455 (2011).

149. The statute does not apply after five years elapses, even if the decedent lacked the capacity to execute a will. § 112.455(b).

150. See MD. CODE ANN., CRIM LAW § 8-801(e) (LexisNexis 2002 & Supp. 2011).

adopted. One problem may be the increasing complexity of the UPC.¹⁵¹

The UPC drafters continue to tweak the UPC, trying to get closer and closer to a hypothetical decedent's wishes. As the drafters try to address more possible scenarios—multiple marriages, ART children, abusive heirs—the number of scenarios continues to expand. An intestacy statute has always been a one-size-fits-all proposition, and even with the increasing numbers of provisions that try to fine-tune the application of the intestacy code, the statutes may be less likely rather than more likely to match what the decedent wanted.¹⁵²

If complexity is not working, then what is the answer? One solution is for more people to execute wills.¹⁵³ A will provides the best evidence of a decedent's intent, and when a decedent has a will, the intestacy statute, with its inevitable flaws, will be unnecessary. The problem, of course, is that people continue to die intestate, despite efforts by the ULC and state legislatures to decrease the likelihood that probate law will refuse to give effect to wills based on errors in execution.¹⁵⁴

An alternative to consider is an intestacy statute that would give the probate court a modicum of discretion in the face of changing family dynamics. This Article proposes using a relatively straightforward intestacy statute, with a rebuttable presumption that the statute applies. The statute would create several categories of potential heirs and describe each category through a list of factors for the court to consider. The factors would guide the court in determining whether a person should qualify for an intestate share.

Under the proposed statute, a potential heir could challenge the application of the statute by presenting evidence that showed that the decedent would have preferred a different result, or that based on the needs of the presumptive heirs and the potential heirs, a different result would be appropriate. The statute would deny a share for an heir who murdered the decedent, but would allow the

151. See Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?* 77 MINN. L. REV. 639, 640 (1993) (describing the “compulsion to deal individually with every conceivable variation” and complaining that the 1990 UPC, in contrast with the pre-1990 UPC, is “complex and wordy”).

152. See Tritt, *Functionally Based Approach*, *supra* note 99, at 407 (describing the UPC definition of parent and child after the 2008 Amendments as “the kitchen-sink approach” with rules that are “overly complicated and ideologically inconsistent”).

153. Professor Knaplund makes this recommendation as a way to address the issue of grandparents raising grandchildren. See Knaplund, *supra* note 127, at 21.

154. See UNIF. PROBATE CODE § 2-503 (2011), 8 U.L.A. pt. I, at 108 (Supp. 2011); John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 1–2 (1987).

court to provide for a share if circumstances warranted doing so. The statute would permit the court to deny or reduce a share for an heir who abused or did not support the decedent, or to create or increase a share for a person who had a close, long-term relationship with the decedent. The statute would provide guidance for the court to consider in reaching its determination.

The advantages of guided discretion are several. Discretion may make effectuating the decedent's intention more likely. Discretion avoids trying to pin down every possible variation, which inevitably results in over-inclusion in some cases¹⁵⁵ and under-inclusion in others.¹⁵⁶ Through guided discretion, a court can address the needs of survivors, deny inheritance to those who mistreated the decedent, and provide some amount for those who aided the decedent. The goal is to improve results for intestate decedents and their families¹⁵⁷ without unduly increasing administrative costs and burdens on the courts.

B. Discretion Is Already in Use in the United States

The idea of using discretion in intestacy statutes is not new. The UPC and some states already permit a degree of judicial discretion in limited circumstances. The UPC uses discretion in its parent-child definition by including in the definition of "parent" a person who "functioned as a parent" of a child born using assisted reproductive technology.¹⁵⁸ Pennsylvania uses discretion in connection with children who have been adopted out, providing that after a child's adoption, the child will still be considered to have a relationship for inheritance purposes if the child has a relationship for family purposes.¹⁵⁹ Both provisions make inheritance depend on proof of a functional relationship, rather than status.

Courts in a few states have discretion to alter intestate shares for bad behavior. In California a court can deny an inheritance based on proof that the heir abused the decedent, financially or physical-

155. Most states and the UPC include, as an heir of a person who dies after reaching the age of majority, the genetic parent who was not involved in raising the child. *See, e.g.*, UNIF. PROBATE CODE § 2-114(a)(2) (2011), 8 U.L.A. pt. I, at 48 (Supp. 2011).

156. Unmarried and unregistered domestic partners are not included. *See supra* text accompanying notes 73–83. The genetic child of a mother whose unmarried and unregistered domestic partner adopted the child is not an heir of the genetic mother. *See supra* text accompanying notes 89–90.

157. The proposal will permit inheritance by people beyond the decedent's family. *See infra* text accompanying notes 209–211.

158. UNIF. PROBATE CODE § 2-120(f)(2) (2011), 8 U.L.A. pt. I, at 58 (Supp. 2011).

159. 20 PA. CONS. STAT. ANN. § 2108 (West 2005).

ly.¹⁶⁰ In Illinois, a parent cannot inherit from a child that the parent abandoned, but the court can decide to give the parent a reduced share “as the interests of justice require.”¹⁶¹ In Wisconsin, a slayer loses her inheritance, but an exception exists if “[t]he court finds that, under the factual situation created by the killing, the decedent’s wishes would best be carried out by means of another disposition of the property.”¹⁶²

A few states recognize common law marriage and will treat as legally married a man and woman who functioned as if they were married.¹⁶³ These states usually require that the couple agree to enter into a marital relationship,¹⁶⁴ and then demand other evidence that they considered themselves married. For example, many states require that the couple lives together and some require that they hold themselves out as married.¹⁶⁵ The court must determine whether they functioned as a married couple. A couple treated as married will be treated as spouses for intestacy purposes.¹⁶⁶

The fact that discretion currently is used, at least to a limited degree, suggests two things. First, the drafters of the UPC and legislatures have accepted the idea that some degree of judicial discretion is useful. Second, courts appear to be using these provisions without generating backlash or arguments about the results.

C. Family Maintenance—Discretion Used in Commonwealth Countries

A number of common law jurisdictions outside the United States use a form of judicial discretion in probate called “family maintenance” (also called testator’s family maintenance or decedent’s family maintenance).¹⁶⁷ New Zealand adopted a family maintenance

160. CAL. PROB. CODE § 259 (West 2002 & Supp. 2012).

161. 755 ILL. COMP. STAT. ANN. 5/2-6.5 (West 2007).

162. WIS. STAT. ANN. § 854.14(6)(a) (West 2002 & Supp. 2011).

163. See Sol Lovas, *When Is a Family Not a Family? Inheritance and the Taxation of Inheritance Within the Non-Traditional Family*, 24 IDAHO L. REV. 353, 360–61 (1988) (describing the history of common law marriage and citing a number of cases recognizing common law marriage).

164. See *id.* at 361.

165. See *id.*

166. Prof. Lovas also notes that Nevada recognizes marriages entered into by Quakers and Indians that comply with religious customs but may not comply with Nevada’s legal rules for marriage. *Id.* at 360 n.51; see also NEV. REV. STAT. § 122.150 (2011) (Quakers); *id.* § 122.170 (Indians).

167. For explanations of family maintenance, see Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 121–26 (1994); Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199, 1210–11; Hargis, *supra* note 16, at 456–63 (describing the differences among the countries that have adopted

statute in 1900. Following New Zealand's lead, England, all of the Australian provinces, and most of the Canadian provinces adopted family maintenance provisions.¹⁶⁸ Family maintenance allows a family member, as defined in the statute, to petition the court for a larger share of a decedent's estate.¹⁶⁹ The court can modify the distribution of assets that would otherwise occur either under a will or through intestacy.¹⁷⁰ The persons who can petition include a surviving spouse and a child or descendant who was dependent on the decedent.¹⁷¹ Some statutes include same-sex partners, and some explicitly do not.¹⁷² The English statute includes anyone dependent on the decedent when the decedent dies.¹⁷³ The statutes provide factors for the court to consider, usually including the decedent's intent, the applicant's financial needs, and the relationship between the decedent and the applicant.¹⁷⁴ The court determines the amount of the award based on the survivor's financial dependency on the decedent and need for support.¹⁷⁵

American scholars have recommended family maintenance,¹⁷⁶ but these proposals have generated little interest and some concern.¹⁷⁷ Criticism of family maintenance focuses on the ability of a

testator's family maintenance, including the degree of discretion, the factors the court may or must consider, and the persons who can apply).

168. See Hargis, *supra* note 16, at 456–57.

169. See *id.* at 457 (citing family maintenance statutes at n. 65).

170. *Id.*

171. *Id.* at 459–60.

172. Jennifer Hargis explains that Ontario permits a same-sex partner to apply; Manitoba and the Yukon allow only an opposite-sex partner to apply; and England provides that a same-sex partner may apply, but only if the person was a “dependant” of the decedent. See Hargis, *supra* note 16, at 460 & nn.75–77.

173. *Id.* at 459–60.

174. See *id.* at 458–59.

175. See *id.* at 458–62.

176. See, e.g., Ronald Chester, *Disinheritance and the American Child: An Alternative from British Columbia*, 1998 UTAH L. REV. 1, 32–35 (proposing discretionary statute based on the British Columbia statute); Edwin M. Epstein, *Testamentary Capacity, Reasonableness and Family Maintenance: A Proposal for Meaningful Reform*, 35 TEMP. L.Q. 231, 249–53 (1962); John T. Gaubatz, *supra* note 14, at 558; Hargis, *supra* note 16, at 466–67; Harris, *supra* note 126, at 260–63 (recommending family maintenance for dependent minors and incompetents whose sole caregiver died); Joseph Laufer, *Flexible Restraints on Testamentary Freedom—A Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277, 277–81 (1955); Jan Ellen Rein, *A More Rational System for the Protection of Family Members Against Disinheritance: A Critique of Washington's Pretermitted Child Statute and Other Matters*, 15 GONZ. L. REV. 11, 44–55 (1979) (proposing discretion based on the New Zealand statute).

177. See, e.g., Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1186–91 (1986). For a summary of the literature and arguments against family maintenance models, see Foster, *supra* note 167, at 1204–05, 1214–16; Harris, *supra* note 127, at 252–59 (reviewing scholarly comments, both negative and positive, about family maintenance).

judge to rewrite a will and disrupt a testator's intent.¹⁷⁸ Although family maintenance permits a judge to change the result of the intestacy statute, a typical case involves an applicant who would have inherited under intestacy—a spouse or a child—but was disinherited under the will.¹⁷⁹ Americans tend to place a high priority on freedom of testation, so permitting a judge to change a testator's expressed intent raises concerns. A particular concern is that a judge—typically a member of the majoritarian society—could be making decisions about a family that did not conform to expectations that accompany a traditional American family structure.

Family maintenance applied to testate decedents is unappealing in the American context, but if limited to intestate decedents, family maintenance can provide useful insights.¹⁸⁰ Problems with discretion have not been reported, and it appears that judges in the jurisdictions with family maintenance provisions use the discretion to reach fair results. As Jennifer Hargis writes:

The statutes in [England, Manitoba, and Ontario] require courts to consider specific factors in determining whether and how much to give an applicant. This limits the court's discretion, and provides courts guidance so that results are fair and consistent.¹⁸¹

Ms. Hargis notes that the only problem identified with family maintenance proceedings in England has been the possibility of depletion of the estate because of costs of litigation.¹⁸² Ontario addresses this concern by granting courts discretion to award costs of the litigation against either the estate or the applicant.¹⁸³

D. Proposals for Discretion for Intestacy Statutes

In recent years, scholars have recommended judicial discretion to address problems with the intestacy statutes.¹⁸⁴ One of the

178. See Harris, *supra* note 127, at 252–53.

179. See Hargis, *supra* note 16, at 461 (noting that in Manitoba, all family maintenance cases since 1990 have involved disinheritance under a will).

180. See Harris, *supra* note 127, at 259–60 (advocating family maintenance in intestacy).

181. Hargis, *supra* note 16, at 460.

182. *Id.* at 462; see also Gaubatz, *supra* note 14, at 547.

183. Hargis, *supra* note 16, at 462–63.

184. For an extensive review of proposals aimed at inheritance law, including but not limited to intestacy law, see Foster, *supra* note 5, at 222–34. Prof. Foster explains that scholarly reform proposals “take the form of three broad strategies. They seek to (1) enhance protections for surviving family members; (2) redefine the family to reflect changes in

earliest advocates was John Gaubatz. In 1977, Professor Gaubatz wrote, “There are many common fact patterns where the decedent and his family do not fit the normal family model. In these situations the law is at best inadequate and at worst unjust.”¹⁸⁵ He noted that “piecemeal changes” by the Uniform Probate Code (1969) improved the Probate Code but were “inherently inadequate to solve the basic problems.”¹⁸⁶ He proposed two solutions: providing flexibility “to allow effective response to the abnormal inheritance situation,” and validating “as many forms of testamentary expression as possible.”¹⁸⁷ The UPC has made progress on the latter of Professor Gaubatz’s suggestions,¹⁸⁸ but the UPC does not yet provide the flexibility in the distribution of property that Professor Gaubatz advocated. Professor Gaubatz notes that the drafters of the 1969 UPC attempted to approximate the intent of intestate decedents when they set up the intestate shares, “and there is no reason to believe that a court scrutinizing one family would do less well than did the drafters when they guessed at the intentions of all American decedents.”¹⁸⁹

Several more recent proposals have recommended creating a category for inheritance based on whether a survivor functioned as a family member. By requiring courts to determine whether the decedent and survivor had a functional relationship of a particular sort, these proposals, if adopted, would inject guided discretion into the intestacy statutes.

Professor Waggoner, Professor Spitko, and Professor Gallanis have all developed proposals that create an intestate share for a domestic partner, with that person defined not by formal status but by behavior.¹⁹⁰ These proposals operate by creating a new category

modern American society; or (3) introduce procedural mechanisms to mitigate the effects of the family paradigm on wills that deviate from ‘natural’ intestacy patterns.” *Id.* at 222.

185. Gaubatz, *supra* note 14, at 556. Prof. Gaubatz points out that under intestacy statutes, children inherit equally even if one needs the assets and the others do not. *Id.* at 449. A husband who has abandoned but not divorced his wife inherits in the same way as a husband who remained in a close relationship with his wife. *Id.* at 450. A foster child being raised by the decedent will not inherit at all, and a grandchild or niece being raised by the decedent will not inherit unless the rest of the family structure just happens to make the child an heir. *Id.* at 549.

186. *Id.* at 557.

187. *Id.*

188. See, e.g., UNIF. PROBATE CODE § 2-503 (2011), 8 U.L.A. pt. I, at 108 (Supp. 2011) (validating a will with defects in execution formalities if the testator intended the document to be a will).

189. Gaubatz, *supra* note 14, at 560.

190. See *supra* text accompanying notes 48–73. Paul Buser suggests a different approach. He urges the use of *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), to argue for an equitable remedy in probate for a surviving domestic partner. Paul J. Buser, *Domestic Partner and Non-*

of intestate taker, providing factors to guide the court in determining whether a person fits the category, and using presumptions to facilitate administration.¹⁹¹

Several proposals address the parent-child definition for intestacy. Margaret Mahoney recommended an intestate share for stepchildren, stepparents, and the descendants of the stepchildren, if the stepfamily formed while the child was a minor and a de facto parent-child relationship existed through their joint lifetimes.¹⁹² This author expanded that idea to create a functional test for the definitions of parent and child.¹⁹³ Anne-Marie Rhodes argued for a functional definition that would focus on positive acts of responsibility, favoring a caring parent over an abandoning parent.¹⁹⁴ Irene Johnson proposes adding to the intestacy definition of child a person “raised in the family” of the decedent.¹⁹⁵ Her proposal would require that the child live with the parent for at least half of the child’s minority, or if the parent died before the child turned eighteen, half of the child’s life.¹⁹⁶ Most recently, Lee-ford Tritt has advocated a solely functional parent-child definition to replace the current “blood or adoption” approach taken by most statutes.¹⁹⁷

In addition to these proposals, which are based on a functional parent-child definition, Michelle Harris would allow a court to use discretion to create an intestate share for a dependent minor or incompetent when the decedent was the sole caregiver for the person.¹⁹⁸ Her proposal does not depend on creating a definition of child, but rather uses the family maintenance model to give the court discretion.¹⁹⁹ Her particular interest is in protecting grandchildren who would not be intestate heirs of the grandparents who raised them.²⁰⁰

Marital Claims Against Probate Estates: Marvin Theories Put to a Different Use, 38 FAM. L.Q. 315 (2004).

191. See *supra* text accompanying notes 48–73.

192. See Mahoney, *supra* note 123, at 928–36 (using an *in loco parentis* standard to establish the necessary parent-child relationship).

193. See Gary, *supra* note 3, at 72–80.

194. See Anne-Marie E. Rhodes, *Abandoning Parents Under Intestacy: Where We Are, Where We Need to Go*, 27 IND. L. REV. 517, 532–41 (1994).

195. See Irene D. Johnson, *A Suggested Solution to the Problem of Intestate Succession in Non-Traditional Family Arrangements: Taking the “Adoption” (and the Inequity) Out of the Doctrine of “Equitable Adoption,”* 54 ST. LOUIS U. L.J. 271, 325–32 (2009).

196. *Id.* at 328.

197. See Tritt, *Functionally Based Approach*, *supra* note 99.

198. See Harris, *supra* note 127, at 260–63. Although based on family maintenance, the proposal would only apply to intestate estates, not to a child disinherited under a will.

199. *Id.*

200. *Id.*

Proposals have also suggested using discretion in connection with disinheritance statutes—statutes that deny an heir an intestate share based on misconduct. Professor Rhodes identifies disinheritance statutes that permit judicial discretion in limited circumstances, and calls the change “a step in the right direction” in permitting distribution of property in accordance with a decedent’s intent.²⁰¹ Paula Monopoli proposes a behavior-based model for inheritance that would deny inheritance to fathers who abandon or do not support their minor children.²⁰²

At least one author has advocated broad discretion in the intestacy context. Jennifer Hargis advocates discretion in intestacy statutes to modify the statutory shares.²⁰³ She would allow “a broad class of persons to apply for payment from an estate”²⁰⁴ and would require the court to take into account a range of factors, including the decedent’s intent and the needs of the applicant.²⁰⁵

More generally, Tanya Hernandez discussed better support for families of choice in laws relating to the disposition of remains.²⁰⁶ She noted that “the role of the family of choice in the intestate context merits greater study.”²⁰⁷ She then expressed the hope that future study will explore ways to incorporate an expansive definition of family, in keeping with her arguments in favor of decedent-controlled definitions of family.²⁰⁸

Most proposals focus on better ways to define family. Frances Foster argues instead that inheritance law should abandon the family paradigm and base revisions on either the “decedent intent approach” or the “actual relationship approach.”²⁰⁹ Her proposal for a decedent intent approach focuses on wills law and notes that applying the decedent intent approach to intestacy presents difficulties. Extrinsic evidence could be admitted to establish intent, but in the absence of any evidence of intent, the intestacy statute’s

201. See Rhodes, *supra* note 134, at 991. Prof. Rhodes explains that although slayer statutes carry out a decedent’s intent in most situations, if the slayer was a spouse who killed the decedent spouse at her request, in the face of a painful and terminal illness, the decedent would likely want the spouse to inherit. *Id.* at 990.

202. See Monopoli, *supra* note 18, at 291–97.

203. Hargis, *supra* note 16.

204. *Id.* at 466. Hargis would include as applicants “a spouse, a former spouse receiving maintenance, a child, one whom the deceased treated as a child[,] one whom the deceased treated as a spouse, or anyone who was substantially financially dependent on the decedent at the time of death.” *Id.*

205. *Id.*

206. See Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971, 1019–28 (1999).

207. *Id.* at 1017.

208. *Id.*

209. Foster, *supra* note 5, at 257–71.

default rules remain tied to the family paradigm. Expanding the rules to include new categories—for example domestic partners—might help, but would not solve the problem of defining people by categories rather than by actual intent.

With respect to her actual relationship approach, Professor Foster suggests basing determinations of heirship on the relationships between the decedent and survivors.²¹⁰ Relationships would be those based on support (whether the decedent was the recipient or provider); financial sharing by the decedent or the survivor; the assumption of legal or decision-making responsibility for the decedent or by the decedent for the survivor; and a relationship of generosity from the decedent to the survivor. A court would have to determine, based on the decedent's relationships, who would receive the property and in what proportions.²¹¹

III. A PROPOSAL FOR GUIDED DISCRETION

The drafters of the UPC continue to fine-tune the intestacy provisions, but fine-tuning cannot address all possible decedent situations. The expansive parent-child provisions will likely be over-inclusive in many situations, and the complicated provisions related to assisted reproductive technology will become out of date as the science changes.²¹² Despite the fine-tuning, unmarried domestic partners continue to be unprotected in the UPC's intestacy statute. Children raised by the decedent will also be excluded if they do not meet the status requirements of the UPC provisions. A simplified set of default provisions with discretion to create or deny intestate shares may be more likely to provide fair and just results for more decedents.

The goals behind intestacy statutes are to give effect to a decedent's intent, to provide for the needs of survivors, to support public policy through financial and psychological support for the family and through denying shares for misconduct, and to serve an expressive function, affirming the importance of family and family members.²¹³ A further policy behind current statutes is to permit survivors to transfer a decedent's property efficiently and without

210. *Id.*

211. *See id.*

212. *See* Tritt, *Functionally Based Approach*, *supra* note 99, at 407 (describing the 2008 Amendments as taking a "kitchen-sink approach"); *id.* at 428 (worrying that the ART sections will quickly become outdated).

213. *See supra* text accompanying notes 9–18.

excessive cost. The proposal attempts to meet all these goals, balancing efficiency with results that will be fair for most people.

A. *The Presumptive Intestate Shares*

The intestacy statutes would continue to provide for family members based on marriage or registration, and on a legal parent-child relationship determined under the state's parentage statute.²¹⁴ If a legal determination of parentage had not been made before death, the rules of the parentage statute could be used by the probate court to determine parentage. Rather than including the various nuances of the UPC, the statute would have minimal options, with the proviso that a survivor could petition the court to obtain or increase a share based on factors set out in the statute.

The initial shares would be those provided in a "simple" intestacy statute.²¹⁵ The statute would provide that the surviving spouse would receive the entire estate, unless the decedent left descendants who were not also descendants of the surviving spouse. If the decedent left any such children or further descendants, then the surviving spouse would get one-half the estate and the decedent's descendants would divide the other half by representation. If a decedent left no spouse or descendants, the property would go to the decedent's parents; or, if none, to their descendants; and if none, to the decedent's grandparents; and if they did not survive, to their descendants. This structure would provide the basic framework for distribution. The statute would also contain guidance to increase or reduce these shares and to create other shares.

214. As reproductive technology changes, the parentage statutes will likely adjust more quickly than the probate statutes. Tying the determination of parentage to the parentage statute ensures that updates will apply, and will avoid the problem of having a person be considered a child under a state's parentage act and not under the intestacy rules, or vice versa. A serious problem under the UPA, on which some parentage statutes are based, is that the UPA follows a one man/one woman model of parentage. See UNIF. PARENTAGE ACT § 704 (2002), 9B U.L.A. 69 (Supp. 2011).

215. Oregon's intestacy statute is used as the basis for the presumptive shares. See OR. REV. STAT. §§ 112.025-.045 (2011). The proposal does not carve out a share for the surviving spouse of a small estate but simply applies the rule—one-half the estate or the entire estate—depending on who survives.

B. Reductions in Presumptive Shares

1. Reducing the Spousal Share

The court could reduce the spousal share based on evidence the decedent would have preferred a smaller share for the spouse. The court should consider the following factors: the length of the marriage, whether the spouses were separated or had begun the process to dissolve their marriage, whether the survivor had engaged in marital misconduct,²¹⁶ and whether the decedent's parents or some other potential heir should receive a share of the intestate (or a larger share, in the case of descendants) because of factors such as care provided for the decedent and needs of the potential heir. Factors would not include a more general evaluation of the relationship, such as whether the spouses were affectionate or entertained together. A reduction would be appropriate only if a significant break in the relationship had occurred.

2. Reducing the Share of a Descendant

A share created for a child or other descendant could be reduced based on abuse—either physical or financial—of the decedent by the descendant. In the case of children, if the court determines that a person whom the decedent had treated as a child should take a share as a child of the decedent, the shares of other children will be reduced to create a share for the potential heir.

3. Reducing the Share of a Parent

A parent who abandoned, abused, or did not support a child could be denied an inheritance, or the share could be reduced. By leaving the decision to the court, denial could apply regardless of the age of the child at death, so that a parent who had never supported a child would likely be unsuccessful if he appeared at the adult child's death to claim a share. A court could decide that a parent who was behind on child support payments because of her

216. See Allison Bridges, *Marital Fault as a Basis for Terminating Inheritance Rights: Protecting the Institution of Marriage and Those Who Abide by Their Vows—Til Death Do Them Part*, 45 REAL PROP. TR. & EST. L.J. 559 (2010) (discussing marital misconduct in connection with the elective share law).

inability to work, but who remained active in the child's life, should receive a partial share.

C. Categories of Potential Heirs

1. Domestic Partner

The proposal published by Professor Gallanis lists factors that could be used to guide the court in determining whether a person should inherit as a domestic partner.²¹⁷ In the case of a domestic partner, the guidance would state that the share should be the same as that for a spouse, absent other factors that would serve to reduce the share. As in Professor Gallanis's proposal, proof of certain factors could create a presumption that the person is a domestic partner and should receive a share. A statute in a state that does not permit marriage or registration for same-sex couples could provide that marriage or registration in another state would create a presumption that the surviving partner should inherit.

2. Person Who Functioned As a Parent or Child

The proposals published by this author and by Professor Tritt list factors that could be used to guide the court in determining whether a person who functioned as a parent or child to the decedent should inherit.²¹⁸ A person deemed to be a child or a parent should inherit the share the person would have inherited had the person been considered a child or parent under the presumptive rules.

3. Dependent

A person dependent on the decedent could also petition for a share of the estate.²¹⁹ The court would consider the needs of the dependent person, the needs of presumptive heirs and other potential heirs, and the size of the estate. The court would consider the intent of the decedent in deciding whether to create a share

217. See Gallanis, *supra* note 51, at 87–90.

218. Gary, *supra* note 3, at 72–80; Tritt, *Functionally Based Approach*, *supra* note 99, at 405.

219. Family maintenance statutes permit persons dependent on the decedent to petition for a share of the estate. See *supra* text accompanying notes 167–175.

for the dependent, but the decedent's intent would not be dispositive.

4. Person Who Provided Uncompensated Care

The court could consider whether to create a share for a person who provided care for the decedent without compensation.²²⁰ Factors can include the decedent's intent, as well as equity. For example, if a neighbor provided daily care for the decedent for several years, and the decedent's presumptive heirs are children who provided no care and never visited, the court may create a share for the neighbor.

5. General Factors

Each category of potential heir would have factors specific to the category. In addition to considering evidence related to the factors, the court would consider written documentation of the decedent's intent with respect to the estate, relationships the decedent had and the length and type of those relationships, the financial needs of the presumptive and potential heirs, and the behavior of the presumptive and potential heirs toward the decedent.²²¹ The proposed provisions would direct the court not to alter presumptive shares on the basis of behavior unless the behavior created significant benefits or detriments for the decedent. The court would be required to make findings based on the factors and evidence before creating a share for a potential heir or reducing a share for a presumptive heir.

As the proposals for committed or domestic partners and the proposals for children demonstrate, a statute could combine a multi-factor test with presumptions and give a court sufficient guidance in making a decision about whether someone should qualify for an intestate share. This proposal differs from those earlier proposals in that this proposal does not create a status category for a domestic partner or child. The results reached through the exercise of guided discretion, however, should be a share for a domestic partner or child that is similar to the share that would be

220. See Foster, *supra* note 5, at 254 (advocating inheritance status for people in support relationships with the decedent, both those supporting the decedent and those supported by the decedent).

221. See Hargis, *supra* note 16, at 466 (describing factors to consider in creating discretionary intestate shares).

obtained under the other proposals. The difference is that the judge can consider the factors given above in determining the amount of the share as well as whether a share should be created. The court would need to exercise a degree of discretion, but within the parameters of a statute that could guide the discretion. Provision of an intestate share based on functional status combined with discretion will make intestacy statutes more responsive to the donative preferences of more people.²²²

D. Possible Criticisms of the Proposal

1. Two Tiers of Heirs

A critique of the proposal raises several issues that bear examination. The first is that the proposal creates a two-tiered approach, with the presumptive heirs as first-tier heirs, and potential heirs in the second tier.²²³ Domestic partners and members of stepfamilies may feel slighted by this type of statute. A response to this critique is that the potential heirs are not part of the intestacy system under current law, and being a potential heir is better than not being an heir at all. In addition, being a potential heir serves an expressive function because the status recognizes the relationship between the decedent and the potential heir, even if not at the level of the status for presumptive heirs. The statute provides that these categories of people “count” and conveys that people in these categories may have been of importance to the decedent.

Although the potential heir category improves statutes that do not provide for these persons, an alternative for a state would be to make one or more of these categories a presumptive heir. For example, the statute could make a domestic partner a presumptive heir. Even if the determination were based on factors rather than status, the court could be required to make the determination rather than wait for the potential heir to petition.

222. From a political perspective, providing an intestate share for an unmarried partner may be less controversial than adopting marriage for same-sex partners. *See* Harrington, *supra* note 21, at 327 (“This Note does not attempt to argue that states should universally recognize same-sex marriage or any equivalent.”).

223. *See* Foster, *supra* note 5, at 256 (raising this concern).

2. Definitions in Trusts

A second problem with the proposal is that definitions in intestacy statutes are used for definitions of “heir” and “descendant” in wills and trusts. If determining who will be considered heirs or descendants depends on judicial discretion, interpreting the term in a will or trust may require judicial analysis. Any court time required will increase costs for probate or trust administration and will also increase costs for the court. A response to this problem is that the persons drafting wills and trusts will have to define what the documents mean by a term like “heir.” A document could say that the term includes only presumptive heirs, could provide for a court determination based on the intestacy rules, or could create its own definition to include domestic partners, step-relatives, or others. Of course, the definitional problem will remain for documents drafted before a change in the intestacy statutes. For older documents, interpretation based on the statutes in effect when the documents were executed may be appropriate.

3. Judicial Bias

A third potential problem with the proposal is judicial bias.²²⁴ If a judge uses the authority provided in the statute to reward people based on the judge’s personal preferences, then the statute will have failed in its goals. Although this concern exists, the concern can be minimized with specific guidelines that narrow the discretion. Experience with family maintenance in other countries suggests that judges in those countries do not use the discretion granted them to apply personal preferences.²²⁵ The UPC already reflects preferences of the drafters. As Professor Gaubatz pointed out, judges should be able to determine the intent of a particular decedent at least as well as drafting committees attempting to create a statute reflecting the intent of all decedents.²²⁶

224. See Mary Ann Glendon, *Partial Justice*, COMMENTARY 22 (1994) (arguing that “adventurous judging”—decisions based on a judge’s personal sense of fairness—is problematic); Tritt, *Functionally Based Approach*, *supra* note 99, at 424 (identifying bias as a concern with a functional parent-child definition but arguing that a factor test can reduce bias). Alabama, Connecticut, Maryland, and New Jersey still have nonlawyer probate judges. See James Findley, *The Debate over Nonlawyer Probate Judges: A Historical Perspective*, 61 ALA. L. REV. 1143, 1143 n.5 (2010). Although the practice of using nonlawyers as judges has been criticized, *see id.* at 1156–59, nonlawyers should not be more likely to be biased than lawyers.

225. See Hargis, *supra* note 16, at 462–63.

226. See *supra* text accompanying notes 185–189.

4. Costs

A final critique of the proposal is a concern over increased costs and efficient administration. Judicial discretion, if required in an estate, will create costs, but the proposal attempts to balance fairness to decedents and survivors while limiting additional costs. The hope is that the presumptions and guidelines will make application of this proposal reasonably efficient, while still providing an opportunity for potential heirs to seek a share of the estate. The proposal will certainly increase costs in estates in which a potential heir petitions for a share of the estate, but the benefits of better results for the decedent and for survivors outweigh the downside of any increased costs. The state may want to permit the judge to assess costs against the petitioning heir to discourage frivolous petitions.

Another economic argument against increasing discretion in intestacy situations relates to transaction costs for property owners. A person with property may decide that the intestacy statutes adequately carry out her wishes. She may decide to avoid the costs of having a will prepared in reliance on the disposition provided in the intestacy statutes. If judicial discretion makes the outcome of the intestate disposition uncertain, she will be unable to use the statutes to plan for the disposition of her estate.²²⁷

CONCLUSION

Status-based inheritance is easy to apply. The status—marriage, registration, birth, or adoption—either exists or does not exist, so no evidentiary hearing will be necessary. The probate system works best when it can operate efficiently, and no one wants to increase the cost of probate. Judicial discretion could lead to controversy and lengthy hearings.

The concerns about discretion are valid, but discretion has begun to creep into intestacy statutes. Societal changes suggest that it may be time for a greater degree of discretion, with guidance in the statute as to how the court should apply the discretion. Criticism of discretion in the past has focused on family maintenance, a system that applies to testate as well as intestate estates. The proposal set forth in this Article applies only in intestacy. The proposal focuses on the decedent's intent, with a little room for moral evaluation in the event of bad behavior and for evaluation of the needs of the heirs.

227. Hirsch, *supra* note 9, at 1065–69.

The family of Dick and Jane depicted in childhood readers used in the 1950s and 1960s may have never been representative of American families, but in the twenty-first century even fewer families reflect this nuclear model. Amendments to the UPC's intestacy statutes have attempted to adjust to some of the changes, but the variations among families are too great for one rule to match the intent of most intestate decedents. With guided discretion, judges will be able to apply intestacy statutes in ways that are more likely to carry out the intent of more decedents. Professor Gaubatz identified the need for flexibility in intestacy statutes in 1977, and many others have taken up this call. Professor Gaubatz concluded his article with the following statement: "It is . . . to be hoped . . . that the current law of decedent's estate is not that which will take us into the twenty-first century."²²⁸ In the second decade of the twenty-first century, reformers continue to tweak the intestacy codes, while future intestate decedents wait for the reforms Professor Gaubatz advocated.

228. Gaubatz, *supra* note 14, at 563.