STANDING IN PLACE: WHY DE FACTO PARENTING OBLIGATIONS MAY BE THE ANSWER FOR NON-TRADITIONAL FAMILIES UNDER INTESTACY LAWS

Amy Armstrong-Reyes[*]

INTRODUCTION

Meredith is a single mother living in Vancouver, British Columbia, Canada.[1] Meredith's daughter, Samantha, was two years old when Meredith met Patrick. Patrick does not have any children of his own. Meredith and Patrick dated for two years and decided to move in together. Patrick is the only father Samantha knows, and she does not have a relationship with her biological father. Meredith, Patrick, and Samantha have all the makings of a traditional nuclear family—a mother, father, and child—who live together in a home purchased by Patrick. Although they plan to get married, Meredith and Patrick have not done so yet. Samantha calls Patrick "Dad." Patrick also coaches Samantha's soccer team, shops for her clothes, helps her with homework, and financially provides for all her life necessities like monthly health insurance and dental care.

Meredith and Samantha live in the home Patrick bought before they moved in, and it is the only home Samantha knows. Although Meredith could work, Patrick decided she should stay at home to raise Samantha. Patrick works as an engineer and makes a salary that provides a good life for their family. Although Patrick does not have life insurance, he has a modest savings account.

Ten years pass, and Patrick and Meredith are involved in a collision that kills Patrick instantly. Patrick was only in his thirties and did not consider that he might need a will. He died intestate, forcing a statutory distribution of his estate.[2] Fortunately for Meredith, under the laws of their domiciliary jurisdiction, she qualifies as Patrick's spouse, and she can still benefit from

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[*] J.D. Candidate, 2025, University of Louisville Louis D. Brandeis School of Law; B.A. Criminology, 2007, St. Thomas University (Canada). Thank you to Professor Kurt Metzmeier, who helped me transform my vision to develop this Note, Dr. C.J. Ryan for providing valuable feedback, and the University of Louisville Law Review editing team, including Mikayla and Rachel. To my husband Julio and daughters Taylor and Haylie, I appreciate your love and patience as you supported and encouraged me through this journey. Finally, this Note is dedicated to my three stepdaughters, Isabella, Charlotte, and Gigi; your presence in my life has been a profound gift. Though you and your sisters do not share genes, you have become bonded and enrich each other's lives in ways I could never have imagined. Here's to all the memories we have made, and I look forward to all the adventures that lie ahead as we continue our journey as a blended family.

[1] The example used about Meredith, Patrick, and Samantha is a hypothetical used solely to aid understanding and to explain concepts throughout this Note.

[2] Jennifer R. Boone Hargis, *Solving Injustice in Inheritance Laws Through Judicial Discretion: Common Sense Solutions from Common Law Tradition*, 2 WASH. U. GLOBAL STUD. L. REV. 447, 449 (2003).

Patrick's estate.[3] Because Patrick has no children of his own, Meredith will acquire Patrick's entire estate,[4] including the family home owned by Patrick.[5] Samantha will not have to move, and she can continue to have stability in her life.

Consider a second scenario: Meredith also dies with Patrick in a car accident. Neither Meredith nor Patrick drafted a will. In this instance, Patrick died, leaving behind no spouse and no surviving issue or descendants, according to the law.[6] As the intestacy statute does not recognize stepchildren the decedent has not formally adopted, Samantha is left behind with no inheritance from Patrick's estate.[7] Patrick's estate will instead pass through the remaining surviving relatives he leaves behind.[8] If Samantha were his biological child, she would be a primary beneficiary of his estate.[9] However, under the law in this scenario, Samantha is left with nothing.[10]

Consider one more scenario: Patrick and Meredith, having never married, part ways after ten years of living together. Meredith claims Patrick should continue to provide support for Samantha, and she petitions the court to order Patrick to pay child support for Samantha. The court will likely find that Patrick stands in place of a parent and should pay child support for Samantha.[11] Patrick now has a legal obligation to provide for Samantha.[12]

This outcome resembles the Canadian courts' approach that non-biological parents who provide support to children through a parent-like relationship are obliged to continue to care for them in the same way they would have been obliged to care for a biological child.[13] Although American courts would have recognized the exact legal requirement in family law if Patrick had been deemed a de facto parent, the outcome remains bleak for Samantha as American intestacy laws have not kept up with these de facto familial obligations.[14]

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[3] *See* Wills, Estates and Succession Act, S.B.C. 2009, c 13 (Can.); Family Maintenance Enforcement Act, R.S.B.C. 1996, c 127 (Can.); Income Tax Act, R.S.C. 1985, c 1 (Can.).

[4] *See* Wills, Estates and Succession Act, S.B.C. 2009, c 13, s 20 (Can.).

[5] *See id.* at s 26.

[6] *See* S.B.C. 2009, c 13; R.S.B.C. 1996, c 127; R.S.C. 1985, c 1.

[7] *See* S.B.C. 2009, c 13.

[8] *See id.* at s 23.

[9] *See id*.

[10] *See id.*

[11] *See* Chartier v. Chartier, [1999] 1 S.C.R. 242, para. 39 (Can.) (holding that examining the relationship between a parent and a child is required to determine if a person stands in place of a parent or *in loco parentis*). This is only true in Canada as in the United States, Patrick would have to petition the court himself to stand in place as a parent of Samantha. Additionally, unless he has already done so previously in the relationship, he is not likely to do so now when the outcome would mean he is financially responsible for Samantha.

[12] *Id.* at para. 8.

[13] *See infra* Section I.C-2.

[14] *See infra* Sections I.B-1, I.C-1.

If Patrick, Meredith, and Samantha were living in the United States, the situation would differ because Samantha would not inherit under intestacy, and neither would Meredith as his spouse.[15] Samantha and Meredith could be forced to find a new home, which would drastically change their lives.

Today, in the United States, it is common for couples like Patrick and Meredith to live together in households that include children from previous relationships.[16] Additionally, it is commonplace that couples with every intention of getting married may have had children outside the institution.[17] But with such a long and steady evolution of family comes the need for laws to adapt to the change.[18]

The laws have developed to benefit blended families in other spheres, yet intestacy laws have failed to incorporate these changes. Family law, for example, has introduced parenting obligations for non-biological children through the doctrine of de facto parentage.[19] Additionally, to highlight Canada's willingness to expand the definition of family, its common law spouse doctrine allows for the distribution of property to an unmarried but cohabitating partner.[20]

Public policy favors functioning family units that are intact and able to live as they were before the death of a family member who was previously supporting the family.[21] A decedent's property and generational wealth should pass directly to their blended, functional family rather than being tied up in probate. This approach prevents the decedent's estate from being consumed by legal and administrative fees and ensures that it is passed to the people who mattered most to them.[22]

To solve these issues, intestacy laws should be revised to allow intestate property distribution to transfer from the decedent to de facto family members as equal heirs to the estate. This Note proposes adopting two revisions to laws: first, expanding the definition of family to allow a child or their advocate to petition the court for de facto parentage, and second, acknowledging and incorporating the de facto parentage doctrine from family law into intestacy law. Part I outlines how the nontraditional family structure has evolved over time to become broadly accepted within contemporary society. The laws of Canada and the U.S. are examined to understand the differences in the intestate distribution of assets. Then, an

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[15] *See infra* Section I.B-1.
[16] *See infra* Section I.A.
[17] *See id.*
[18] John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 516 (1977).
[19] *See infra* Section I.C-2.
[20] *See* Wills, Estates and Succession Act, S.B.C. 2009, c 13 (Can.); Family Maintenance Enforcement Act, R.S.B.C. 1996, c 127 (Can.); Income Tax Act, R.S.C. 1985, c 1 (Can.).
[21] *See infra* Section II.B.
[22] *See id.*

analysis of the de facto parentage doctrine, viewed through the lens of Canada's jurisprudence, considers how and why the definition of family should be expanded to include stepchildren. Part II examines justifications for the law's expansion, looking at probable intent and public policy. Lastly, Part III incorporates Canada's jurisprudence into a model statute that stretches to the bounds of American estate law, concluding that an amendment to current intestacy laws is necessary to keep up with evolving family dynamics.

I. FAMILIES, INTESTACY, AND THE LAW: A BRIEF HISTORY

To determine what changes are required to update intestacy laws in the United States, it is essential to understand how the family unit has evolved over time and how these changes are not captured in existing statutes. Sections A and B present a breakdown of current intestacy laws in the United States and Canada.

A. Evolution of the Non-Traditional Family

The dynamics of a functioning family unit have evolved over the years.[23] The traditional family in North America is defined as a "nuclear family unit of a heterosexual couple and their biological children."[24] Historically, stepfamilies—families with at least one child who is the biological child of only one parent in the relationship—began as the result of the death of one parent.[25] More recently, divorce is now just one of the catalysts that thrust some 20% of children into new residences with non-biological parents, creating a stepfamily.[26] Non-marital cohabitation is another instance that creates stepfamilies; only here, the parent may not be married to the non-biological parent.[27] Further, it is common to see people entering first marriages with stepchildren in tow because of non-marital childbearing.[28]

Studies of American census data found that 40% of births are to unmarried mothers, and many of these children may be raised by a stepparent at one

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[23] *See* JAY TEACHMAN & LUCKY TEDROW, *The Demography of Stepfamilies in the United States*, *in* THE INTERNATIONAL HANDBOOK OF STEPFAMILIES: POLICY AND PRACTICE IN LEGAL, RESEARCH, AND CLINICAL ENVIRONMENTS 3, 5 (Jan Pryor ed., 2008).

[24] Malinda L. Seymore, *Inconceivable Families*, 100 N.C. L. REV. 1745 (2022) (citing Katarina Wegar, *Adoption, Family Ideology, and Social Stigma: Bias in Community Attitudes, Adoption Research, and Practice*, 49 FAM. RELS. 363, 363 (2000) (citing Margaret L. Andersen, *Feminism and the American Family Ideal*, 22 J. COMPAR. FAM. STUD. 235 (1991))).

[25] TEACHMAN & TEDROW, *supra* note 23, at 5.

[26] Jonathan W. Gould et al., *How Children Experience the Blended Family*, 36 FAM. ADVOC., Summer 2013, at 4, 4.

[27] TEACHMAN & TEDROW, *supra* note 23, at 5.

[28] *Id.*

point in their lives.[29] In data collected between 1991 and 2019, studies showed a decrease in children living with both parents.[30] Additionally, between 2007 and 2019, there was an increase in children who lived with their father only and an increase in children who lived with two unmarried parents.[31] Children living with at least one stepparent rose from 6 to 7% over the twelve-year period.[32] In 2021, the American Community Survey estimated that 2.4 million stepchildren were living in the United States—so many that the United States now celebrates National Stepfamily Day.[33]

Considering the statistics and the census collection, it is important to recognize that stepfamilies may be more commonplace than the data shows.[34] How the Census Bureau measures the data on stepfamilies can significantly impact how a family's relationship is accounted for.[35] If a reporting adult is the biological parent of a child, that child may not be reported as a stepchild even though the child may reside with the reporting individual's new spouse, who is not the biological parent.[36]

These non-traditional family dynamics have progressed within the U.S. and become the norm in many English-speaking common-law countries, like Canada.[37] Canada shares many of the same trends for stepfamilies, as seen by Canada census data.[38] Increases in unmarried, cohabitating spouses, common-law couples, and single-parent families mean that the potential number of stepfamilies is on the rise.[39] Canadian data showed that 67% of families reported as married couples, 17% were common-law couples, and 16% were single-parent families.[40] A total of 12% of families in the 2011 Canadian census reported as a stepfamily,[41] and one in ten children under the age of 14 lived in a stepfamily.[42]

Although Canadian law has progressed further in its adaptation of non-traditional family laws than its southern neighbor—which will be explored

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[29] U. S. CENSUS BUREAU, P70-174, LIVING ARRANGEMENTS OF CHILDREN: 2009 (2022); Michelle J.K. Osterman et al., *Births: Final Data for 2021*, 72 NAT'L VITAL STAT. REP. 1, 5 (2023).

[30] *See* U. S. CENSUS BUREAU, *supra* note 29, at 2-3.

[31] *See id.* at 2.

[32] *See id.*

[33] *National Stepfamily Day: September 16, 2023*, U.S. CENSUS BUREAU (Sept. 16, 2023), https://www.census.gov/newsroom/stories/stepfamily-day.html [http://perma.cc/C4UL-59C8].

[34] *Cf.* U. S. CENSUS BUREAU, *supra* note 29, at 3; Osterman et al., *supra* note 29, at 5.

[35] TEACHMAN & TEDROW, *supra* note 23, at 7.

[36] *Id.*

[37] *See* STAT. CAN., CAT. NO. 98-312-X2011001, PORTRAIT OF FAMILIES AND LIVING ARRANGEMENTS IN CANADA: FAMILIES, HOUSEHOLDS AND MARITAL STATUS, 3–7 (2012), https://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/98-312-x2011001-eng.pdf [https://perma.cc/YT2T-PDSB].

[38] *See id.* at 5-11.

[39] *See id.* at 5 tbl.1.

[40] *Id.*

[41] *Id.* at 6.

[42] *Id.* at 12.

later in this Note—the likewise upward trending dynamics of blended families in the United States suggest that the American legal system must also find a way to adapt to these new realities.[43] Family laws have begun to incorporate child-parent relationships, especially when it comes to divorce, custody, and child support issues.[44] However, probate laws, namely intestacy distribution statutes, have not addressed the possibility that a decedent's probable intent[45] may include non-biological familial relationships within the modern stepfamily.

B. Intestacy Laws

Succession is the transfer of property upon one's death.[46] When an individual dies without a will, they have died intestate.[47] As a result, the default for intestate property is to be distributed according to the laws of the decedent's domicile.[48] This section focuses on the laws governing intestacy in both the United States and Canada to highlight any differences between the two countries.

1. Intestacy in the United States

In America, at least half of the population will die intestate.[49] Succession in American society is formed around the principle of *freedom of disposition*, "authorizing the dead hand to control."[50] Although this freedom is valued greatly, it is not absolute.[51] The Restatement (Third) of Property describes property owners as having a "nearly unrestricted right to dispose of their property as they please," whereby the only instances that the law will restrict such freedom is when the transfer's purpose conflicts with public policy or is outright prohibited by law.[52] Further, "the law of succession facilitates rather than regulates implementation of the decedent's intent."[53]

Even still, laws regulating succession attempt to give as much deference as possible to the probable intent of the donor and give effect to their wishes

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[43] *See* TEACHMAN & TEDROW, *supra* note 23, at 3.
[44] *See infra* Section II.C-2.
[45] *See infra* Sections II.B-1–2.
[46] *See* Robert H. Sitkoff, *Freedom of Disposition in American Succession Law*, *in* FREEDOM OF TESTATION AND ITS LIMITS 501, 502 (Antoni Vaquer ed., 2018).
[47] *Id.*
[48] *See* UNIF. PROB. CODE § 2-71 (UNIF. L. COMM'N amended 2019) [hereinafter UPC (2019)].
[49] *See id.*
[50] RESTATEMENT (THIRD) OF PROP. § 10.1 cmts. a, c (AM. L. INST. 2003); *see id.*
[51] Sitkoff, *supra* note 46, at 502.
[52] RESTATEMENT (THIRD) OF PROP. § 10.1 cmt. a, (AM. L. INST. 2003).
[53] Sitkoff, *supra* note 46, at 502.

upon death.[54] Intestacy is no exception.[55] In capturing laws on intestacy, legislators have long tried to discern and implement a rule-based system based upon how the majority of its citizens prefer to distribute their property.[56] Therefore, it is important that in capturing a scheme of property transfer in intestacy law, the system should be reliable facilitation of one's probable wishes—a difficult task left to lawmakers to determine.[57] It is so difficult, in fact, that the laws of each state as of February 2024 remain vastly dissimilar, particularly regarding spousal gifts.[58] The Uniform Law Commission (ULC) has attempted to rectify this disparity by promulgating a model uniform code for adoption by state legislatures—the Uniform Probate Code (UPC), initially drafted in 1969.[59]

The UPC is a uniform set of default intestacy laws which only 19 states have adopted, making the UPC a minority rule in the United States.[60] The UPC defines intestate succession as "[a]ny part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this [code], except as modified by the decedent's will."[61] The goal of codifying intestacy into statutory schemes is to ensure that the distribution of property is allocated according to the wishes and probable intent of the typical decedent, quickly and straightforwardly, making the administration of the estate efficient.[62]

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[54] *Id.*

[55] *See id.* at 503.

[56] *See* Yair Listokin & John D. Morley, *A Survey of Preferences for Estate Distribution at Death Part 1: Spouses and Partners*, YALE L. & ECON. RSCH. PAPER, Feb. 2023, at 1, 5, (explaining that intestacy laws are also of great importance when considering property distribution of a testate individual as they stipulate who may challenge the validity of an individual's will. A person benefits through intestacy only if they have standing to challenge a will's validity in court).

[57] *See* Sitkoff, *supra* note 46, at 502-03.

[58] *See* Listokin & Morley, *supra* note 56, at 3.

[59] UPC (2019), *supra* note 48, § 1-102 (stating that the intention of its policy is "to discover and make effective the intent of a decedent in the distribution of the decedent's property").

[60] The laws governing intestacy in the United States vary greatly among the several states, with many incorporating their statutory succession schemes to address intestate distribution. Each state determines who should inherit from the estate at what priority level. Varying among most states are what level of priority a spouse should be given—depending on whether that spouse shares children with the decedent or has children not belonging biologically to the testator and that children of the decedent should inherit the entire estate if the spouse does not survive the decedent. One commonality is that most states do not allow stepchildren to inherit under intestacy, and none allow non-married but cohabitating spouses. In the few states allowing stepchildren to inherit under intestacy laws, it is only after there are no remaining surviving family members. Because there are so many variations among the states, this Note will use only the UPC as its established baseline for ease of reference. *Probate Code (2019)*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?communitykey=35a4e3e3-de91-4527-aeec-26b1fc41b1c3#LegBillTrackingAnchor [https://perma.cc/3DC6-DSBE].

[61] UPC (2019), *supra* note 48, § 2-101.

[62] *See* Danaya C. Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 42 ACTEC L.J. 341, 345 (2017); UPC (2019), *supra* note 48, § 1-102.

Intestacy provisions were substantially revised in 1990 and again in 2008 to "provide suitable rules for the person of modest means who relies on the estate plan provided by law."[63] The 1990 and 2008 revisions were proposed to further that purpose by fine-tuning the various sections and bringing them in line with developing public policy and family relationships.[64]

The UPC has made several modifications that highlight the evolving nature of non-traditional families, including divorce and remarriage, and broadening the scope of the child-parent relationship.[65] The 1990 revision recognized that society is becoming fraught with divorce and remarriages, "resulting in a significant fraction of the population being married more than once and having stepchildren and children by previous marriages."[66] Further, a broadened scope emerged in defining who a spouse is, which goes beyond the traditional married partnerships.[67] Accordingly, the following two groups of beneficiaries will be explored in greater detail throughout this Note: the unmarried cohabitating spouse and the stepchild.[68]

The adopted statutory application of intestacy does not account for the evolving myriad of non-traditional familial deviations.[69] Most states that have incorporated the UPC into their state legislation have incorporated the 2010 revised code, with a few adopting an even earlier version.[70] There was a newly revised code released in 2019, but as of January 2024, none of the states have adopted it.[71] Importantly, there have been some advancements toward incorporating the stepchild beyond those included in 2010, which this Note will discuss later.[72]

Relevant to this Note are two intestate distribution methods detailed in the UPC: per stirpes and per capita.[73] Currently, states across the U.S. vary as to which system of representation they follow, while some choose to adopt

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[63] UPC (2019), *supra* note 48, art. II, pt. 1 gen. cmt.

[64] *See id.*; Listokin & Morley, *supra* note 56, at 6 (discussing UPC revisions based upon the findings of several empirical studies including: "Browder, 1969; Contemporary Studies Project, 1978; Dunham, 1963; Friedman, 1964; Friedman, 2007; Glucksman, 1976; Powell and Looker, 1930; Price, 1975; Ward and Beuscher, 1950; Wright, 2020; Wright and Sterner, 2017").

[65] *See* UNIF. PROB. CODE, art. II, pt. 1 gen. cmt. (UNIF. L. COMM'N amended 2008); UNIF. PROB. CODE, § 2-103 gen. cmt. (UNIF. L. COMM'N amended 2010) [hereinafter UPC (2010)].

[66] UPC (2010), *supra* note 65, § 2-103 gen. cmt.

[67] *Id.*

[68] The cohabitating unmarried partner will be examined solely to the extent they show Canada's willingness to accept an extension and broadening of what defines family. While these are not the only emerging trends that affect non-traditional families, the scope of this Note will limit the examination to these two issues solely. It should be noted that there are intricacies regarding other topics that need further development and study, including same-sex marriage.

[69] *See generally* UPC (2010), *supra* note 65.

[70] *See Probate Code (2019), supra* note 60.

[71] *Id.*

[72] *Id.*

[73] UPC (2019), *supra* note 48, § 2-709(b)–(c).

neither system, electing a system of their own creation.[74] These systems of representation differ in deciding how to further distribute the estate when one or more children have predeceased the decedent.[75] Per stirpes provides that one's estate is divided equally among surviving descendants within the closest relation to the decedent, and any children of a deceased parent will take their parent's share by representation.[76] Alternatively, per capita initially divides the estate into equal shares at the first generation of at least one living decedent, and the remaining shares for any deceased members at that line are placed into a pot and divided at the next generation.[77] This continues until the estate has been fully distributed.[78]

Throughout these systems of representation and in the definitions section of UPC 1-201, the stepchild is explicitly omitted from the intestate estate distribution.[79] "Descendant of an individual means all of his [or her] descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in this [code]."[80] The term child then refers to "an individual entitled to take as a child under this [code] by intestate succession . . . and excludes a person who is only a stepchild."[81] And finally, a parent "excludes any person who is only a stepparent."[82]

The UPC's reference to spouse, although not defined in the code, defers to the state's existing legislation to accord recognition for domestic partnerships or other unmarried individuals.[83] The UPC defaults toward recognition of individuals in marital unions because if the decedent either enters into a marriage or divorces, the will becomes void, and the estate passes through intestacy.[84]

Article II of the 2010 UPC provides that the intestate share of a decedent's surviving spouse is the entirety of the estate when there are no parents or descendants that have survived the decedent.[85] The estate that passes to the spouse decreases for each surviving parent or child that survives the

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[74] *See id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*; UPC (2010), *supra* note 65, § Part 1, gen. cmt. (evidencing another system called "per capita at each generation . . . that was also adopted as a means of more faithfully carrying out the underlying premise of the pre-1990 UPC system of representation. Under the per-capita-at-each-generation system, all grandchildren (whose parent has predeceased the intestate) receive equal shares").

[79] UPC (2010), *supra* note 65, § 1-201.

[80] *Id.* at § 1-201(9).

[81] *Id.* at § 1-201(5). Of note, the reference to stepchildren throughout this note will not incorporate those children who are in the process of being adopted by a stepparent or who have been adopted by a stepparent.

[82] *Id.* at § 1-201(32).

[83] UPC (2010), *supra* note 65, prefatory note, legislative note.

[84] *Id.* at § 2-804.

[85] *Id.* at § 2-102.

decedent.[86] Further, the remaining estate that does not pass to the surviving spouse passes to anyone who survives the decedent by representation, including only blood relatives.[87] The 2008 revision to the UPC incorporated stepchildren into the distribution scheme, allowing the estate to pass to descendants of a spouse who was married to the decedent at the time of their death.[88] These provisions incorporate stepchildren into intestacy as a last resort before the estate escheats[89] to the state.[90] Although considered by the drafters, it is clear they did not intend stepchildren to be treated as equals to the biological or adopted children of the testator by placing them as a last resort.[91]

The 2010 revision notes a trend toward incorporating parent-child relationships outside of the traditional biological relationship.[92] First, the word "issue" is replaced with the word "descendants."[93] With inheritance rights in some cases extending to adopted children, the reasoning to account for such a change is because the term "issue" "is a term of art having a biological connotation [and] the term descendants is a more appropriate term."[94] Next is the definition of "Functioned as a Parent of the Child."[95] The definition incorporates an analysis of the parent-child relationship to include decision-making, caretaking, and parenting functions, although it bars a parent from inheriting from a child in certain circumstances.[96]

Further, while only applicable to class gifts devised through a will, Section 2-603 extended the anti-lapse[97] protection to include devises to the testator's

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[86] *Id.* at § 2-102(2)–(4) ("the first [$300,000], plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent; the first [$225,000], plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent; the first [$150,000], plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.").

[87] *Id.* at § 2-103.

[88] *Id.* (emphasis added); *Id.* Part 1, Subpart 1, gen. cmt. regarding 2008 revisions, at 27.

[89] *Escheat*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/escheat? [https://perma.cc/HG8V-CHK5] (defining the word as "the reversion of property . . . to the state in the U.S. when there are no legal heirs").

[90] UPC (2010), *supra* note 65, § 2-103.

[91] *See id.*

[92] *See generally id.*

[93] UPC (2010), *supra* note 65, § 1-201(24).

[94] *Id.* at § 2-103 gen. cmt.

[95] *Id.* at § 2-115(4).

[96] UPC (2010), *supra* note 65, art. II, prefatory note.

[97] Antilapse statutes provide that if a beneficiary dies before the testator, the intended beneficiary's descendants covered by the statute are permitted to inherit in their place instead of lapsing—either reverting to the estate's residuary or passing through intestacy. *See* UPC (2010), *supra* note 65, § 2-603 cmt.

stepchild as a last resort before escheating to the state.[98] As a note under Section 2-804, it provides that "a devise to a stepchild might be revoked if the testator and the stepchild's adoptive or genetic parent become divorced."[99] This stipulates that the testator's stepchildren are only considered devisees if they were present in the marital relationship and survived the testator.[100]

For the most part, Canada has left stepchildren out of intestacy laws but has shown openness towards extending the definition of family by expanding the definition of spouse—incorporating non-traditional family members into statutes.[101] Canada exemplifies the trend in the rising number of stepfamilies, as seen by Canadian census data.[102]

2. Intestacy in Canada

In Canada, each province has jurisdiction over the laws of inheritance.[103] In British Columbia, for example, the Wills, Estates and Succession Act governs the distribution of an individual's estate when a decedent does not have a will.[104] One of the key differences in this Act compared to the United States is the incorporation of a "marriage-like relationship" in the definition of a spouse.[105] Two individuals are considered spouses if they are married or have "lived with each other in a marriage-like relationship for at least 2 years."[106] Similarly, they can terminate this relationship by divorcing or discontinuing such a relationship.[107] There can also be more than one spouse since an individual can have a married spouse and a common-law spouse.[108] Each spouse is entitled to a share of the estate.[109]

In British Columbia, when an individual who dies without a will leaves behind a spouse and surviving descendants, the spouse receives the

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[98] *See* UPC (2010), *supra* note 65, § 2-603 gen. cmt. (explaining that the stepchild is defined as a "child of the surviving, deceased, or former spouse of the testator or of the donor of a power of appointment, and not of the testator or donor." Further, the comments section clarifies that the devise does not pass further to any stepchildren of a relative of the testator. This means that stepchildren are only considered as part of the devise structure if they are the stepchild of the testator themselves).

[99] *Id*.

[100] *Id.*

[101] Succession Law Reform Act, R.S.O. 1990, c. S.26, Part V, defs. (Can.).

[102] *See generally* STAT. CAN., *supra* note 37.

[103] *See* Ronald Chester, *Disinheritance and the American Child: An Alternative from British Columbia*, 1998 UTAH L. REV. 1, 8 (1998).

[104] Wills, Estates and Succession Act, S.B.C. 2009, c 13 (Can.).

[105] *Id.* at s. 2.

[106] British Columbia Family Law Act, S.B.C. 2011, c 25, s 3, (recognizing spouses as if the individual was living with another person in a marriage-like relationship for a continuous period of at least two years or has a child with the other person).

[107] *Id.*

[108] *See id.*

[109] *See* Wills, Estates and Succession Act, S.B.C. 2009, c 13, s 22 (Can.).

household furnishings and their preferential estate share.[110] Interestingly, if there are two or more spouses of an intestate individual who are entitled to a spousal share, the spouses must agree to split the spousal share into portions, and if no agreement can be made, the court will determine shares.[111]

If no spouse is left behind, the decedent's estate is distributed to lineal descendants pursuant to the Act.[112] Distribution to descendants is divided in equal shares such that the surviving descendants, as well as deceased descendants who have surviving descendants in the first generation that contains surviving members, each receive one equal share.[113] This is most similar to the per capita distribution system found in the UPC.[114] Finally, if there are no surviving descendants, the estate will escheat to the government, subject to the Escheat Act.[115]

Similar to the United States, no intestacy statute provisions allow stepchildren to take a share of the intestate's property in the Canadian provinces.[116] Several other acts, however, include stepchildren within the definition of a child or immediate family members for various purposes such as pension plans, compensation for victims of crimes, family status for purposes of human rights claims, and dependents relief claims.[117] Dependent relief claims can be made when a person dies and the estate fails to provide adequate support for the dependent spouse and children, but the courts have been reluctant to connect the claim of a stepchild under this provision.[118]

Unlike dependent relief in other provinces, British Columbia allows judicial discretion when it comes to varying a testator's will distribution for family members.[119] Although not under the intestacy umbrella, the courts do so through the Wills, Estates and Succession Act, allowing the testator's

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[110] If the decedent has surviving descendants to include children from the spouse and testator together, their share is $300,000. That amount decreases to $150,000 if those surviving descendants are not from the two together. *See id.* s 21(2).

[111] *See id.* at s 22.

[112] *See id.* at s 23(2).

[113] *See id.* at s 24.

[114] *See* UPC (2019), *supra* note 48, § 2-709(b)–(c).

[115] *See* Wills, Estates and Succession Act, S.B.C. 2009, c 13, s 23(2)(f) (Can.); Escheat Act, R.S.B.C. 1996, c 120 (Can.).

[116] *See generally* Wills, Estates and Succession Act, S.B.C. 2009, c 13; British Columbia Family Law Act, S.B.C. 2011, c 25.

[117] *See, e.g.*, Veterans Insurance Act, R.S.C. 1970, c V-3, s 2, L.R.C. 1970, ch V-3, art 2 (Can.) (including a stepchild or a child whom the insured is ordered to support through a court order); Defence Services Pension Continuation Act, R.S.C. 1970, c D-3, s 2, L.R.C. 1970, ch D-3, art 2 (Can.) (including stepchild as a child); Environmental Protection Act, R.S.O. 1990, c E.19, s 82 (Can.) (including stepchild within the meaning of immediate family); Family Services Act, S.N.B. 1980, c F-2.2, s 147, LN-B 1980, ch F-2.2, art 147 (Can.) (including a child, or a child over whom the parent stands in loco parentis for purposes of victim compensation); Human Rights Act, 2010, S.N.L. 2010, c H-13.1, s 2 (Can.).

[118] *See, e.g.,* Peters v. Peters Estate, [2015] A.B.C.A. 301 (Can.) (holding that the stepchildren of Ileen Rogers were not entitled to her estate when she died without a will, even though the family functioned as one unit for several years).

[119] *See* Family Maintenance Enforcement Act, R.S.B.C. 1996, c 127 (Can.).

dependents to petition the court to provide an entitlement from the estate that it thinks is "adequate, just and equitable in the circumstances."[120] This is done to ensure the testator has met their legal and moral obligations to their family.[121] In contrast with Alberta's Wills and Succession Act (AWSA), through a Family Maintenance Support claim, dependent children may only obtain monthly payment awards based on need, whereas in British Columbia, a full variation of the testator's will is possible.[122] Further, an order can be applied when the decedent dies intestate.[123] Both dependent relief as well as will variation statutes highlight Canadian legislators' willingness to allow a legal obligation toward a family member that the decedent has chosen in life to support and to transcend their life into death.[124] This opens the door to an expansion including non-traditional family members such as stepchildren, which is currently the focus of new Canadian studies.

Currently, in both British Columbia and Alberta, the definition of the descendant does not include stepchildren.[125] A report released in January 2022 lobbies for such a change by Alberta's legislature.[126] The report surveyed several citizens and practitioners in Alberta.[127] The surveyors determined that it is in the "best interest of a child" to incorporate stepchildren into the AWSA framework, which would allow a petition for a Family Maintenance Support claim to be made on their behalf.[128] Additionally, supporting the recommendation includes principles of child equality and consistency with other areas of the law that already acknowledge the person in place of a parent definition.[129]

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[120] *Id.*

[121] *Id.*; *see* Tataryn v. Tataryn's Estate, [1994] 2 S.C.R. 807, 825 (Can.).

[122] *See* Wills and Succession Act, S.A. 2010, c W-12.2, s 88 (Can.) (establishing that the claim can be made by one or more surviving family member whether or not there is a will in place, or the decedent dies intestate).

[123] *See id.*

[124] *See Family Maintenance and Support from the Estate of a Person Who Stood in Place of a Parent,* ALBERTA L. REFORM INST., 46 (Jan. 2022) https://www.alri.ualberta.ca/wp-content/uploads/2022/01/FR117.pdf [http://perma.cc/F9MY-9Q2L] ("Eighty-one percent of ALRI's survey participants thought that a biological or adoptive parent has the primary obligation to support a child after the death of a person who stood in the place of a parent.").

[125] *See id.* at 41.

[126] *See id.* at 43.

[127] *See id.* at vi.

[128] *Id.* at 23.

[129] *Id.* (identifying that a child is not deciding with whom they reside or who to be raised by—whether it is a "biological or adoptive parent, or a person standing in place of a parent." Further, a child may apply for support in the person standing in place of a parent's lifetime, but not after the person has died); *see also* Veterans Insurance Act, R.S.C. 1970, c V-3, s 2, L.R.C. 1970, ch V-3, art 2 (Can.) (including a stepchild or a child whom the insured is ordered to support through a court order); Defence Services Pension Continuation Act, R.S.C. 1970, c D-3, s 2, L.R.C. 1970, ch D-3, art 2 (Can.) (including stepchild as a child); Environmental Protection Act, R.S.O. 1990, c E.19, s 82 (Can.) (including stepchild within the meaning of immediate family); Family Services Act, S.N.B. 1980, c F-2.2, s 147, LN-B 1980, ch F-2.2, art 147 (Can.) (including a child, or a child over whom the parent stands in loco parentis for purposes of victim compensation); Human Rights Act, 2010, S.N.L. 2010, c H-13.1, s 2 (Can.).

There have been significant shifts in Canada regarding unmarried spouses and dependents and their ability to make claims against an estate;[130] however, growth is still required in current laws regarding stepchildren in intestacy. Over time, connecting legal and moral obligations under a family law context with intestacy laws will drive necessary changes to include stepchildren in this framework.

C. Family Law: Defining a Child

While neither the United States nor Canada's intestacy laws include stepchildren within the definition of a child, the sphere of family laws provides for such an incorporation.[131] The definition of a family, specifically the child, should be broadened to include stepchildren, similar to how it has been expanded upon in family law. The factors that determine when a parent-child relationship is formed outside a biological connection will be explored in both the laws of the United States and Canada.[132]

1. Family Law in the United States

In addition to uniform intestacy laws, the ULC issues uniform family laws such as the Uniform Parentage Act (UPA).[133] Most recently revised in 2017, the UPA demonstrates consideration for the nontraditional family structure and will provide the baseline for this Note when examining parent-child relationships and considering the inclusion of a stepchild in tandem with the intestacy provision of the UPC.[134]

In its most recent revision, the UPA included a provision that established a de facto parent as the legal parent of a child.[135] The UPA acknowledges de facto parentage doctrine, sometimes referred to as "in loco parentis," now recognized in many states.[136] The doctrine applies to children who have

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[130] *See Family Maintenance and Support, supra* note 124.

[131] *See infra* pp. 16-18, 20-22.

[132] *See id.*

[133] *See* UNIF. PARENTAGE ACT, prefatory note, 1, 2 (UNIF. L. COMM'N amended 2017) [hereinafter UPA (2017)].

[134] *See id.* at 1–2; *Uniform Parentage Act*, UNIFORM LAW COMMISSION (2017) https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f [http://perma.cc/HL6B-3K8B]. A total of 24 states have enacted the UPA, including seven states that have enacted the 2017 revision, nine states that have enacted the 2002 revision, and eight that have enacted the original 1973 version. A total of five of those states have introduced the 2017 version to be enacted into legislation currently.

[135] *See* UPA (2017), *supra* note 133, prefatory notes 1, 2.

[136] *Id.*

adults in their lives who have functioned as a parent to them but are otherwise unconnected as the biological parent or through marriage.[137]

According to the UPA, a legal parent-child relationship can be alleged, acknowledged, or adjudicated.[138] An alleged parent is a "genetic parent or possible genetic parent of a child whose parentage has not been adjudicated,"[139] while an acknowledged parent is "an individual who has established a parent-child relationship by voluntarily signing an acknowledgment of parentage."[140] Finally, an adjudicated parent—the method used to determine de facto parentage— is "an individual who has been adjudicated to be a parent of a child by a court with jurisdiction."[141]

The determination of parentage typically occurs due to a judicial court or administrative proceeding that establishes the parent-child relationship.[142] In some cases, the establishment of a parent-child relationship is determined by a state's child support agency that has jurisdiction over such parentage relationships.[143] Section 202 of the UPA provides that such a parent-child relationship can exist equally to any child and parent, regardless of the parent's marital status.[144] Section 203 further provides that such a relationship does not extend to other areas of the law, such as the UPC, thus preventing intestate distribution.[145] This means that the parent-child relationship that may be obtained through adjudication under the UPA would not apply to UPC intestacy provisions.[146]

To adjudicate a parent-child relationship under a de facto parentage claim, both the individual and the child must be alive at the commencement of the proceedings, and the claim must be commenced before the child reaches the age of 18.[147] An individual seeking to establish a de facto parent-child

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[137] *Id.* ("Two states—Delaware and Maine—achieve this result by including 'de facto parents' in their definition of parent in their state versions of the Uniform Parentage Act. Other states, including California, Colorado, Kansas, New Hampshire, and New Mexico, reached this conclusion by applying their existing parentage provisions to such persons.").

[138] There are five classifications of parents; the remaining two—presumed and intended parents—deal with the relationship that exists either for a child born within a marriage or those born through assisted reproduction or a surrogate agreement. These parent-child relationships will not be explored in this note. *See* UPA (2017), *supra* note 133, § 102, gen cmt.

[139] *Id*. at § 102(3).

[140] Although intended to allow genetic parents to acknowledge their parental rights, revisions have also been included to allow intended parents and same-sex couples to acknowledge parental rights. UPA (2017), *supra* note 133, art. 3, gen cmt.; Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 A.M. U. J. GENDER SOC. POL'Y & L. 467, 469-70 (2012) (explaining that all states allow for acknowledged parentage and is "the most common way to establish the legal paternity of children born outside marriage"); UPA (2017), *supra* note 133, art. 1, § 301 gen. cmt.

[141] UPA (2017), *supra* note 133, § 102(3).

[142] *See id.* at § 102(8).

[143] *See id*. at § 104, gen cmt.

[144] *Id.* § 202.

[145] UPC (2010), note 65, § 2-103.

[146] *See id.*; UPA (2017), *supra* note 133, § 202.

[147] *See* UPA (2017), *supra* note 133, § 609(b).

relationship in a proceeding must prove by clear and convincing evidence that the individual resided with the child for a significant period within the same household, cared for the child consistently, permanently provided for the child without expecting to be financially compensated, and acted as though the child was theirs through a bonded parent-child relationship while the other parent supported such a relationship between the child and the individual.[148] Further, the best interest of the child is met through the continuance of the relationship.[149] Finally, only the individual seeking to claim parentage may bring forward a claim to limit and address concerns that a stepparent may be obligated to pay child support under this parentage theory involuntarily.[150]

UPA Section 613 allows states to determine whether or not they will allow for more than two parents to be established.[151] The court can adjudicate competing interests if there is more than one other individual who is—or claims to be—a parent and the court determines that the requirements of Section 609(d) are satisfied.[152] It does so by assessing the following factors in light of the best interest of the child: the length of time the parent has assumed the parenting role, the nature of their relationship, any harm to the child if the relationship is not recognized, and the basis for the claim including other equitable factors that will occur if the relationship is disrupted.[153] Overall, it is essential to note that the UPA recognizes a trend in states potentially allowing more than two parents legally.[154] This furthers a potential recognition that although a child could have two biological parents, a stepparent may still petition the court for de facto parentage of a child.[155] Still, the obligation to do so remains with the individual seeking that determination.[156]

Shifting focus back to intestacy, a revision to the UPC in 2019 took the 2017 UPA de facto parentage definitions and incorporated them into the code.[157] While no state has currently adopted this revision into its

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[148] *See id.* at § 609(d).

[149] *See id.*

[150] *See id*. at § 609 gen. cmt.

[151] *Id.* at § 613.

[152] *Id.* at §§ 609(d), 613.

[153] *See id.* at § 609 gen. cmt. ("This provision ensures that individuals who form strong parent-child bonds with children with the consent and encouragement of the child's legal parent are not excluded from a determination of parentage simply because they entered the child's life sometime after the child's birth. Consistent with the case law and the existing statutory provisions in other states, this section does not include a specific time length requirement. Instead, whether the period is significant is left to the determination of the court, based on the circumstances of the case. The length of time required will vary depending on the age of the child.").

[154] *Id.* at § 613; *see* CAL. FAM. CODE § 7612(c); DEL. CODE ANN. tit. 13, § 8-201(a)(4), (b)(6), (c); D.C. CODE § 16-909(e); ME. REV. STAT. tit. 19-a, § 1853(2).

[155] *In re* Parentage of J.B.R. Child, 336 P.3d 648, 653 (Wash. Ct. App. 2014).

[156] *See* UPA (2017), *supra* note 133, § 609(c)(3).

[157] *See id.* at § 609.

legislation,[158] these updates highlight the trend that the drafters identified toward the acceptance of stepchildren in the family translating into the intestacy scheme.[159]

Sections have been added to address de facto parentage with its roots coming from the 2017 revision of the UPA.[160] These revisions were intended to update the code's intestacy and class-gift provisions while identifying that a child may now have more than a set of two parents and more than two sets of grandparents. [161] References to "half-blood" relatives were removed, reasoning that parent-child relationships are formed in a variety of ways, including de facto parentage.[162] Additionally, the de facto child may inherit through a class gift identified in a will as long as the adjudication proceeding begins before the death of the de facto parent and the parentage is subsequently established.[163] One limitation to this incorporation, however, is that adjudication to proceed toward de facto parentage cannot begin posthumously.[164] While these are important revisions, it does not reach far enough to effectively override the bounds of intestacy when an individual dies suddenly without the chance to act to adjudicate the non-traditional familial relationship.[165]

California has a more progressive view on unadopted stepchildren inheriting under intestacy.[166] California allows a parent-child relationship to be established for a stepchild if their relationship began while the child was a minor and continued throughout their lifetime, and there is clear and convincing evidence that the child would have been adopted by the stepparent if not for a legal obstacle.[167] Such an obstacle is often the lack of consent given by the other biological parent, which is relinquished when the child becomes the age of majority, leaving adult stepchildren without any recourse under the intestacy statute.[168] However, a recent court decision in California has created a harmonized approach to establishing a parent-child

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[158] *See Probate Code (2019)*, supra note 60.

[159] *See* UPA (2017), *supra* note 133, § 609 gen. cmt.

[160] *See* UPC (2019), *supra* note 48, § 1-205(5); *id.* at § 2-115 (defines de facto parentage as someone who has been adjudicated under the UPA (2017) [applicable state law] as a parent of the child).

[161] *See* UPC (2019), *supra* note 48, prefatory note.

[162] *See id.* at § 2-107, gen. cmt.

[163] *See id.* at § 2-603.

[164] *See id.* at § 2-705.

[165] *See id.*

[166] *See* CAL. PROB. CODE § 6454 (2022).

[167] *See id.*

[168] *In re* Estate of Joseph, 949 P.2d 472, 477 (Cal. 1998) (holding that the legal bar to adoption must be present throughout the relationship, past the age of majority of the stepchild, and until the death of the decedent).

relationship for intestacy purposes.[169] In this case, California interpreted[170] its code to allow for the presumption of such a relationship to occur when the "presumed parent receives the child into their home and openly holds out the child as their natural child."[171] Because this is new common law, more time is needed to discover how this will impact petitioners' claims for inheriting under intestacy. On the other hand, Canada allows other petitioners to claim a parent-child relationship exists to create a legal obligation.[172]

2. Family Law in Canada

A parenting obligation in Canada can be found in various statutes, depending on the obligation. Canada's federal Divorce Act provides that a child of the marriage is "any child for whom they both stand in the place of parents; and any child of whom one is the parent and for whom the other stands in the place of a parent."[173] Furthermore, if the biological parent and the stepparent are living together in a marriage-like relationship for at least two years with the child, the stepparent may later be responsible for paying child support for the stepchild.[174] In that case, the court determines the stepparent's obligation based on a contribution to the child's support for over a year of the relationship with the child's parent and the child's standard of living while living with the stepparent.[175]

The British Columbia Family Law Act determines that a stepparent does not have an obligation to provide support for a child unless "the stepparent contributed to the support of the child for at least one year, and a proceeding for an order . . . is started within one year after the date the stepparent last contributed to the support of the child."[176] This is contrary to the UPA in that the stepparent is the only person who can bring a claim to stand in place of a parent over a stepchild.[177] Here, an obligation can be forced upon the stepparent by the other spouse in a failed relationship.[178]

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[169] *In re* Estate of Martino, 96 Cal. App. 5th 596, 611 (2023) (reasoning that the failure to read the two statutes in harmony would discourage marriage in violation of strong public policy and fundamental rights and that both "can be given effect . . . without rendering the other a nullity").

[170] As of January 2024, there was a petition for review filed on 27 November 2023.

[171] *See* CAL. FAM. CODE § 7611 (Deering 2023).

[172] *See* Divorce Act § 2(2); *Putting Children's Interest First – Federal-Provincial-Territorial Consultations on Custody and Access and Child Support*, Government of Canada (Dec. 28, 2022), https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/cons/consdoc/obligat.html [http://perma.cc/E8RU-4P3B].

[173] Divorce Act, § 2(2); *Putting Children's Interest First – Federal-Provincial-Territorial Consultations on Custody and Access and Child Support*, GOV'T CAN. (Dec. 28, 2022), https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/cons/consdoc/obligat.html [http://perma.cc/E8RU-4P3B].

[174] Online Divorce Assistance, PROVINCE OF BRITISH COLUMBIA (Feb. 24, 2024), https://justice.gov.bc.ca/divorce/prequalification/step_04 [http://perma.cc/PG6H-G5XZ].

[175] *See id.*

[176] British Columbia Family Law Act, S.B.C. 2011, c 25, s 147 (Can.).

[177] *See* UPC (2010), *supra* note 65, art. I, prefatory note.

[178] British Columbia Family Law Act, S.B.C. 2011, c 25, s 147 (Can.).

In Ontario, a dependent (spouse or child) can petition the court for access to their provider's estate if they provide the court with an assessment of certain factors.[179] For a child seeking dependency, the definition expands to include a demonstration of "settled intention."[180] But obtaining status as a dependent is only the first step.[181] The dependent then must petition the court who then shall consider the totality of life factors relating to the dependent's current and future financial means and capacity to include mental health, accustomed standard of living, needs, lifetime support from the individual, and any existing legal obligations.[182]

Additionally, other provinces recognize the ability of dependents to benefit from the deceased's estate.[183] British Columbia permits maintenance to be paid from a testator's estate as follows:

> if a will-maker dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the will-maker's spouse or children, the court may . . . order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the will-maker's estate for the spouse or children.[184]

Several Canadian statutes recognize an individual's duty to support their minor children.[185] But in providing the opportunity to petition the court, administrative and legal costs add up, reducing the size of the estate overall and burdening the legal system.[186]

A key case in Canada involving establishing a child-parent relationship is *Chartier v. Chartier*.[187] The two parties were married and raising the wife's child from a previous relationship and one shared child.[188] Upon their divorce proceedings, the wife claimed the husband stood in the place of a parent to his stepdaughter.[189] The Court held that it needed to determine the nature of the relationship from an objective perspective, believing that any attempt to view it from the perspective of the child was too impractical.[190] The Court

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[179] Succession Law Reform Act, R.S.O. 1990, c S.26, s 26 (Can).
[180] *Id.* at s 57.
[181] *Id.* at s 62.
[182] British Columbia Family Law Act, S.B.C. 2011, c 25, s 147 (Can.).
[183] Wills, Estates and Succession Act, S.B.C. 2009, c 13, s 20 (Can.).
[184] *Id.*
[185] *See e.g.*, British Columbia Family Law Act, S.B.C. 2011 (Can.); Criminal Code, R.S.C. 1985, c C-46.
[186] *See* Noel Semple, *The Cost of Seeking Civil Justice in Canada*, 93 THE CANADIAN BAR REV. 3, 639 (2016), https://scholar.uwindsor.ca/lawpub/36 [https://perma.cc/4AQ9-59TN].
[187] Chartier v. Chartier, [1999] 1 S.C.R. 242, 242 (Can.).
[188] *Id.* at paras. 2–3.
[189] *Id.* at para. 4.
[190] *Id.* at para. 38.

assessed six factors in its approach to defining the parental relationship, including, but not limited to,

> [i]ntention . . . not only expressed formally, [but inferred] from actions[;] whether the child participates in the extended family in the same way as would a biological child; whether the person provides financially for the child (depending on ability to pay); whether the person disciplines the child as a parent; whether the person represents to the child, the family, [or] the world, either explicitly or implicitly, that he or she is responsible as a parent to the child; [and] the nature or existence of the child's relationship with the absent biological parent.[191]

Further, the Court considered the concern that a child may collect support from a biological parent and a stepparent. Still, it dismissed this concern as "the obligations of parents for a child are all joint and several."[192] *Chartier* demonstrates that the parent voluntarily assumed the role in his relationship with the stepchild but could not withdraw from his parenting obligations unilaterally.[193] Having this ability is discouraged as "this type of generosity which leaves children feeling rejected and shattered once a relationship between the adults sours is not beneficial to society in general and the children, in particular.[194] After all, it is the court's obligation to look out for the best interests of the children."[195]

If the courts can determine that an obligation occurs in life resulting from the voluntary assumption of the role of either a stepparent or a cohabiting partner,[196] why then does the U.S. legal system not capture this theory in the capacity of intestacy laws? Perhaps the U.S. legal system is allowing a person's death to provide them freedom from their obligations. There are, however, several reasons to permit such an obligation—and acknowledge it should remain in place after death—that are justified by both the intent of the decedent and public policy.

II. JUSTIFICATION TO SUPPORT CHANGES TO INTESTACY LAWS

Over time, intestacy laws have changed based on the determinations of elected officials and how such officials believe a decedent would have wanted their property to be distributed.[197] Whether these laws accurately

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[191] *Id.* at para. 39.
[192] *Id.* at para. 42.
[193] *See id.* at para. 37.
[194] *Id.* at para. 41.
[195] *Id.*
[196] *Id.* at paras. 37, 42.
[197] Wright & Sterner, *supra* note 62, at 343.

reflect decedents' wishes has been the source of various empirical research and scholarly debates.[198] Have legislatures gotten it right? With the increasing occurrence of non-traditional families in today's society,[199] the law may not be on par with what the average decedent's prioritization of non-blood relatives would truly be.[200] Section A looks at studies that shed light on the gap between current laws and the probable intent of decedents with non-traditional family members.[201] Section B examines the public policy benefits of families caring for their own members upon death rather than a shift to public dependency needs.[202]

A. Probable Intent

As times change, so too does the nature of the probable intent of an average person.[203] Moreover, an individual's intent can change throughout their lifetime, adapting to changing situations and reacting to factors such as changes in family makeup.[204] Although intestacy laws aim to capture a decedent's wishes, provided they did not create a will prior to their death, the results from at least one study show this may not be the case.[205]

Merrill Lynch and Age Wave estimated that approximately $30 trillion will be passed on to younger generations over the next 30 years.[206] Over half of Americans intend to transfer wealth to their heirs for various reasons: feeling it was the "right thing to do," providing security for their family, funeral costs, and memorializing a gift that will allow their family to remember them.[207] Remarkably, there is an increasing trend among younger generations who believe that parents are obligated to leave an inheritance to their children.[208] Further, 60% of participants believed that stepchildren should inherit amounts equal to biological and adopted children.[209] Many

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[198] *Id.*

[199] The American Family Survey, *2023 Summary Report: The Practicalities and Politicization of American Family Life* 6 (2023), https://media.deseret.com/media/misc/pdf/afs/2023-american-family-survey.pdf [https://perma.cc/LZ3J-5GQG] (showing "the marriage rate in the country is reportedly on the decline, while the parenting rate remains fairly constant").

[200] Wright & Sterner, *supra* note 62, at 344.

[201] *See infra* Section II.A.

[202] *See infra* Section II.B.

[203] *See* Wright & Sterner, *supra* note 62, at 346.

[204] *Id.* at 347.

[205] *See* Merrill Lynch & New Age, *Leaving a Legacy: A Lasting Gift to Loved Ones,* BANK AM., 6, https://images.em.bankofamerica.com/HOST-01-19-2701/ML_Legacy_Study.pdf [https://perma.cc/AX8J-DCT3]; Wright & Sterner, *supra* note 62, at 362.

[206] *Leaving a Legacy, supra* note 205, at 6.

[207] *Id.*

[208] *Id.* (explaining that 55% of Millennials believe it is an obligation to leave an inheritance while only 36% of those their parents age agrees and that the trend shows a decrease in this belief as the age group gets older: 44% of Gen X and 34% of Silent Gen).

[209] *Id.*

Americans may think about their end-of-life plans, but nearly half of Americans over 55 do not have a will.[210] In addition, since intestacy can affect such a large portion of the population, it is an important goal of intestacy statutes to ensure the distribution scheme will devise property according to the decedent's intent, but presumably, many will not.[211]

State lawmakers may also presume that intestacy statutes provide a reliable scheme whereby individuals can decide whether they wish to draft a will or rely on intestacy laws to distribute their property.[212] However, many individuals may not even be aware of the laws that dictate the disposition of their property at death or the identity of their heirs.[213] As previously discussed, an increasing rate of couples live together in long-term relationships but refrain from marriage.[214] These couples may share or have introduced children from their previous partners into the relationship.[215] Accordingly, it is important to ensure that, with changing societal norms,[216] lawmakers capture the probable intent of decedents,[217] especially those in non-traditional families who may unintentionally fail to provide for their loved ones in the event of their intestate death.

Although it may not be possible to capture probable intent retroactively,[218] examining empirical studies may provide insight and inform lawmakers when reforming legislation.[219] As Mary Louise Fellows points out, the two ways to determine the testamentary wishes of intestate individuals are by studying those who died with a will and examining opinions from living people regarding their wishes at death regarding their property.[220]

Listokin and Morley recently conducted a study that surveyed the dispositive wishes of 9,000 living respondents.[221] Interviewers asked the respondents about their relationship status, whether they had children—including stepchildren—and how much of their total property they would divest to any given beneficiaries upon their death.[222] As one might expect, the respondents preferred their descendants over others, but unlike the UPC

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[210] *Id.* at 3.

[211] Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 L. & INEQ. 1, 2 (2000).

[212] *See* Listokin & Morley, *supra* note 56, at 4.

[213] Mary Louise Fellows et al., *An Empirical Study of the Illinois Statutory Estate Plan*, 1976 U. ILL. L. F. 717, 723 (1976).

[214] *C.f.* STAT. CAN., *supra* note 37, at 3.

[215] *C.f. id.*

[216] Gary, *supra* note 211, at 2.

[217] *Id.* at 7.

[218] *Id.* at 8.

[219] *See id.* at 14, 42.

[220] 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, 325 (1978).

[221] *See* Listokin & Morley, *supra* note 56 at 2.

[222] *See id*. at 11 (stating that the list of beneficiaries included "friends and acquaintances," "charities, churches, schools, or nonprofits," and family members of varying degrees of separation. Spousal gifts were removed from this study to "sharpen the focus on other beneficiaries").

intestacy rules, the respondents who did not have descendants did not favor the lineal structure included in current intestacy laws.[223] Those respondents displayed generosity to nonrelatives, including friends, charities, and stepchildren.[224] Respondents without spouses and legal children would provide 29.7% of their estate to each marital stepchild.[225]

For respondents who lived with a stepchild in a marital household, the average gift per stepchild was twice that of a gift to a stepchild the respondent never lived with, suggesting the bond formed with a child in the home was a motivating factor in gift-giving.[226] This finding strengthens Fellows' finding from an earlier study that discussed how bringing a child into a marriage from a previous relationship differed depending on whether the child was young or old when introduced to the family.[227] When a child is very young, they are more likely to develop a close relationship with the stepparent and, thus, can affect the intent of the decedent.[228] Fellows' findings showed that if the respondent had children by both a present and a prior spouse, they preferred that "all children be treated equally," whereas Listokin's respondents did not go so far as to prefer equal treatment between their legal children and stepchildren.[229] The fact remains, however, that several studies of wills indicated a theme that generally all children were provided for, irrespective of the age of the children or the marital status of the parents (i.e., divorced).[230]

Wright and Sterner conducted a study examining nearly 500 wills to compare how decedents distributed their estates with the current distribution schemes of intestacy laws in place at the time.[231] Respondents in the survey generally did not favor their biological children over stepchildren.[232] Often, a will was used to disinherit a child or give unequal distribution; otherwise, one could discern that stepchildren were likely considered equals alongside biological children.[233] Moreover, 82% of those with stepchildren left property to them.[234] David Horton discerned in a short commentary on Wright and Sterner's work that the study may not account for the non-probate transfers

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[223] *See id* at 13.

[224] *See id.*

[225] The size of the gift is represented per capita rather than on a total basis, meaning that the size of the gifts to stepchildren is divided amongst the total number of children in that category to ensure there is no distortion between any difference in the number of legal children and stepchildren. Thus, the percentage represented here may be larger if there is more than one stepchild. *See id.* at 14.

[226] *See id.*

[227] Fellows, et al., *supra* note 220, at 365.

[228] *See id.*

[229] Listokin & Morley, *supra* note 56, at 15–16 (showing that respondents generally favored their legal children over stepchildren, and even more so for nonmarital stepchildren); *see* Fellows, et al., *supra* note 213, at 723.

[230] *See* Fellows, et al., *supra* note 213, at 723.

[231] Wright & Sterner, *supra* note 62, at 341.

[232] *Id.* at 369.

[233] *Id.*

[234] *Id.* at 377.

that occur in products such as trusts, life insurance, or any other pay-on-death contracts.[235] Horton argues that the distribution schemes studied through wills may not be as equitable as they appear because they were not studied in tandem, and only probate documents were reviewed.[236] Horton's comment merely highlights what is already known: one cannot be certain as to the probable intent of any given citizen; lawmakers must use available resources like studies such as these to depict the best possible guess as to their probable intent.[237]

Over time, studies suggest that including stepchildren in estate distribution remains citizens' priority, even more so if a bond has developed between the stepparent and stepchild.[238] As such, the current reality reflects that citizens' probable intent is likely not being met through current intestacy laws, and reform is needed.

B. Public Policy Favors Care for Family Members

While studies show the overall rate of marriage among several groups has declined, marriage is still a positive factor in children's overall lives and is suitable for society.[239] Despite this decline, an abundance of children remains; thus, many of those children are losing the stability of a two-parent household.[240] Despite any argument that can be made in support of the institution of marriage as being the best vehicle to provide stability, the fact remains that marriage is on the decline.[241] Whether the decline is attributable to marriage dissolution or a complete refrain from the legal commitment, the children left behind require support.[242] Accordingly, how can those same children be protected and reduce the strain on the public from the negative consequences that can come from the death of a parental figure?

In Canada, one particular method has been used in British Columbia involving judicial discretion in varying a will that has disinherited children.[243] In *Tataryn v. Tataryn's Estate*, the Supreme Court of Canada

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[235] *See* David Horton, Intestacy, Wills, and Intent: *A Short Comment on Wright & Sterner*, 43 ACTEC L.J. 339, 341 (2018).

[236] *See id.*

[237] *See id.*

[238] *See, e.g.,* Fellows, et al., *supra* note 220, at 325; Wright & Sterner, *supra* note 62, at 341.

[239] *See* The American Family Survey, *supra* note 199, at 6–7.

[240] *See id.* at 8.

[241] *See id*. at 6.

[242] *See id.* at 11 fig.4 (stating that when asked about the top concern for families generally, respondents said it was the costs associated with raising a family).

[243] While this Note is focused on laws surrounding intestacy, the examination of the judicial decision-making in *Tataryn v. Tataryn's Estate* is particularly noteworthy in its recognition of legal obligations that were significant enough to override a testator's intent when they have gone to the trouble of drafting a will that specifically disinherits their adult children. *See* Tataryn v. Tataryn's Estate, [1994] 2 S.C.R. 807, 807 (Can.).

found that the testator's will could be varied under the Wills Variation Act when the testator has a legal or moral obligation to support a spouse or child.[244] In her decision, Justice McLachlin defines the marriage of both legal and moral obligation as "what is 'adequate, just, and equitable' in the circumstances" of the case and can be limited to what is necessary for preventing the spouse or child from becoming a burden on the state.[245]

Justice McLauchlin further considered the legal obligations one has created during their lifetime and how those should support family legal obligations in death.[246] There is no clear moral standard by which legal obligations can be enforced, but there is a "strong moral obligation" to support one's family after death if the estate permits.[247] For example, if a spouse would be required to pay maintenance to the other spouse upon separation, there should be no difference if a spouse dies rather than leaves the relationship.

Moreover, Justice McLachlin considered the adult children as having not contributed as much to the estate and, thus, only receiving $10,000.[248] If this were a minor child, the Court would have arguably found that the legal obligation to support one's child transcended their death.[249] Nonetheless, it is understandable if nothing were left to biological children because the spouse instead received the majority of the estate, as traditionally, spouses continue to care for and provide for their children.[250] This becomes more complicated when stepchildren are involved, and there is no remaining spouse. This may be a particularly rare situation, but it is worth consideration. Morally and legally, this obligation should exist in the same way if the decedent has taken on the role that would fit a de facto parent in family law.[251] The stepchildren should be provided for without having to drain estate money in litigation.

In Canada, the Supreme Court has placed weight on a social obligation that provides for a testator's family in the event of their death, whether the decedent has affirmatively intended to do so or not.[252] One goal of providing a statutory framework for areas like intestacy is to provide stability,[253] which in turn will reduce litigation—a drain on the estate.[254] According to a study by Jeffrey Rosenfeld, litigation occurs in over 70% of will contests involving

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[244] *Id.* at para. 31.
[245] *Id.* at para.14.
[246] *Id.* at para. 29.
[247] *Id.* at para. 31.
[248] *Id.* at para. 36.
[249] *See id.* at para. 29.
[250] *See id.* at 807.
[251] *See supra* Section I.C-1.
[252] Chester, *supra* note 103, at 8.
[253] Danaya C. Wright, *The Demographics of Intergenerational Transmission of Wealth: An Empirical Study of Testacy and Intestacy on Family* Property, 88 UMKC L. REV. 665, 669 (2020).
[254] *Id.*

stepchildren or biological children in the United States.[255] Moreover, another study shows people's overall dissatisfaction with the idea of disinheriting children as minors.[256] Additionally, as the Court pointed out in *Tataryn's Estate*, lawmakers should be concerned with children and spouses not becoming a welfare burden on the state.[257]

While it is recognized that intestacy laws in Canada and the United States direct the estate to the decedent's family, it only accounts for those relatives who are blood-related, adopted, or married to the decedent.[258] Generally, lawmakers favor a distribution scheme that provides for and passes property within one's family, highlighting a desire to keep property within one's bloodline.[259] There are, however, additional goals of inheritance laws that largely provide for the well-being of society.[260]

First, providing basic life essentials to its citizens is something John Gaubatz says is intrinsic to a civilized society.[261] Thus, succession laws allow a decedent to provide necessities for their families so that societies are not forced to do so in the decedent's place.[262] For example, in American intestacy law, the spousal share and property provisions allow families some protection against homelessness or poverty, even if at the expense of creditors.[263] Additionally, in Canada, maintenance support claims provide financial assistance from the estate for a family member who demonstrates a need for support to the court.[264] Families are assumed to be those most meritorious and deserving of a testator's estate within a society, typically receiving the entirety of the estate before it might escheat back to the state in an intestacy scheme of succession.[265] This account, however, fails to support others who may be a part of the testator's family but are not recognized by the law to benefit from the estate.[266] Further, intestacy laws benefit society by providing stability and ease of administration and preventing litigation over a share of

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[255] Chester, *supra* note 103, at 4 (*quoting* Jeffrey P. Rosenfeld, *Will Contests: Legacies of Social Change*, *in* INHERITANCE AND WEALTH IN AMERICA, 186, tbl.8.4 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998)).

[256] Chester, *supra* note 103, at 5–6 (discussing Julius Cohen et al., *Parental Authority: The Community and the Law* 77, tbl. 12 (1958) (". . . 93.4% of respondents felt that a parent with no surviving spouse should not be able to disinherit children under twenty-one, and 63A% believed such a parent should not be allowed to disinherit children twenty-one or older.")).

[257] Tataryn v. Tataryn's Estate [1994] 2 S.C.R. 807, para. 14 (Can.).

[258] *See supra* Sections I.A–B.

[259] *See* Gaubatz, *supra* note 18, at 532.

[260] *See id.*

[261] *See id.* at 510.

[262] *See id.* at 510.

[263] *See id.* at 510–11.

[264] *See, e.g.,* Family Maintenance Enforcement Act, R.S.B.C. 1996, c 127.

[265] *See* Gaubatz, *supra* note 18, at 511.

[266] *See id.*

the estate from draining the estate[267] or placing additional burden on the courts.[268]

Due to changing public policy, family laws have expanded their definition of family.[269] The reform of state parentage laws to eliminate discrimination against children based on marital status has occurred slowly.[270] Then, as an increasing number of parents were bearing children outside marriage, the Supreme Court declared laws that discriminated against nonmarital children as unconstitutional.[271] The UPA was instrumental in shaping state reform to achieve equality among children, regardless of the marital status of their parents.[272] Moreover, the UPA also furthered a goal of acknowledging and protecting a parent-child bond between individuals who have formed strong relationships even though they may have entered the child's life after birth.[273] Given the recognition of this bond in family law,[274] the parent may have strong preferences for providing care to a de facto child if they die intestate, without having the opportunity to capture their wishes in a will. Nonetheless, the legal obligation to provide for that child after the parent's death should exist in intestate law.

One may argue that the law must remain unchanged for fear that moral control of society will be lost.[275] With an expansive view of familial definitions introduced in legislation,[276] such a change may produce a further decline in marriage rates.[277] Instead, studies show that marriage has declined for years regardless of any change in legal definitions.[278] Marriage was once something that young adults did very early in life, whereas more recently, marriage occurs later in adulthood.[279]

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[267] Individuals who are most often affected by the reduction in the size of an estate—whatever the reason—are less wealthy and thus generally die intestate as they fail to see the value of estate planning. Nontraditional families were found to have endemic barriers to wealth gaps, and to protect even the smallest amounts of wealth, the "downward wealth gap cycle" must be disrupted. Wright, *supra* note 253, at 669.

[268] *See* Gaubatz, *supra* note 18, at 513–16.

[269] *See* Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L.J. F. 589, 592 (2018), https://www.yalelawjournal.org/pdf/Joslin_4srmpiia.pdf [https://perma.cc/X3CL-JJWU].

[270] *Id.* at 597.

[271] *Id.* at 598 n. 54 (collecting Supreme Court cases that determined laws discriminating against illegitimate children were unconstitutional).

[272] *Id*. at 598–99.

[273] *Id.* at 599; UPA (2017), *supra* note 133, art. 1, § 609(d).

[274] *See* Joslin, *supra* note 269, at 599.

[275] *See generally*, *id.*

[276] *See id.* at 598–99.

[277] *See* The American Family Survey, *supra* note 199**,** at 6–7.

[278] Kim Parker & Renee Stepler, *As U.S. marriage rate hovers at 50%, education gap in marital status widens*, PEW RSCH. CTR. (Sept. 14, 2017), https://www.pewresearch.org/short-reads/2017/09/14/as-u-s-marriage-rate-hovers-at-50-education-gap-in-marital-status-widens/ [https://perma.cc/HC8G-HFVE] (indicating marriage rates may instead be closer related to financial concerns and partner satisfaction).

[279] Katerine Schaeffer, *Striking Findings from 2023*, PEW RSCH. CTR. (Dec. 8, 2023),

A study conducted in Scandinavia found that marriage decline does not appear to result from the expansion of the definition of family in law.[280] In his study, Kurtz suggested a host of other factors contributed to marital decline, including "contraception, abortion, women in the workforce, cultural individualism, secularism, and the welfare state."[281] All of these factors existed before the legalization of same-sex marriage, an expansion of the definition of family in the law.[282] Further, a district court in Connecticut acknowledged factors from the same study as contributing to extra-marital procreation, including the expansion of the welfare state, women's independence, women entering the workforce, and a rise in feminist and socialist ideas.[283] This suggests that both nonmarital procreation, as well as the decline in marriage, are not caused by an expanded definition of family in the law.[284]

Accordingly, any adaption of family and intestacy laws to include stepchildren within the definition of family is not likely to contribute to a further decline in the institution of marriage.[285] Children will continue to be born out of wedlock, and unmarried cohabitation will remain a choice for many. Therefore, broadening the definition of one's family is needed to reduce an impending burden on society and allow for the maximum value of an estate that will pass to a decedent's family.

III. RESOLUTION

One indication that the United States is closer to accepting the contemporary view—that the probable intent of a decedent is to incorporate stepchildren into their property distribution—is the revision of the 2019 UPC.[286] While the revision incorporated the 2017 UPA de facto parentage definitions[287] into the code, the limitation remains that in the United States, the de facto parent must begin the legal process to adjudicate themselves as

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https://www.pewresearch.org/short-reads/2023/12/08/striking-findings-from-2023/ [https://perma.cc/SA2K-S4C5] (finding that a record high existed at the end of 2021 as 25% of 40-year-olds have never been married).

[280] *Legal Threats to Traditional Marriage: Implications for Public Policy: Hearing Before the Subcomm. on the Const. of the Comm. on the Judiciary H.R.*, 108th Cong. 17 (2004) (statement of Stanley Kurtz), https://www.govinfo.gov/content/pkg/CHRG-108hhrg93225/pdf/CHRG-108hhrg93225.pdf [https://perma.cc/U6DY-D7DF].

[281] *Id.*

[282] *Id.*

[283] *See* Pedersen v. OPM, 881 F. Supp. 2d 294, 338 (D. Conn. 2012).

[284] *See id.*

[285] *See* Parker & Stepler, *supra* note 278 (showing the average decline in marriage regardless of any change in legal definitions).

[286] *See generally* UPC (2019), *supra* note 48.

[287] UPA (2017), *supra* note 133, prefatory note, § 609(d).

a de facto parent.[288] Moreover, there is a high legal standard to meet, that of clear and convincing evidence.[289] Finally, the adjudication must begin before the child turns the age of majority.[290] These limitations may be a legal barrier to individuals who are not savvy regarding the law's requirements or do not have the means to begin legal proceedings. And, as studies revealed, those with modest means are among those most likely to die without an estate plan—they are also most likely to live in nontraditional households, making this proposed revision to intestacy laws fundamental.[291]

The revision does not address situations similar to what Samantha finds herself in when Meredith and Patrick suddenly die without planning or beginning the adjudication process. Samantha cannot petition for adjudication, nor can she or anyone else proceed toward de facto parentage posthumously.[292] Samantha would satisfy all the factors to establish Patrick as a de facto parent: he has resided with her for a significant period of her life in the same household, provided consistent care for her without an expectation to be financially compensated, she called him "Dad," he held out as her father in all aspects of their lives, and this relationship serves Samantha's best interests.[293] But Samantha cannot claim any share of Patrick's estate under intestacy laws.[294] Only if Patrick petitioned the court (with Meredith's consent) to adjudicate a parent-child relationship with Samantha before his death could she share in his estate as a child.[295]

Although the 2019 revision of the UPC incorporates modern contemporary views found in the UPA on blended families, it is limited in application because of the requirement to petition the court for adjudication of the parent-child de facto relationship.[296] Further, the UPA allows the addition of a parent without the requirement to terminate one of the biological parent's rights to do so.[297] However, the UPA still requires a legal process to occur before establishing the relationship,[298] which may negatively impact a subsect of the population if they are unable or unaware that they are required to petition the court. It is also important to note that, as of January 2024, no states have adopted the 2019 revisions.[299]

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[288] *Id.* at § 609(a).
[289] *Id.* at § 609(d).
[290] *Id.* at § 609(b).
[291] *See* Wright, *supra* note 253, at 668 ("[O]n average, intestate decedents were more likely to be younger, married, and poorer than their testate counterparts, meaning provisions for children were less likely to be well-planned.").
[292] *See* UPC (2019), *supra* note 48, § 2-705.
[293] *See* UPA (2017), *supra* note 133, § 609.
[294] *See supra* Section I.B-1.
[295] *See* UPA (2017), *supra* note 133, § 609(a).
[296] *See id.* at § 609.
[297] *See id.* at § 613.
[298] *See id.* at § 102(8).
[299] *See Probate Code (2019), supra* note 60.

In Canada, if Samantha resided in Ontario, she could petition the court to recognize Patrick's de facto parental status, but more importantly, make a claim against Patrick's estate for support; a claim, while a step in the right direction, does not entitle Samantha to any actual inheritance.[300] Samantha would have to prove that Patrick was already providing support to her immediately before his death and had a settled intention to treat her as a child.[301] Where in Canada, it is easier for Samantha to adjudicate a de facto parent-child relationship, it has not entirely passed into intestacy.[302] As the courts have been willing to allow non-married spouses to petition the court for inheritance and dependents to petition for support, it is likely only a matter of time before intestacy laws catch up. A revision to uniform intestacy statutes is required to fully capture societal advances, and the United States should not only utilize Canada's baseline but expand upon it.

A. Model Statute

The United States has failed to reach the same consensus that countries like Canada have regarding the obligation to continue supporting a child once the parent has become entrenched in the child's life unless the de facto parent themselves petitioned for it.[303] While it is understood that lawmakers and the public prefer having a consistent and reliable approach to the distribution of property at one's death,[304] the best possible scenario would be to merge Canada's establishment of de facto parenting with the 2019 revision of the UPC.

One of the limitations of the 2017 revision of the UPA is that it does not permit a party to establish a de facto parentage relationship involuntarily against an individual or after the death of either the parent or child.[305] While acknowledging that such a limitation may ease concerns for some individuals, it is important to balance this with an individual's probable intent and the child's best interest principle. Ensuring there is still an escape hatch—in the form of a rebuttable presumption—similar to an individual retaining the ability to disinherit through a will or through the presentation of clear and convincing evidence that the decedent would not have wanted to provide for the stepchild can be an effective option.[306] Moreover, allowing for a default presumption of a de facto parent-child relationship in a statute would authorize a stepchild to share the decedent's property without having to drain

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[300] *See* Succession Law Reform Act, R.S.O. 1990, c S.26. s 62 (Can.).
[301] *See id.* s 57.
[302] *See* generally Succession Law Reform Act, R.S.O. 1990, c S.26 (Can.).
[303] *See generally* Chartier v. Chartier, [1999] 1 S.C.R. 242, 242 (Can.).
[304] *See supra* Section II.A-1.
[305] UPA (2017), *supra* note 133, § 609.
[306] *See, e.g.*, UPC (2019), *supra* note 48, § 1-102.

the estate or place a burden on the legal system.[307] The unification of family laws that acknowledge adjudication of a de facto parent relationship in revised scenarios with intestacy laws will address these concerns.

The proposed model statute compiles provisions from relevant statutes and case law discussed throughout this Note. States are recommended to adopt the following through their legislatures:

Preamble

If a state does not acknowledge adjudication of a de facto parent-child relationship through the Uniform Parentage Act, the following sections should be adopted.

Whether an individual is presumed to be a de facto parent of a child should be defined in a manner that is consistent with Section 613 of the Uniform Parentage Act in adjudicating a child to have more than two parents if the court finds that failure to do so would be detrimental to the child.

1. Presumption of De Facto Parentage of Child.

a. A presumption of de facto parentage of a child may be made under this section by an individual:

i. before the child attains 18 years of age; and

ii. while the child is alive.

b. A presumption of de facto parentage of a child shall be made if *the petitioner* demonstrates a *settled intention* by the individual as a de facto parent by satisfying each of the following:

i. the individual resided with the child as a regular member of the child's household for at least one year, as long as the time began to accrue when the child was under the age of 18;

ii. the individual undertook full and permanent responsibilities as a parent of the child without expectation of financial compensation;

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[307] *See* UPA (2017), *supra* note 133, prefatory notes 1, 2.

iii. the individual was consistently involved in the child's care, discipline, education and recreational activities;

iv. the individual established a bonded and dependent relationship with the child, which is parental in nature to include:

(a) the individual held out the child as the individual's child; and

(b) the child perceived the individual as a parental figure;

v. another parent of the child fostered or supported the bonded and dependent relationship required under paragraph (iv); and

vi. the relationship between the individual and the child is in the best interest of the child.

c. An individual does not need to be alive at the time of the presumption of de facto parentage, but proceedings must commence no later than one year after the de facto parent's death.

d. A child adjudicated to be the child of a de facto parent shall be considered a *child* in an applicable Intestate Succession Act and subject to inherit as such from the de facto parent's estate.

e. Conversely, the above factors in paragraph (b) may be used to exclude an estate from succession where appropriate, to include termination of such a relationship. If an individual demonstrates by clear and convincing evidence that there was not a sufficiently settled intention to treat a child as if the child were their own while alive, the estate should not be subject to such a claim. Factors that can be included to prove there was not a settled intention include, but are not limited to, the following:

i. the extent of the contact between the individual and the child if the individual was living separate and apart from the child's other parent before their death;

ii. an individual, prior to being subject to adjudication as a de facto parent of a child contracted out of support obligations; and

iii. the child has, and will continue to receive, sufficient financial support from their other biological parent that would provide the same, or better, standard of living after the death of the de facto parent.

Comments

The definition of a child permitted to inherit from a parent through the Uniform Probate Code, including intestacy, should be expanded to incorporate a child of a de facto parent.

The above model statute is ideal for states to incorporate because trends in research have shown that societal attitudes toward nontraditional families have become more mainstream.[308] Further, blended families encompass a significant portion of the nation.[309] Accordingly, legislatures should adopt it in its entirety to ensure laws remain current and address the decedent's probable intent. This allows stepchildren to inherit through intestacy when the stepparent has taken on a de facto parent role and likely wishes to care for the child upon their death. This modernization of the current intestacy statute incorporates an expanded definition of family—namely stepchildren—and aids in preserving as much of the estate as possible while allowing a decedent who has demonstrated the settled intention to stand in the place of a parent to support the child through their death.

B. Common Law

Although the proposed model statute is the ideal method for addressing the lack of acknowledgment of the stepchild in American intestacy laws, it is not likely that states will adopt such a statute soon, bearing in mind as of January 2024, no states have adopted the 2019 UPC revisions into their codes.[310] In the meantime, expanding common law to permit stepchildren to petition the court for a share of their stepparent's estate is the next best solution. As this judicial approach takes form, states can monitor the success of such petitions to determine a need for accompanying changes to their intestacy laws.

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[308] *See supra* Section I.A-1.
[309] *See* TEACHMAN & TEDROW, *supra* note 23, at 3.
[310] *See Probate Code (2019)*, supra note 60.

At a minimum, common law would allow Samantha standing to petition the court to receive a share of Patrick's estate upon his death. She would present evidence that meets the required standard to acquire de facto parentage, and the court would determine its sufficiency. Likely, Samantha may require an attorney to assist her through the process and represent her in proceedings, and the cost alone may drain the estate considerably depending on its size.

In particular, the transfer of wealth in smaller estates—which, by and large, represent the estates handled through intestacy—depends on factors such as the ease of the process, keeping assets out of probate, and ensuring the ability to transfer the maximum amount of assets with minimal cost.[311] Unfortunately, judicial action through probate would not be cost-effective and could significantly reduce wealth transfer.[312] The judicial activism necessary to expand the common law to accommodate stepchildren in intestacy laws may, therefore, be untenable as it relates to the typical petitioner. Additional concerns with a common law approach may include the potential for stepchildren with little to no relationship with the decedent—akin to laughing heirs—to seize the opportunity to inherit from a decedent with whom they had no meaningful relationship.[313] The judicial discretion present in the courts, however, will allow the judiciary to assess stepchildren's fulfillment of the common law standards and gatekeep estate assets from strategic advances by individuals who may not meet the standard but are attempting to take advantage of being the last family member standing.[314]

IV. CONCLUSION

When parents die without a will, their children are generally provided for through inheritance from their parent's estates. This is not the case for stepchildren like Samantha. Without revisions to America's intestacy laws, Samantha may be left without financial support and, as a minor, may require government aid to provide for her care. Adopting the modernized model statute will permit Samantha to presume that Patrick stood in place of her parent through de facto parentage, ultimately allowing her the opportunity to inherit from his estate—which arguably aligned with Patrick's probable intent. The emergence of the blended family means that lawmakers can no longer continue to disregard an entire category of children in intestacy laws who may be left standing with nothing.

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[311] *See* Gary, *supra* note 211, at 9.
[312] *See id.*
[313] *See* Hargis, *supra*, note 2, at 451.
[314] *See id.* at 465; Gaubatz, *supra* note 18, at 509.