

INHERITANCE FOR THE ILLEGITIMATE: CHILDREN OF RAPE AND THE NEED FOR PROGRESSIVE INTESTATE REFORM IN TEXAS

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I. INTRODUCTION

Genevieve Rindfield gave birth to a daughter, Diane Burkhard, nine months after her distant relative and employer, John Brooks, raped her.¹ No one believed her story, and she and her daughter became outcasts.² Rindfield did not bring suit because she wanted to avoid the negative attention.³ Fifty-one years later, Burkhard avenged her mother.⁴ When Brooks died, Burkhard contested his will.⁵ Despite his relatives' objections, Burkhard had the body exhumed, and a subsequent DNA test confirmed that Brooks was Burkhard's biological father.⁶ At the time, unrecognized, illegitimate children could not claim inheritance in Michigan.⁷ After Burkhard successfully contested her biological father's will and won \$90,000 of his estate, Michigan changed its laws.⁸

Burkhard is committed to helping other children conceived through rape by establishing support groups and modifying laws across the country.⁹ Burkhard states, "This is about men not taking the responsibility, not being accountable for their actions—and the laws seem to be on their side when it comes to the illegitimate child."¹⁰ Burkhard brought national attention to a topic that is not often recognized—a topic state legislatures need to address.

Should adoption or abortion solve this problem? For many women who conceive a child through rape, these are viable options.¹¹ This discussion does not concern any debates about abortion versus adoption versus keeping the child; many women choose not to have an abortion or give the child up for adoption for personal, for moral, or for a myriad of other reasons.¹² This discussion concerns the women who keep the child and the legislation that should be passed to protect their families. Because this is a changing area of probate law, Texas needs to follow other states'

1. *Child of Rape Wins Claim of Inheritance*, N.Y. TIMES, July 10, 1994, <http://www.nytimes.com/1994/07/10/us/child-of-rape-wins-claim-of-inheritance.html>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Mary Brooks, *Fighting for Rights: Daughter of Rape Victim Works for Equitable Inheritance Laws*, ORLANDO SENTINEL, Jan. 2, 1995, at C1, 1995 WLNR 4610528 ("The judge [who ruled in Burkhard's favor] in summation said we're now bringing women and children into the 20th century.").

9. *Id.*

10. *Id.*

11. See Meg Brannagan, *Facts About Adoption Instead of Abortion*, LIVESTRONG.COM (Mar. 30, 2011), <http://www.livestrong.com/article/181997-facts-about-adoption-instead-of-abortion/>.

12. See Carey Tennis, *I Was Impregnated by a Rapist 32 Years Ago*, SALON (May 6, 2005), www.salon.com/2005/05/06/child_of_rapist/. See also Kara N. Bitar, *Parental Rights of Rapists*, 19 DUKE J. GENDER L. & POL'Y 275, 282–84 (2012).

leads and pass legislation that directly addresses inheritance rights of children conceived by rape.

II. CHILDREN CONCEIVED BY RAPE AND INHERITANCE RIGHTS: A MAJOR PROBLEM

Children conceived through rape create a larger probate concern than society might realize.¹³ Moreover, a substantial percentage of women who conceive a child after being raped are victims of relatives, creating bizarre intestacy problems.¹⁴

A. Children Conceived by Rape Are Prevalent

There are more children conceived by rape than the general public might know.¹⁵ “[S]omeone in the United States is sexually assaulted every two minutes.”¹⁶ U.S. Representative Todd Akin created serious controversy when he asserted that women infrequently get pregnant from actual rape because their bodies shut down the reproductive system to prevent a pregnancy.¹⁷

The American Journal of Obstetrics and Gynecology, however, has reached different results.¹⁸ After a three-year study, the journal established that 5% of reproductive-age women became pregnant after rape.¹⁹ Another study found that in one year, more than 31,000 raped women became pregnant.²⁰ Of those women, about 30% chose to keep and raise the child.²¹

B. Children Conceived by Rape and Issues with Incest

Many women who become pregnant as the result of rape are victims not of strangers, but of perpetrators to whom they are related.²² The Centers

13. See Bitar, *supra* note 12, at 281.

14. See discussion *infra* notes 25–27.

15. See discussion *infra* notes 16–21.

16. Dr. Swati Shroff & Dr. Tiffany Chao, *Todd Akin Challenged by Doctors on Rape and Pregnancy*, ABC NEWS MED. UNIT (Aug. 21, 2012), <http://abcnews.go.com/blogs/health/2012/08/21/todd-akin-challenged-by-doctors-on-rape-and-pregnancy/> (“[O]n average there are 207,754 victims (age 12 or older) of sexual assault every year.”).

17. Ethan Bronner, *A Candidate’s Stumble on a Distressing Crime*, N.Y. TIMES, Aug. 23, 2012, <http://www.nytimes.com/2012/08/24/us/definition-of-rape-is-shifting-rapidly.html>.

18. *Id.*

19. *Id.*

20. Aaron Carroll, *Rape Can Make You Pregnant. Period.*, CNN (Aug. 20, 2012), <http://www.cnn.com/012/08/20/opinion/carroll-akin-rape/index.html>. See also Bronner, *supra* note 17 (“The Centers for Disease Control and Prevention [have estimated,] based on interviews with women, [that] the number of men-on-women rapes in 2010 was 1.3 million. . . .”).

21. Shauna Prewitt, *Raped, Pregnant and Ordeal Not Over*, CNN (Aug. 23, 2012), <http://www.cnn.com/2012/08/22/opinion/prewitt-rape-visitation-rights/index.html>.

22. See Bitar, *supra* note 12, at 281.

for Disease Control and Prevention found that 23.7% of rapists are family members.²³ The National Victim Center and Crime Victims Research and Treatment Center studies revealed that out of all raped individuals, 75% knew their rapists—11% were the victims' stepfathers or fathers and 16% were the victims' other relatives.²⁴

These statistics have disturbing intestacy implications: if a father rapes his daughter and she conceives a child, is that child a sister or daughter to the victim?²⁵ Kristi Hofferber, for example, realized not only that she was conceived in rape, but also that her biological father was her biological grandfather.²⁶ This creates intestacy complications because if Hofferber's biological father/grandfather were to die intestate, would intestacy law treat Hofferber as a daughter or granddaughter of his estate?²⁷ This type of predicament represents nearly one third of all pregnancies resulting from rape.²⁸

III. HOW PARENTAL RIGHTS DRASTICALLY INFLUENCE INHERITANCE RIGHTS

Determining paternity significantly affects inheritance rights, and different states have different paternity determination methods. In some states, biological parents, including rapists, have automatically-established legal parental rights.²⁹ These rights include having custody of the child, making medical decisions for the child, or inheriting from the child.³⁰ Therefore, these rapists—some of whom are the victims' family members—are presumed to have parental rights to the children they conceived through rape.³¹

In other states, fathers must complete certain requirements to have legal parental rights.³² In New York, for example, these requirements include the court issuing an order of filiation during the father's lifetime, the father issuing a formal paternity acknowledgement, the father submitting DNA proof that "with other evidence establishes paternity by

23. *Id.*

24. *Id.*

25. *See generally* TEX. PROB. CODE ANN. § 38 (West 2011).

26. Rebecca Kiessling, *Other Conceived in Rape Stories*, CONCEIVED RAPE, TARGETED FOR ABORTION, <http://www.rebeccakiessling.com/Otherconceivedinrape.html> (last visited May 20, 2013).

27. *See generally* PROB. § 38.

28. *See* Bitar, *supra* note 12, at 281.

29. *See, e.g., Doe v. Brown*, 489 S.E.2d 917, 919 (S.C. 1997) (denying a rapist father parental rights and disallowing him to contest an adoption, but only because the rapist father did not comply with the statutory requirements).

30. *See* Bitar, *supra* note 12, at 281.

31. *See id.* at 276.

32. *See generally* discussion *infra* notes 46–54.

clear and convincing evidence,” or the father “openly and notoriously acknowledg[ing] the child as his own.”³³

Generally, these states do not allow the illegitimate child to have any support from his or her biological father unless the child is legitimized.³⁴ Understanding the different presumptions or criteria for establishing parental rights is vital to understanding the complicated inheritance issues of children conceived by rape.

A. States with an Automatic Presumption of Parental Rights

In some states, such as Nebraska, Alaska, and Missouri, parents—including rapists—automatically have a presumption of parental rights over a child.³⁵ For example, in Nebraska, a woman’s stepfather raped her, and she conceived a child.³⁶ She decided to keep the child, and eleven years later, she wanted her fiancé to adopt the child.³⁷ The stepfather/rapist refused to terminate his parental rights and would not agree to the adoption.³⁸ These states’ courts presume that parents have parental rights to their biological children.³⁹ To overcome this presumption and deprive a parent of parental rights, “there must be ‘grave and weighty reasons’ for such deprivation.”⁴⁰

Similarly, a convicted rapist in Massachusetts sought to enforce his parental rights over a child that he conceived when he raped a fourteen-year-old girl.⁴¹ The rapist wanted access to the child because the court ordered the rapist to pay \$110 a week in child support.⁴² The victim’s attorney said, “She wants nothing to do with this guy . . . He can request visitation, he can have potential involvement in the child’s education, [and he can] have access to the child.”⁴³ The Massachusetts high court took the case to decide whether “criminal courts can send rapists to Family Court at all in Massachusetts.”⁴⁴ The automatic presumption of parental rights can have devastating effects on children conceived through rape.⁴⁵

33. N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 2010). *See also* Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 86 (2003).

34. *See, e.g.*, TEX. FAM. CODE ANN. § 101.025 (West 2001).

35. *See, e.g.*, MO. ANN. STAT. § 452.160 (West 2012).

36. Bitar, *supra* note 12, at 278.

37. *Id.*

38. *Id.*

39. *Id.* at 276.

40. *Id.*

41. Colleen Curry, *Rapist Wants Visitation Rights With Child Conceived During Rape*, ABC NEWS (Sept. 29, 2012), <http://abcnews.go.com/US/massachusetts-rapist-seeks-visitation-victims-child/story?id=17349095>.

42. *Id.*

43. *Id.*

44. *Id.*

45. *See* discussion *supra* notes 36–43.

B. States with Requirements for Parental Rights

Other states, such as Texas, Michigan, New York, Ohio, and Georgia, approach parental rights differently.⁴⁶ If a man is the biological father but has not legally authenticated the child as his own, the man has no legal rights to the child.⁴⁷ These states have statutes that permit illegitimate children to inherit from their mothers but only allow illegitimate children to inherit from their fathers after fulfilling specific requirements.⁴⁸ These requirements can include “marrying the mother, acknowledging the child, designating the child as an heir-at-law, adoption, or making a provision in the will.”⁴⁹ Therefore, illegitimate children can, under certain circumstances, have no legal father.⁵⁰

In Georgia’s intestacy provision, for example, an illegitimate child and his or her biological father must satisfy a condition before being able to inherit from one another.⁵¹ These conditions include the court declaring the child to be legitimate or establishing paternity, the father signing a sworn statement to establish the parent-child relationship, the father signing the birth certificate, or the existence of clear and convincing evidence to establish paternity.⁵²

New York has parallel conditions on illegitimate children receiving inheritance from their biological fathers.⁵³ Alternatively, an illegitimate child who wants to inherit from his or her mother has no problem doing so under New York law.⁵⁴

C. Texas Paternity Law

To propose effective legislation, it is necessary to understand the current paternity laws in Texas. Courts do not assume paternity in Texas; both parents must complete certain criteria to have legal paternity.⁵⁵ Unless

46. See, e.g., *In re Estate of Miller*, 524 N.W.2d 246, 246–47 (Mich. Ct. App. 1994) (explaining that paternity in Michigan can be established by the man and the mother of the child acknowledging paternity in writing any time during the child’s lifetime, the man and the mother of the child executing a written inquiry to correct the child’s birth certificate, or the man and the child maintaining a father-child relationship, which must have commenced before the child turned eighteen and continued until one of the parties’ death).

47. See, e.g., discussion *infra* notes 51–52.

48. See Eleanor Mixon, *Deadbeat Dads: Undeserving of the Right to Inherit from Their Illegitimate Children and Undeserving of Equal Protection*, 34 GA. L. REV. 1773, 1775 (2000).

49. *White v. Randolph*, 391 N.E.2d 333, 333 (Ohio 1979) (emphasis omitted).

50. See discussion *infra* notes 66–67.

51. See GA. CODE ANN. § 53-2-3(2)(A) (West 2012); Mixon, *supra* note 48, at 1790–91.

52. § 53-2-3(2)(A).

53. See discussion *supra* note 33.

54. See N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 2010); Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 87–88 (2003).

55. See discussion *infra* notes 57–59.

legal paternity is established, Texas does not give the biological father any rights or responsibilities as the child's father.⁵⁶

A mother can create a legal parent-child relationship between a woman and a child in Texas by giving birth to the child, by having a court adjudicate paternity, or by adopting the child.⁵⁷ A father can establish a parent-child relationship if he is presumed to be the child's father,⁵⁸ if a court adjudicated that the man is the father, if the man adopted the child, if the man effectively acknowledged paternity, or if the man consented to his wife's assisted reproduction.⁵⁹

If one of the above requirements is met, the child can inherit from his or her biological parents and that parent's relatives.⁶⁰ If the child has not established paternity by the alleged parent's death, then the child may petition the court for a posthumous determination of right to inheritance from the parent.⁶¹ For the child to inherit, the court must find by clear and convincing evidence that the presumed parent was in fact the biological parent of the child.⁶² However, if none of these options for legitimization are accomplished, the child can be illegitimate for purposes of inheritance.⁶³

IV. BRIEF HISTORY OF ILLEGITIMATE CHILDREN AND ABILITY TO INHERIT

In the states that require some sort of authentication, it is possible that a child can have no legal father and be considered illegitimate.⁶⁴ In Texas, as discussed above, the child either has a presumed father if the father meets certain requirements or if the father legally authenticates the child through other means.⁶⁵

If the biological father has not legitimized the child, unless the child can successfully petition the court to authenticate paternity, the child cannot inherit from the father.⁶⁶ If the child has "no presumed, acknowledged, or adjudicated father," then the child can attempt to adjudicate paternity at any time.⁶⁷

56. See TEX. FAM. CODE ANN. § 101.025 (West 2001).

57. TEX. FAM. CODE ANN. § 160.201 (West 2001).

58. TEX. FAM. CODE ANN. § 160.204 (West 2001) (stating that the father is presumed to be the father of a child if he is married to the child's mother and the child is born during their marriage, if he is married to the child's mother and the child is born before the 301st day if the marriage has ended, or the man held the child out to be his in the first two years of the child's life).

59. FAM. §§ 160.201, 101.024.

60. TEX. PROB. CODE ANN. § 42(b)(1) (West 2001).

61. *Id.*

62. *Id.*

63. *Id.*

64. See, e.g., *id.*

65. See discussion *supra* notes 58–59.

66. TEX. FAM. CODE ANN. § 160.606 (West 2001).

67. *Id.*

However, if the child's biological parent is a rapist, the child may not want to authenticate paternity. The child or the parent must establish paternity for the child to be able to inherit from the parent.⁶⁸ However, authenticating paternity gives that parent legal rights—which could give a rapist control over the child.⁶⁹ For example, a legal parent has custody rights and can determine where the child goes to school.⁷⁰ Also, if the child dies intestate, then the rapist (now a legal parent) stands to inherit from the child.⁷¹ However, if the parent or the child never takes steps towards legitimization, then the child is illegitimate.⁷² Therefore, to better understand why change in this area progresses slowly, it is helpful to consider a brief history of illegitimate children's legal and inheritance rights.⁷³

A. Illegitimate Children Inheriting from Parents

At common law, children conceived by rape were not considered to have a legal father.⁷⁴ In the past, inheritance rights were based on the assumption that each person belongs to a nuclear family.⁷⁵ An illegitimate child was considered “*filius nullius*,” which means “the child of no one.”⁷⁶

It was not until the 1920s that an illegitimate child could inherit from his or her mother.⁷⁷ Even now, “in wrongful death actions, intestate inheritance, domicile, custody, and adoption,” many states give mothers' relationships with their out-of-wedlock children more authority than fathers' relationships.⁷⁸

Illegitimate children possibly experience discrimination because of a fear that men might be wrongly accused of having an illegitimate child, which would allow this child to falsely claim an inheritance.⁷⁹ Another potential theory is that illegitimate children are discriminated against to protect “legitimate issue.”⁸⁰ This notion means that any children born to parents who are married have superior inheritance rights than children born

68. See discussion *supra* notes 60–62.

69. See Bitar, *supra* note 12, at 281.

70. See *id.*

71. See discussion *infra* notes 107–08.

72. See TEX. PROB. CODE ANN. § 42(b)(1) (West 2001).

73. See discussion *infra* Part IV.

74. 41 AM. JUR. 2D *Illegitimate Children* § 7 (2013).

75. Peter Wendel, *Inheritance Rights and the Step-Partner Adoption Paradigm: Shades of the Discrimination Against Illegitimate Children*, 34 HOFSTRA L. REV. 351, 352 (2005).

76. Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 81 (2003).

77. *Id.* at 81–82.

78. *Id.* at 73.

79. See *Mixon, supra* note 48, at 1777.

80. *Compensation for the Harmful Effects of Illegitimacy*, 66 COLUM. L. REV. 127, 130 (1966).

to parents who are not married.⁸¹ States have cited “discouraging promiscuity, protecting the family unit, and discouraging men from fathering children out of wedlock” for the states’ anti-illegitimate children statutes.⁸²

B. Parents Inheriting from Illegitimate Children

A parent inheriting from an illegitimate child, however, has different ramifications.⁸³ Fathers did not inherit from their illegitimate children without going through legal formalities.⁸⁴ Some states necessitate fathers to care for and recognize the illegitimate children before the father is entitled to any inheritance from the child.⁸⁵

Alabama, for example, did not allow a father to inherit from his illegitimate child even though paternity had been established by adjudication, “unless [he had] openly treated the child as his, and [had] not refused to support the child.”⁸⁶ Other states—Missouri, Nebraska, South Carolina, and Delaware—have similar requirements.⁸⁷ Many states, such as Texas, require the parent to fulfill some sort of requirement to be entitled to parental legal rights, including the ability to inherit.⁸⁸

C. Judicial Relief

Children conceived by rape finally began receiving judicial relief in the 1960s.⁸⁹ One of the first cases dealing with this, *Williams v. State*, concerned “a mentally deficient mother” who had a child after another patient in a state mental institution raped her.⁹⁰ The damages the child requested included compensation for the stigma of being an illegitimate child, loss of a normal home life, and inability to inherit from his father and paternal relatives.⁹¹ The court agreed that “the injuries suffered by an illegitimate were substantial and merited recompense.”⁹²

When a parent establishes paternity, however, “the child is on equal footing with all other children[;] . . . [the] child is ‘legitimate’ as far as the

81. *See id.*

82. *Mixon, supra* note 48, at 1777.

83. *See* discussion *infra* notes 84–87.

84. *Davis, supra* note 76, at 82.

85. *Mixon, supra* note 48, at 1775–76.

86. *Davis, supra* note 76, at 87.

87. *Id.*

88. *See infra* Part V.B.

89. *See Compensation for the Harmful Effects of Illegitimacy, supra* note 80, at 128.

90. *See id.*

91. *See id.*

92. *See id.*

law is concerned.”⁹³ However, until the establishment of paternity, probate law treats illegitimate children differently than legitimate children.⁹⁴

V. INTESTACY AND ITS COMPLICATIONS

A significant portion of children conceived through rape and often defined as illegitimate deal with intestacy problems.⁹⁵ The definition of intestacy is “[t]he state or condition of a person’s having died without a valid will.”⁹⁶ Because the court does not know how the decedent would have wanted the decedent’s estate distributed, the court relies on strict intestacy rules to divide the estate.⁹⁷ Because most people would likely not have their estates divided as the intestacy rules instruct, the courts determined that there is a presumption against intestacy.⁹⁸ Writing a valid will avoids intestacy completely; however, if the will was not valid or did not distribute everything in the estate, intestacy determines how the decedent’s property is distributed.⁹⁹

A. Intestacy Generally

Between 60% and 75% of people die intestate.¹⁰⁰ The intestacy laws are strict and clear-cut rules; there is no room for interpretation.¹⁰¹ Therefore, the deceased’s estate passes strictly through intestacy, which disregards the decedent’s intent.¹⁰²

Although writing a will easily solves the complications of dying intestate, a shockingly low number of people take advantage of writing wills.¹⁰³ Approximately 71% of Americans age thirty-four or younger do not have a will.¹⁰⁴ Of people between the ages thirty-five and fifty-four,

93. *Pruitt v. Lindsey*, 407 S.E.2d 750, 752 (Ga. 1991).

94. *See discussion supra* notes 60–63.

95. *See text accompanying notes 107–08* (explaining, for example, that children conceived from rape might not know they were conceived by rape and of the necessity of writing a will, and people under the age of eighteen cannot write a will).

96. BLACK’S LAW DICTIONARY 898 (9th ed. 2009) (alteration in original).

97. *See* TEX. PROB. CODE ANN. § 38 (West 2011).

98. *See* 10 TEX. PRAC., *Texas Law of Wills* § 47.18 (3d ed.).

99. *See id.*

100. Gerry W. Beyer, *The Basics of Texas Intestate Succession Law*, SSRN (Dec. 3, 2010), available at <http://ssrn.com/abstract=1711484>.

101. *See generally* TEX. PROB. CODE ANN. § 42 (West 2011) (explaining different rules for maternal and paternal inheritance).

102. 10 TEX. PRAC., *Texas Law of Wills* § 54.5 (3d ed.).

103. Gerry W. Beyer, *Odds of Having a Will Increase with Age*, WILLS, TR. & EST. PROF. BLOG (Dec. 28, 2010), http://lawprofessors.typepad.com/trusts_estates_prof/2010/12/odds-of-having-a-will-increase-with-age.html.

104. Christine Dugas, *Times Change Wills, Yet Many Americans Don’t Have One*, USA TODAY (Apr. 30, 2012), <http://usatoday30.usatoday.com/money/perfi/basics/story/2012-04-27/preparing-a-will/54632436/1>.

only 39% have a will.¹⁰⁵ As people get older, however, they are understandably more likely to write a will; 81% of people sixty-five years or older have a will.¹⁰⁶

B. Intestacy in Texas

In Texas, if a child dies intestate (assuming the child did not have any children), the child's estate would pass through intestacy and would be split evenly between the child's parents.¹⁰⁷ A person cannot write a will until he or she reaches eighteen, so every decedent under the age of eighteen goes through intestacy.¹⁰⁸

If the child was conceived through rape, the child might not know that the child was conceived that way.¹⁰⁹ Many mothers find it difficult to tell children that they are the product of rape.¹¹⁰ A natural consequence of this fear is that the child might turn eighteen and not know that the child was conceived in rape; therefore, the child would not know of the necessity of writing a will.¹¹¹

Alternatively, if a rapist died intestate in Texas, the rapist must be a legal parent to the child conceived by rape for the child to inherit from the rapist's estate.¹¹² If the rapist did not legally authenticate the child conceived by rape, the child would have to petition the court as an illegitimate child to be able to inherit from the rapist's estate.¹¹³ However, if the illegitimate child could not be legitimized, then the rapist's estate would go to a spouse, other legitimate children, or the rapist's parents, depending on the rapist's available family members.¹¹⁴

There is a catch-22 with the current Texas intestacy scheme.¹¹⁵ For a child to inherit from a biological parent who is also the rapist, the rapist or child must legally legitimize the parent-child relationship.¹¹⁶ This unfortunately gives the rapist parental rights over the child, and the rapist stands to inherit from the child should the child die intestate.¹¹⁷ However, if the rapist or child does not take steps to authenticate their relationship, then

105. Beyer, *supra* note 103.

106. *Id.*

107. TEX. PROB. CODE ANN. §§ 57, 38 (West 2011).

108. PROB. § 57.

109. See discussion *infra* notes 136–39.

110. See discussion *infra* notes 136–38.

111. See discussion *infra* notes 136–39.

112. TEX. PROB. CODE ANN. § 42(b) (West 2011).

113. *Id.* See also Villery v. Solomon, 16 S.W.3d 106, 107 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

114. TEX. PROB. CODE ANN. § 38 (West 2011).

115. See discussion *infra* notes 116–20.

116. PROB. § 42(b)(1).

117. See Bitar, *supra* note 12, at 275–77.

the rapist is successfully prevented from inheriting from the child.¹¹⁸ But the problem with this scenario is that the child cannot inherit from the rapist because the child is considered illegitimate.¹¹⁹ The current solutions in Texas do not adequately solve this problem.¹²⁰

VI. CURRENT SOLUTION IN TEXAS: THE BAD PARENT STATUTE

In Texas, there are currently a couple of possible options to handle the inheritance issues of children conceived through rape.¹²¹ First is to classify the alleged rapist as a “bad parent” under the “bad parent” statute, and the second is to terminate the parent-child relationship between the child and the alleged rapist.¹²²

A. Qualifying for the Bad Parent Statute

A possible solution Texas has for this type of situation is the “bad parent” statute.¹²³ Texas’s bad parent statute states that a parent will not be able to inherit from the parent’s child if the parent did one of the “evil acts” described in the statute, and it is proved by clear and convincing evidence.¹²⁴ The acts described in the statute are:

- (1) [V]oluntarily abandoning and fail[ing] to support the child in accordance with the parent’s obligation or ability for at least three years before the date of the child’s death, and did not resume support for the child before that date; (2) voluntarily and with knowledge of the pregnancy, abandon[ing] the mother of the child beginning at a time during her pregnancy with the child[;] . . . or (3) being criminally responsible for death or a serious injury to a child.¹²⁵

If the court finds that the parent is disqualified, the law considers the parent to have predeceased the child for inheritance purposes.¹²⁶

B. Problems with the Bad Parent Statute

Unfortunately, there are several basic ways that Texas’s bad parent statute inadequately handles the inheritance problems of a child conceived

118. Davis, *supra* note 76, at 82.

119. PROB. § 42(b)(1).

120. See discussion *supra* notes 116–19.

121. See discussion *infra* notes 123–26, 142–46.

122. See discussion *infra* notes 123–26, 142–46.

123. TEX. PROB. CODE ANN. § 41 (Supp. 2012).

124. *Id.*

125. *Id.*

126. PROB. § 41(f).

by rape.¹²⁷ First, Texas Attorney General Greg Abbott thinks that Texas's bad parent statute is probably unconstitutional.¹²⁸ Greg Abbott advised Governor Rick Perry that "Article I, section 21 of the Texas constitution provides that 'no conviction shall work corruption of blood or forfeiture of estate,' which means that a person may not be denied the right to inherit on the basis of a criminal conviction."¹²⁹ Texas courts have two exceptions to this rule: the Slayer's Rule and the constructive trust doctrine.¹³⁰

Therefore, the attorney general believes that unless the Texas Supreme Court decides to expand these two exceptions, "a court would likely find that Probate Code section 41(e)(3) contravenes article I, section 21 of the Texas constitution when applied to bar a person's inheritance from his own child under circumstances not within the Slayer's Rule or the constructive trust doctrine."¹³¹ This would strike down Texas's bad parent statute as unconstitutional.¹³²

Second, even if one meets these requirements, disallowing a parent to inherit from the parent's child is left to the judge's discretion, and the court must rule upon it.¹³³ This can be a time consuming process, and for whatever reason, a judge might now find that the evidence meets the threshold.¹³⁴

Third, if the child reaches eighteen, this statute will no longer apply because the child could theoretically write a will to prevent intestacy.¹³⁵ This creates problems for children conceived from rape because in many situations, the parent delays the explanation because the parent finds it difficult to disclose how the child was conceived.¹³⁶

Tony Kiessling, for example, did not find out he was a child of rape until he was eighteen.¹³⁷ He states, "The circumstances under which my mom told me the truth are vague to me today."¹³⁸ Kiessling claims that his

127. See discussion *infra* notes 128–41 (explaining that the Texas Attorney General believes the statute is likely unconstitutional, the bad parent statute is discretionary with the court, and the statute only applies to individuals under the age of eighteen).

128. See Tex. Att'y Gen. Op. No. GA-0632 (2008).

129. *Id.* at 4.

130. *Id.* (stating that these two exceptions "prevent a convicted murderer from receiving life insurance proceeds or inheriting property from the murder victim[.]" meaning that a person convicted of killing someone cannot benefit from the killer's bad act by receiving money or property from the decedent) (alteration in original).

131. *Id.*

132. *Id.*

133. See TEX. PROB. CODE ANN. § 41(e) (West 2007).

134. See *Mediation as a Trial Alternative: Effective Use of the ADR Rules*, 57 AM. JUR. TRIALS 555, § 4 (1995) (stating that a major benefit of mediation is to save time and expense of litigation).

135. See PROB. § 41(e).

136. See, e.g., Kiessling, *supra* note 26.

137. *Id.*

138. *Id.* (alteration in original).

conception was incredibly difficult for his mother to talk about, and during his lifetime they have only discussed it three times.¹³⁹

Situations like Kiessling's highlight the fact that because of the pain surrounding the situation, a parent may delay or never tell a child the truth about the child's conception.¹⁴⁰ Therefore, the child would not know of the need to write a will after turning eighteen, and the child would have no protection from the rapist benefiting upon the child's death.¹⁴¹ For all of these reasons, the bad parent statute does not satisfactorily protect children conceived through rape.

C. Terminating the Parent-Child Relationship

Another possible solution to protect the children of rape in Texas is terminating the parent-child relationship.¹⁴² Section 161.001 of the Texas Family Code provides that a court can end a parent-child relationship if there is clear and convincing evidence that the parent commits one of the acts in a laundry list of bad acts.¹⁴³ The statute catalogues many ways to end the parent-child relationship, including abandoning the child, knowingly allowing the child to be somewhere that endangers the child's well-being, or failing to support the child.¹⁴⁴ The statute also allows the parent-child relationship to be terminated if the parent has been convicted of a myriad of crimes.¹⁴⁵ If the court decides to terminate the parent-child relationship, the child can still inherit from that parent.¹⁴⁶

D. Problems with Terminating the Parent-Child Relationship

There are several reasons why this statute is ill equipped to deal with the inheritance issues of children conceived from rape. First, in Texas, a parent must be presumed or authenticated as a parent to have a parent-child relationship.¹⁴⁷ Because in many cases of rape an alleged rapist has not authenticated the child as legally theirs, this statute does not apply because the courts cannot terminate a relationship that never legally existed. This

139. *Id.*

140. *See, e.g., id.*

141. *See* TEX. PROB. CODE ANN. §§ 41(e), 57 (West 2011).

142. *See* TEX. FAM. CODE ANN. § 161.001 (West 2011).

143. *Id.*

144. *Id.*

145. *Id.*

146. TEX. FAM. CODE ANN. § 161.206 (West 2011).

147. *See, e.g., In re Baby Boy R.*, 191 S.W.3d 916, 923 (Tex. App.—Dallas 2006, no pet.) (holding that there was clear and convincing evidence that a parent-child relationship between alleged father and child “did not exist in law or fact”) (“We note that [the alleged father] was never adjudicated the child’s father and is not a ‘parent’ within the meaning of the family code.”) (alteration in original).

statute provides no protection for children conceived through rape whose parents never legally recognized them.

Second, proving by clear and convicting evidence can be a hard standard to meet.¹⁴⁸ The clear and convincing standard requires “the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.”¹⁴⁹

In *In re J.R.*, for example, the court held that the Texas Department of Family and Protective Services failed to show by clear and convincing evidence that the mother’s parental rights should be terminated.¹⁵⁰ Protective Services sought to prove that the mother knowingly allowed the children to stay in a place and be around people who endangered their well-being.¹⁵¹ Even though the mother left the children alone with sex offenders, “no reasonable factfinder could form a firm belief or conviction . . . that [the mother] *knowingly* placed or *knowingly* allowed the children to remain in an environment that endangered their physical or emotional well-being.”¹⁵² Even when children are in a bad situation, there may be insufficient evidence to terminate the parental rights.¹⁵³

VII. SOLUTIONS IN PLACE IN OTHER STATES

Across the nation, states have come up with various solutions to deal with children conceived by rape and their inheritance problem.¹⁵⁴ Some states took steps to limit parental rights of rapists.¹⁵⁵ This is commendable but unfortunately results in unintended and negative effects on the inheritance rights of the child.¹⁵⁶

Other states such as Idaho and Indiana have broad statutes that restrict a rapist’s parental rights.¹⁵⁷ However, these statutes also cause problems for the child’s inheritance.¹⁵⁸ Some states, such as North Carolina and Maryland, have specifically targeted statutes to deal with the inheritance rights of children conceived by rape, but there are still problems with the legislation.¹⁵⁹ Finally, many other states such as Connecticut, Kentucky,

148. See discussion *infra* notes 150–52.

149. TEX. FAM. CODE ANN. § 101.007 (West 2011).

150. *In re J.R.*, 171 S.W.3d 558, 579 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

151. *Id.* at 567–68.

152. *Id.* at 571 (alteration in original).

153. See *id.* at 579.

154. See *infra* Part VII.A–E.

155. See *infra* Part VII.A–E.

156. See *infra* Part VII.A–E.

157. See *infra* Part VII.A–B.

158. See *infra* Part VII.A–B.

159. See *infra* Part VII.C–D.

Pennsylvania, Texas, New York, Oregon, and Missouri have broad legislation in place that generally prohibits bad actors from inheritance.¹⁶⁰

A. Idaho

Idaho has a statute in place that terminates a rapist's parental rights to a child conceived through rape.¹⁶¹ This statute, however, likely requires a rapist to be prosecuted for the statute to be effective.¹⁶² Assuming the rape is reported and prosecuted, "cases can take more than a year to make their way through the court system."¹⁶³ If one parent successfully cuts off the parental rights of the other, the child conceived by rape cannot receive child support from the rapist and the child will not inherit from the rapist or the rapist's family.¹⁶⁴

"While judges are often hesitant to terminate one parent's rights if another person isn't there to adopt the child, that changes if one of the parents is a rapist."¹⁶⁵ Legislators intended this statute to limit a rapist's ability to exert control over the child, but the statute negatively impacts the child because it takes away the child's ability to inherit from the rapist and the rapist's family.¹⁶⁶

B. Indiana

This February, Indiana amended Senate Bill 190 and now a woman may "seek a court order terminating the parent-child relationship between her child conceived by rape and the rapist."¹⁶⁷ The modification reads:

If a child was conceived as a result of an act of rape and the person convicted of rape is the natural father of the child, the person has no right to custody, visitation, or parenting time with the child unless the natural mother or legal guardian consents to the person having custody, visitation,

160. See *infra* Part VII.E.

161. IDAHO CODE ANN. § 16-2005(2)(a) (West 2012).

162. See Melissa Davlin, *Pregnancy from Rape Poses Difficult Legal Questions*, TIMES NEWS (Aug. 26, 2012), http://m.magicvalley.com/news/local/pregnancy-from-rape-poses-difficult-legal-questions/article_c56f002e-eda5-5157-ae8d-1376f4910eed.html.

163. *Id.*

164. *Id.*

165. *Id.*

166. See *id.*

167. Dan Carden, *Indiana Plan to Deny Rapists Access to Child Conceived By Crime Advances*, TIMES NORTHWEST IND. (Feb. 20, 2012), http://www.nwitimes.com/news/local/govt-and-politics/ind-plan-to-deny-rapists-access-to-child-conceived-by/article_81b763a8-12b4-5284-8d93-9673c05231f3.html.

or parenting time and the court determines it is in the best interests of the child.¹⁶⁸

State Representative Linda Lawson said that this “plan leaves unanswered questions about child support, grandparent visitation rights and inheritance matters.”¹⁶⁹

C. North Carolina

North Carolina wove an inheritance clause directly into their first and second degree rape statutes, as well as their statutory rape statute.¹⁷⁰ Statute 14-27.2(c) states, “Upon conviction, a person convicted under this section has no rights to custody of or rights of inheritance from any child born as a result of the commission of the rape.”¹⁷¹ However, if the rape is unreported, the rapist is not convicted, or the rapist is convicted of a lesser offense, this statute does not apply.¹⁷²

D. Maryland

Maryland also has a statute on point that deals with inheritance rights of children conceived by rape.¹⁷³ In Maryland, a woman tried to commit suicide because her stepfather repeatedly raped her and, consequently, they conceived a child.¹⁷⁴ Even though this child was fourteen at the time, the mother was still haunted by the sexual assault.¹⁷⁵ When the mother was seeking help, the state asked a judge to transfer custody of the child to some of the mother’s relatives, “but the judge stated that under Maryland law the father’s ‘rights and wishes need to be considered in planning for this child.’”¹⁷⁶

This situation inspired the Maryland Legislature to pass laws that prevented rapists from asserting parental rights.¹⁷⁷ These laws included disallowing a parent from inheriting from the child if the parent committed rape or sexual crimes against a child or the other parent.¹⁷⁸

168. S. 190, 117th Cong. (2012), available at <http://www.in.gov/legislative/bills/2012/ES/ES0190.2.html>.

169. Carden, *supra* note 167.

170. See N.C. GEN. STAT. ANN. §§ 14-27.2(c), 14-27.3(c), 14-27.2A(d) (West 2012).

171. § 14-27.2(c).

172. See Kathleen F. Treadwell, *If a Man Fathers a Child Through Rape, Does He Have Any Parental Rights?*, WNHP FAM. L. BLOG (Aug. 24, 2012), <http://www.wnhpfamilylaw.com/family-law-blog/if-a-man-fathers-a-child-through-rape-does-he-have-any-parental-rights/>.

173. See MD. CODE ANN., EST. & TRUSTS § 3-111 (West 2002).

174. See Bitar, *supra* note 12, at 286.

175. See *id.*

176. See *id.*

177. See *id.*

178. EST. & TRUSTS § 3-111.

E. States with Broad Restrictions on Inheritance

While some states possess statutes directly relating to the inheritance rights of rapists and children conceived by rape, other states have general prohibitions against inheritances if the possible heir is a “bad person.” Oregon, for example, disinherits “rapists, sodomists, sexual abusers, elder abusers, financial abusers and the like.”¹⁷⁹ States with similar laws include Texas, Connecticut, Kentucky, Missouri, New York, and Pennsylvania.¹⁸⁰

There are also statutes specifically for “bad parents,” similar to the Texas statute.¹⁸¹ The main purpose of these bad parent statutes is to encourage people to be good parents and to discipline those who fail to adequately provide for their children.¹⁸² The bad parent statutes discipline parents by disallowing bad parents to inherit from their children, even if the biological parents acknowledge the children as their own.¹⁸³

VIII. ISSUES THAT PROPOSED TEXAS LEGISLATION MUST ADDRESS

The Texas Legislature should follow Idaho’s, Indiana’s, North Carolina’s, and Maryland’s lead and pass legislation that limits a rapist’s inheritance rights but tweak the legislation so that it is more effective to protect the inheritance rights of children conceived by rape. There are, however, several issues that the legislature must address before writing more efficient legislation for this issue.

A. “Consensual” Statutory Rape

There is an issue of “consensual,” statutory rape. For example, Mary Kay Letourneau, a teacher who served a seven-and-a-half-year prison sentence for statutory rape, was pregnant for the second time.¹⁸⁴ Letourneau claims the father is a former student who was an eighth-grader at the time and “the love of her life.”¹⁸⁵ Letourneau gave birth to the boy’s first child and was on parole but was sent back to jail after becoming pregnant for a second time by the same student.¹⁸⁶ What about her

179. Lisa C. Dumon, *The Undeserving Heir: Domestic Elder Abuser’s Right to Inherit*, 23 QUINNIPIAC PROB. L.J. 214, 231 (2010).

180. See Ronald J. Scalise Jr., *Honor thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents*, 37 SETON HALL L. REV. 171, 192 (2011).

181. *Id.*

182. *Id.*

183. *Id.*

184. See Patrice O’Shaughnessy, *Ex-Teacher Pregnant 2nd With Teen: Report*, N.Y. DAILY NEWS (Mar. 15, 1998), http://articles.nydailynews.com/1998-03-15/news/18064126_1_mary-kay-letourneau-david-gehrke-infant-girl.

185. *Id.*

186. *Id.*

children's inheritance rights? What is the result when the woman is the rapist? Does statutory rape have any effect on inheritance rights of the children conceived through consensual statutory rape?

Similarly, a sixty-one-year-old man statutorily raped a thirteen-year-old girl, who consequently conceived a child.¹⁸⁷ Both parties, however, apparently loved each other and wanted to get married.¹⁸⁸ The man wanted to be a part of the child's life and provide for the child.¹⁸⁹ The court denied the biological father any visitation rights.¹⁹⁰ How should children conceived through statutory rape be treated, especially when the children were conceived through consensual statutory rape?

The rights of a child conceived by consensual rape should be the same as a legitimate child. This follows logically because while the relationship between the parents is bizarre, the only reason it is illegal is because of the parties' ages—the children should not be penalized for this.¹⁹¹ The most challenging issue presented by these facts is whether the law would supersede the individual wishes of the “raped” person and progeny. Sex, even if consensual, and the victims, even if supportive of the rapist, cannot supersede the law based on emotional desires.

B. Conviction as a Prerequisite

Another important problem with other states' legislation is the requirement that the rapist be convicted, which is a high burden to meet. First, rape is heavily underreported.¹⁹² According to the Rape, Abuse, and Incest National Network, only 46% of rape victims report the incident to the police.¹⁹³ Of the rapes that are actually reported, only 12% result in an arrest, only 5% lead to a felony conviction, and only 3% of rapists are in jail for even one day.¹⁹⁴ For instance, when Patti Smith's mother told her daughter that she had been raped and subsequently became pregnant, she did not report the incident to the police because she was “too ashamed.”¹⁹⁵

187. See *E.R. v. D.T.*, 353 N.Y.S.2d 612, 613 (N.Y. Fam. Ct. 1974).

188. *Id.* at 614.

189. *Id.* at 613–14.

190. *Id.* at 615.

191. BLACK'S LAW DICTIONARY, 1374–75 (9th ed. 2009) (defining statutory rape as “[u]nlawful sexual intercourse with a person under the age of consent (as defined by statute), regardless of whether it is against that person's will. Generally, only an adult may be convicted of this crime. A person under the age of consent cannot be convicted”).

192. See Bitar, *supra* note 12, at 279. See also Bronner, *supra* note 17 (“Scholars and practitioners are certain that rape is heavily underreported, especially to the police.”).

193. See REPORTING RATES, RAPE, ABUSE & INCEST NAT'L NETWORK, <http://www.rainn.org/get-information/statistics/reporting-rates> (last visited May 20, 2013).

194. *Id.*

195. See Kiessling, *supra* note 26.

Second, when women do have the courage to bring charges against their alleged rapists, it is hard to get a conviction.¹⁹⁶ For example, a woman became pregnant after her neighbor raped her.¹⁹⁷ She decided to press charges against this man, but the jury looked at the neighbor with sympathy because he had recently lost his family in a tragic car accident.¹⁹⁸ The jury believed the neighbor when he said that it was consensual sex and the jury acquitted him.¹⁹⁹ Instead of bringing any justice or closure, this woman only remembers the trial as “three horrible days on the witness stand.”²⁰⁰

Similarly, in New Orleans, a jury acquitted an alleged rapist in less than one hour.²⁰¹ The accuser, a freshman in high school, claimed that a senior raped her in a hotel staircase.²⁰² Although she claims she tried to fight back, even scratching the senior to the point of drawing blood, the senior trapped the freshman.²⁰³ Despite a DNA test finding the senior’s blood on the staircase walls, the jury acquitted him.²⁰⁴ A spokesman for District Attorney Leon Cannizzaro said, “[Rape] cases are always tough. It’s one person’s word against the other’s.”²⁰⁵

When rape victims decide to prosecute, it is an emotionally draining and sometimes fruitless endeavor.²⁰⁶ Different studies aimed at rape reporting statistics produced varying results; one study found that amongst college students, ninety-five out of one hundred women who were raped did not report the incident.²⁰⁷ Another study conducted by the Department of Justice found that only 5% of alleged rapists received a felony conviction.²⁰⁸

For those rapists who are convicted, rapists are on average sentenced to 9.75 years in prison and serve an average of 5.4 years before they are released.²⁰⁹ Because rape victims are not likely to report the rape and women’s legal actions are often fruitless, any proposed legislation must take this into account.

196. See discussion *infra* notes 197–205.

197. See Carey Tennis, *I Was Impregnated by a Rapist 32 Years Ago*, SALON (May 6, 2005), www.salon.com/2005/05/06/child_of_rapist/.

198. See *id.*

199. *Id.*

200. *Id.*

201. See John Simerman, *Man Acquitted of Rape in Downtown New Orleans Hotel Stairwell*, TIMES-PICAYUNE (Sept. 26, 2012), http://www.nola.com/crime/index.ssf/2012/09/man_found_not_guilty_of_rape_i.html.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. See discussion *supra* notes 197–205.

207. *September Is National Campus Safety Awareness Month*, T&M PROTECTION RESOURCES (Sept. 7, 2012), http://tmprotection.com/news_details.php?newsid=157.

208. REPORTING RATES, RAPE, ABUSE & INCEST NAT’L NETWORK, *supra* note 193.

209. SUSAN L. MILLER, *AFTER THE CRIME: THE POWER OF RESTORATIVE JUSTICE DIALOGUES BETWEEN VICTIMS AND VIOLENT OFFENDERS* 239 (New York University Press 2011).

C. Necessity of Establishing Paternity to Inherit

For a child to inherit from the child's parents in Texas, the child must be legally recognized as those parents' child.²¹⁰ In Texas, if a child has a presumed father, the child's parentage must be commenced before that child's fourth birthday.²¹¹ However, if the child does not have a presumed father, the child can try to authenticate paternity at any time. Once paternity is established, the rapist is the child's legal parent.²¹²

Does a child want a convicted or even an alleged rapist as a legal parent? The child will stand to inherit but must now be subject to the rapist's control.²¹³ The rapist can have substantial influence on the child's life.²¹⁴ To merely be allowed to inherit from a biological parent, a child conceived through rape must take substantial risk in legally authenticating a rapist as a parent.²¹⁵ There needs to be an exception to Texas's requirement of paternity for children conceived through rape.²¹⁶

IX. POSSIBLE SOLUTIONS FOR TEXAS

After considering some of the issues that any proposed legislation must address, Texas could solve this problem by applying the principals and rationale from Texas's adoption by estoppel to children conceived through rape.²¹⁷ Alternatively, Texas could look to other states' legislatures that have already passed legislation specifically on this issue and follow their leads.²¹⁸

A. Appropriate Burden of Proof

Before discussing adoption by estoppel or other states' legislation, it is important to discuss the appropriate standard of proof. This proposed legislation is not intended to incarcerate anyone or deprive anyone of fundamental rights; this possible legislation is about inheritance rights, a civil issue. Because this is a civil issue, one of the two civil standards of

210. See TEX. PROB. CODE ANN. § 42(b)(1) (West 2001).

211. 9 TEX. PRAC., *Texas Law of Wills* § 6.22 (3d ed.) (stating that "[i]f the child has no presumed, acknowledged, or adjudicated father, a proceeding to adjudicate the parentage of the child may be commenced at any time").

212. See *Mixon*, *supra* note 48, at 1775.

213. See *Bitar*, *supra* note 12, at 281.

214. See *id.*

215. See discussion *supra* notes 211–14.

216. See discussion *supra* notes 210–15.

217. See discussion *infra* notes 227–37.

218. See discussion *infra* notes 234–43.

proof should be used: preponderance of the evidence or clear and convincing evidence.²¹⁹

For example, Jamie Raskin, a Maryland state senator, proposed legislation to deny all paternity rights of rapists who conceive a child through sexual assault.²²⁰ He believes that the civil standard—by a preponderance of the evidence—should be used.²²¹ Preponderance of the evidence requires the jury to find that it is more likely than not that the person is liable.²²²

Similarly, Missouri recently passed a law that puts “an automatic stay on paternity proceedings when there is a pending criminal case alleging rape by the child’s father.”²²³ Angela Crews, the woman who petitioned a lawmaker to take action, was appalled when her daughter conceived a son after an alleged rape and there was no law to prevent her daughter’s alleged rapist from asserting custody rights during the criminal trial.²²⁴

Senate Bill 628, the result of Crews’s efforts, prevents a putative father from asserting custody rights during criminal proceedings.²²⁵ Crews’s eventual objective is to prevent custody based on “clear and convincing evidence” so that a criminal conviction to prevent custody would not be necessary.²²⁶ Texas should follow this line of thought and apply a civil standard to determine the inheritance rights of children conceived through rape.

B. Apply Adoption by Estoppel Principals to Children Conceived by Rape

In Texas, the idea of adoption by estoppel began in *Cubley v. Barbee*, stating that although the adoption technicalities had never been officially completed, the child was for all practical purposes adopted.²²⁷ Texas courts have long recognized adoption by estoppel.²²⁸ If the child had reason to believe that the parents had legally adopted the child, but for whatever

219. See, e.g., *In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002, no pet.) (stating that “[c]lear and convincing evidence” means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established”). See also BLACK’S LAW DICTIONARY 1301 (9th ed. 2009) (stating the definition of preponderance of the evidence is when “the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be”).

220. Dana Liebelson & Sydney Brownstone, *Imagine You Were Raped. Got Pregnant. Then Your Rapist Sought Custody.*, MOTHER JONES (Aug. 24, 2012), <http://www.motherjones.com/politics/2012/08/rapist-seeks-child-custody-shauna-prewitt>.

221. *Id.*

222. BLACK’S LAW DICTIONARY 1301 (9th ed. 2009).

223. Liebelson, *supra* note 220.

224. *Id.*

225. *Id.*

226. *Id.*

227. See *Cubley v. Barbee*, 73 S.W.2d 72, 79–80 (Tex. 1934, no writ).

228. See *Pope v. First Nat’l Bank in Dallas*, 658 S.W.2d 764, 765 (Tex. App.—Dallas 1983, no writ).

reason the parents never officially completed the adoption, then the child could still have the benefits of being legally adopted.²²⁹

The logic behind the inheritance rights of children adopted by estoppel is that it was not the child's fault his or her parents did not complete the legal adoption, and because the child relied on the appearance that a legal adoption did occur, if the parents die intestate, the child should be allowed to inherit from the parents.²³⁰ However, because the parents did not rely on any illusion of the child's, the parents should not be allowed to inherit from the child.²³¹ Therefore, the parents will not be allowed to inherit from the child who was adopted by estoppel, but the child will be able to inherit from the parents because the child was faultless.²³² The rationale behind adoption by estoppel could successfully be applied to children conceived by rape because it is certainly not the child's fault that he or she is a product of rape.²³³

Therefore, the Texas Legislature should pass legislation that states the following: For purposes of inheritance under the laws of descent and distribution, a child, who is the product of sexual assault, shall inherit from both of the child's biological parents, and any of the child's paternal or maternal relatives. The rapist and the rapist's relatives shall not inherit from the child, and the child is not required to establish legal paternity to inherit from both parents as long as a court finds that the child is the biological offspring of the parent.

C. Follow Examples of Other States' Legislation

Texas could also follow North Carolina's example and pass legislation directly on point.²³⁴ North Carolina's statute 14-27.2(c) states, in part, "Upon conviction, a person convicted [of first degree rape] under this section has no rights to custody of or rights of inheritance from any child born as a result of the commission of the rape."²³⁵

Texas could pass a nearly identical statute. However, the "[u]pon conviction" requirement should be modified. As discussed earlier, getting a conviction can be very difficult.²³⁶ Instead, because this statute should be specifically aimed at inheritance rights, the standard should be a preponderance of the evidence (or at least clear and convincing

229. *Heien v. Crabtree*, 369 S.W.2d 28, 30 (Tex. 1963, no writ).

230. See discussion *supra* notes 227–29.

231. See discussion *supra* notes 228–30.

232. See *Heien*, 369 S.W.2d at 29. See also *Spiers v. Maples*, 970 S.W.2d 166, 170 (Tex. App.—Fort Worth 1998, no pet.).

233. Interview with Gerry W. Beyer, Professor of Law, Texas Tech University School of Law, in Lubbock, Tex. (Sept. 3, 2012).

234. See N.C. GEN. STAT. ANN. § 14-27.2(c) (West 2012).

235. *Id.*

236. See *supra* Part VIII.B.

evidence).²³⁷ Therefore, if the child conceived by rape can prove that it is more likely than not that the child is in fact a child conceived by rape, the statute will apply.²³⁸

For example, Texas could pass a statute along these lines: If a person, by a preponderance of the evidence (or clear and convincing evidence) is determined to have raped someone, that person shall have no rights of inheritance from any child born as a result of the rape. The child is not required to establish legal paternity to inherit from both parents as long as a court finds by a preponderance of the evidence (or by clear and convincing evidence) that the child is the biological offspring of the parent.

X. CONCLUSION

Children should be able to inherit from both biological parents, and if one of those parents is a rapist, then the child should be able to inherit from the rapist. However, rapists should not inherit from a child conceived in the rapist's violence.

There is a catch-22 with the current Texas intestacy scheme.²³⁹ For a child to inherit from the biological parent who also raped the child, the rapist or child must take steps towards legal legitimization.²⁴⁰ This gives the rapist parental rights over the child, and the rapist stands to inherit from the child should the child die intestate.²⁴¹ However, if the rapist or child does not authenticate their parent-child relationship, then the rapist is prevented from inheriting from the child.²⁴² But in this scenario, the child cannot inherit from the rapist because the child is considered illegitimate.²⁴³

The Texas Legislature needs to fix this problem by passing appropriate legislation to prevent rapists from inheriting from their biological children and facilitate children in this position's ability to inherit from both biological parents.²⁴⁴ Children should not be denied the ability to inherit or be forced to legally authenticate a rapist to inherit from their parents.²⁴⁵

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237. See *supra* Part IX.A.

238. See *supra* Part IX.A.

239. See discussion *supra* notes 116–19.

240. See discussion *supra* notes 116–19.

241. See discussion *supra* notes 116–19.

242. See discussion *supra* notes 116–19.

243. See discussion *supra* notes 116–19.

244. See *supra* Part IX.

245. See discussion *supra* notes 116–19.