

# GRANDPARENTS RAISING GRANDCHILDREN AND THE IMPLICATIONS FOR INHERITANCE

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## INTRODUCTION

Today in the United States, thousands of grandparents are raising their young grandchildren because the children's parents are ill, disabled, imprisoned, or otherwise unable to care for them. Congress recognized this phenomenon in 1996 when it directed the Census Bureau to add questions to the long form<sup>1</sup> "to find out about grandparents who were the primary caregivers for their grandchildren, and if this relationship was temporary or permanent."<sup>2</sup> In 2002, Boston's GrandFamilies House, "the first housing in the nation developed specifically for grandparents raising grandchildren," opened to house twenty-six families.<sup>3</sup> In December 2003, Congress passed the American Dream Downpayment Act,<sup>4</sup> which included provisions to create a demonstration program to develop intergenerational housing.<sup>5</sup> Resource guides<sup>6</sup> and Web sites such as Generations United<sup>7</sup> have sprung up to help grandparents who are again raising young children.

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1. All households received the Census 2000 short form, which included six population questions and one housing question. About one in six households received the long form with an additional twenty-six population questions and twenty housing questions, including those regarding grandparents as caregivers. U.S. Bureau of the Census, United States Census 2000, *available at* <http://www.census.gov/dmd/www/pdf/d-61b.pdf>.

2. TAVIA SIMMONS & JANE LAWLER DYE, U.S. CENSUS BUREAU, GRANDPARENTS LIVING WITH GRANDCHILDREN: 2000, CENSUS 2000 BRIEF C2KBR-31, at 2 (Oct. 2003), *available at* <http://www.census.gov/prod/2003pubs/c2kbr-31.pdf>.

3. Kristin Kanders, *Mind the Gap: Grandparents Raising Grandchildren*, COMMUNITIES & BANKING, Spring 2002, at 1, *available at* <http://www.bos.frb.org/commdev/c&b/2002/spring/gf.pdf>.

4. Pub. L. No. 108-186, 117 Stat. 2685 (2003) (codified at 42 U.S.C.A. § 12821 (West 2005)).

5. Press Release, Office of Congressman Michael E. Capuano, Housing Bill Passes Congress with Capuano Intergenerational Housing Provisions (Dec. 9, 2003), *available at* <http://www.house.gov/capuano/news/2003/pr120903.htm>.

One area of this new trend has not been explored in depth: inheritance. A common assumption is that childcare arrangements are temporary, and so grandparents have no involvement with social service agencies or courts. The reality, however, is that almost forty percent of the time, the care continues for five years or more.<sup>8</sup> Like most people, the grandparent, concerned with the day-to-day care of a young child, has not executed a will. If the grandparent dies, the laws of intestacy in all states will allow the child's living parent to inherit but will give nothing to the child.<sup>9</sup> This Article will discuss existing and proposed doctrines in order to explore ways that such grandchildren could inherit. Part I discusses current statistical data on the number of grandparents raising grandchildren, and the likelihood of the grandparents having an estate plan. Next, Part II discusses existing legal doctrines such as equitable adoption, pretermitted child statutes, and family maintenance systems, to see if they are appropriate solutions for the grandchild. In the end, the simplest solutions—a gift under the Uniform Transfers to Minors Act (“UTMA”) or a trust in a will—may also be the best.

### I. STATISTICS ON GRANDPARENTS RAISING GRANDCHILDREN

The exact number of grandparents raising grandchildren without a parent present is difficult to determine because the vast majority of these relationships are informal, which means that neither social services offices nor courts are involved. A 2002 report by the Urban Institute estimated that 2.3 million children were living with relatives not their parents.<sup>10</sup> The majority of these (59%, or 1.36 million) lived with a grandparent, most often the grandmother.<sup>11</sup> The children fell into one of three arrangements: (1) 1.76 million, 76% of the children in the study, were in “private kinship care,” in which neither the state nor other child care agencies had any involvement with placing the child;<sup>12</sup> (2) 400,000, 17%, were in “kinship foster care,” in which social services placed the child with the relative and the court made the relative responsible for the child's care;<sup>13</sup> and (3) another 140,000, 6%, were in “voluntary kinship care,” in which social services helped place the child with the relative, but the courts were not involved.<sup>14</sup>

For the first time, the 2000 Census included questions designed to assist in estimating the number of grandparents living with their grandchildren.<sup>15</sup> The

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6. See, e.g., GRISELDA R. WILLIAMS ET AL., GRANDPARENTS RAISING GRANDCHILDREN: A RESOURCE GUIDE FOR PROFESSIONALS (1998), available at <http://www.ces.ncsu.edu/depts/fcs/nfr/grandman>.

7. Generations United, Home Page, <http://www.gu.org> (last visited Jan. 28, 2006).

8. See *infra* note 17 and accompanying text.

9. See *infra* note 42 and accompanying text.

10. THE URBAN INSTITUTE, CHILDREN IN KINSHIP CARE (Oct. 9, 2003), <http://www.urban.org/publications/900661.html>.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. SIMMONS & DYE, *supra* note 2, at 2. Question 19a on the long form asked, “Does this person have any of his/her own grandchildren living in this house or apartment?” *Id.* at 1. Those responding “yes” went on to answer Question 19b: “Is this grandparent

subsequent report concluded that approximately 2.4 million grandparents, out of nearly 5.8 million who resided with their minor grandchildren, were “grandparent caregivers,” meaning they had primary responsibility for their minor live-in grandchildren.<sup>16</sup> Thirty-nine percent of these grandparent caregivers had cared for their grandchildren for five years or more, while only twelve percent reported that the care had lasted less than six months.<sup>17</sup> Thirty-four percent of grandparent caregivers were the householder or the householder’s spouse with no parent of the child present,<sup>18</sup> meaning that an estimated 825,088 grandparents were primarily responsible for the care of their grandchild without the child’s parent being involved.<sup>19</sup>

From an inheritance perspective, two attributes of those involved in kinship care stand out: (1) many of the children are quite young, and (2) the caregivers are usually over age fifty and are not likely to have a will. Among the children in kinship care, 32% are eleven to fifteen years old, 28% are six to ten years old, and 20% are five years old or younger.<sup>20</sup> Infants under the age of one are rarely in this type of arrangement but still make up about 2% of children in kinship care.<sup>21</sup> Only 20% are sixteen to seventeen years old.<sup>22</sup> Thus, for the majority of these children, if their caregiver died, they would still need a guardian for many years before reaching adulthood.

Demographically, slightly more than half of grandparent caregivers are married,<sup>23</sup> and families of color are disproportionately represented.<sup>24</sup> An African-American grandparent is statistically much more likely than a white grandparent to share a home with a grandchild for three months or more.<sup>25</sup> This may be due to the central role of the extended African-American family and the prevalence of

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currently responsible for most of the basic needs of any grandchild(ren) under the age of 18 who lives(s) in this house or apartment?” *Id.* If the response was once again “yes,” then Question 19c asked: “How long has this grandparent been responsible for the(se) grandchild(ren)?” *Id.*

16. *Id.* at 3.

17. *Id.* Eleven percent reported care for six to eleven months; twenty-three percent for one to two years; and fifteen percent for three to four years. *Id.*

18. *Id.* at 5 tbl.2.

19. The Urban Institute is counting children who live with relatives not their parents. URBAN INSTITUTE, *supra* note 10. However, the Census Bureau is counting the number of grandparents who live with their grandchildren. U.S. Bureau of the Census, *supra* note 1.

20. URBAN INSTITUTE, *supra* note 10.

21. *Id.*

22. *Id.*

23. Kathleen M. Roe & Meredith Minkler, *Grandparents Raising Grandchildren: Challenges and Responses*, GENERATIONS, Winter 1998–99, at 25.

24. *Id.*

25. Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315, 1327 & n.38 (1994) (citing ANDREW J. CHERLIN & FRANK F. FURSTENBERG, *THE NEW AMERICAN GRANDPARENT: A PLACE IN THE FAMILY, A LIFE APART* 189–90 (1986)).

informal adoptions in that community.<sup>26</sup> Of those children living with grandparents, about 70% are living with a caregiver who is over age fifty.<sup>27</sup> That is compared to the broader population of children in kinship care, 52% of which live with a caregiver who is older than fifty.<sup>28</sup> Not only are these caregivers older, but 45% of them also have a limiting condition or are in fair or poor health.<sup>29</sup>

In some cases, children are living with relatives because their parents have died; more often, the parent is alive but unable to care for the child.<sup>30</sup> “Increasing drug abuse among parents, teen pregnancy, divorce, the rapid rise of single parent households, mental and physical illnesses, AIDS, crime, child abuse and neglect, and incarceration are a few of the most common explanations” for kinship care.<sup>31</sup> The rising number of female prisoners has also contributed: one study found that grandparents were primary caregivers to more than half the children of imprisoned mothers in the United States.<sup>32</sup>

While no one has measured whether grandparents raising grandchildren are likely to have a will, demographic statistics suggest that they probably do not. Most people do not have a will; a recent online survey of more than 1000 people over age eighteen reported that only 42% of respondents had a will.<sup>33</sup> Minorities are less likely to have an estate plan than whites. Forty-five percent of African-Americans and Hispanics have any estate planning documents (such as wills, trusts, or medical directives), compared to 57% of whites.<sup>34</sup> An AARP survey of those over the age of fifty found that the likelihood of having a will or trust increases with age and income.<sup>35</sup> AARP also tentatively concluded that whites

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26. Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACKLETTER L.J. 39, 43–44 (1993).

27. CYNTHIA A. SCARCELLA ET AL., URBAN INSTITUTE, IDENTIFYING AND ADDRESSING THE NEEDS OF CHILDREN IN GRANDPARENT CARE (Aug. 31, 2003), <http://www.urban.org/publications/310842.html>.

28. URBAN INSTITUTE, *supra* note 10.

29. JENNIFER EHRLE MACOMBER & ROB GEEN, URBAN INSTITUTE, CHILDREN CARED FOR BY RELATIVES: WHAT SERVICES DO THEY NEED? (June 26, 2002), <http://www.urban.org/url.cfm?ID=310511>.

30. LYNNE M. CASPER & KENNETH R. BRYSON, U.S. CENSUS BUREAU, CO-RESIDENT GRANDPARENTS AND THEIR GRANDCHILDREN: GRANDPARENT MAINTAINED FAMILIES 2–3 (1998), *available at* <http://www.census.gov/population/www/documentation/twps0026/twps0026.html>.

31. *Id.*

32. Roe & Minkler, *supra* note 23 (citing L.A. GREENFIELD & S. MINOR-HARPER, BUREAU OF JUST. STAT., SPECIAL REPORT: WOMEN IN PRISON (1991)).

33. Kathy Chu, *More People Are Postponing Wills*, WALL ST. J., June 10, 2004, at D2. The survey was conducted by Martindale-Hubbell. *Id.*

34. Press Release, [www.lawyers.com](http://www.lawyers.com), *Many Americans Leave Loved Ones Vulnerable, Due to Lack of Estate Planning, New Survey Finds* (May 24, 2004), *available at* <http://www.lawyers.com/lawyers/G~1016321~lds/martindale+hubbell+survey+loved+ones+vulnerable.html>.

35. AARP RESEARCH GROUP, WHERE THERE IS A WILL . . . LEGAL DOCUMENTS AMONG THE 50+ POPULATION: FINDINGS FROM AN AARP SURVEY, at 1–2 (2000), *available at* <http://assets.aarp.org/rgcenter/econ/will.pdf>.

were more likely to have a will than African-Americans (64% vs. 27%)<sup>36</sup> and were far more likely to have a living trust (25% vs. 3%).<sup>37</sup> Some of the reasons given in the survey for not having a will included procrastination, limited assets to pass on to heirs, and uncertainty over estate taxes.<sup>38</sup> Grandparents serving as primary caregivers are likely to be busy and unable to take the time to overcome these common hurdles to writing a will.

This Article is concerned with the several hundred thousand children being cared for by a relative, usually a grandparent,<sup>39</sup> because their parents, although living, are unable to care for them. They have not been adopted, either because everyone assumes the arrangement is temporary or because they perceive an adoption as unnecessarily depriving the parents of their rights.<sup>40</sup> The caregiver, like many Americans, has no will but may have a few valuable assets, such as a car, a bank account, some furniture, or a house.<sup>41</sup> If the caregiver dies unexpectedly and has no will, all his or her assets pass automatically through intestacy law to the child's parent and none goes to the child.<sup>42</sup> Is there a way to solve the inheritance problem in this common scenario, or would allowing a grandchild to inherit complicate estate planning for stepchildren, common law spouses, and other family members?

## II. EXISTING SOLUTIONS: EQUITABLE ADOPTION, PRETERMITTED HEIR STATUTES, AND FAMILY MAINTENANCE

### A. U.S. Solutions: Equitable Adoption and Pretermitted Heir Statutes

One possible solution is to expand the existing doctrine of equitable adoption to help the grandchild whose caregiver grandparent dies intestate after years of raising the grandchild. Some courts allow a child to inherit in cases where the decedent reared the child but never formally adopted her.<sup>43</sup> A few states, however, do not recognize the doctrine at all. The Supreme Court of Kansas, for example, has rejected the doctrine on the theory that a child's status as an heir exists only by operation of law; thus the legislature, not the court, should decide

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36. *Id.* at 2. Findings for African-Americans should be viewed with caution because the survey includes a limited number of people in that demographic. *Id.*

37. *Id.* at 4.

38. Chu, *supra* note 33.

39. URBAN INSTITUTE, *supra* note 10. After grandparents (59%), 19% of children in kinship care lived with aunts or uncles, and the remaining 22% lived with other relatives, such as siblings or cousins. *Id.*

40. Fenton, *supra* note 26, at 64.

41. Roughly half (54%) of relatives caring for children are well below the federal poverty level and are thus unlikely to have any significant assets to leave at death. URBAN INSTITUTE, *supra* note 10.

42. WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, *WILLS, TRUSTS AND ESTATES: INCLUDING TAXATION AND FUTURE INTERESTS* 50 (3d ed. 2004).

43. Adam J. Hirsch, *Inheritance Law, Legal Contraptions, and the Problem of Doctrinal Change*, 79 OR. L. REV. 527, 547 (2000).

who inherits.<sup>44</sup> Since at least twenty-eight states do recognize equitable adoption, the doctrine remains a theoretical option in a majority of states.<sup>45</sup>

However, the application of equitable adoption in those states that recognize the doctrine is limited because those states generally give it a narrow scope, allowing the child to inherit only in cases in which the foster parent has attempted to formally adopt the child or where there is a clear agreement to adopt.<sup>46</sup> For example, Florida requires proof by clear and convincing evidence of “an agreement to adopt between the natural parents and alleged adoptive parents.”<sup>47</sup> Courts use different equitable theories to allow the child to inherit, either finding an implicit contract to adopt, which is enforced by specific performance, or finding detrimental reliance by the child either on the parent’s promise to adopt or on a belief that she was adopted.<sup>48</sup> Both theories, however, are predicated on the existence of a contract to adopt and so are not helpful in our scenario in which the foster parents may believe that there is no need to proceed with a formal adoption. Furthermore, it seems clear that the doctrine does not apply where the parent temporarily places the child in the grandparent’s home or where no agreement to adopt was ever made.<sup>49</sup>

One state, West Virginia, may have broadened the doctrine enough to allow a grandchild to inherit even in a case where there was no agreement to adopt and where the child did not believe she had been adopted. In *Welch v. Wilson*,<sup>50</sup> the Supreme Court of Appeals of West Virginia held that a woman raised by her stepgrandfather (the husband of her maternal grandmother) since she was six months old had been equitably adopted and thus was entitled to an intestate share of his estate. In that case, her grandparents had provided all financial support for her and were listed as her “parents” on school records, and all ties were severed with her natural parents.<sup>51</sup> After her maternal grandmother died, the third wife of her father offered to raise the child, who was fifteen at the time.<sup>52</sup> Her

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44. *In re Estate of Robbins*, 738 P.2d 458, 462 (Kan. 1987) (citing cases from North Carolina, Arkansas, Indiana, and Virginia that do not recognize equitable adoption).

45. Tracy Bateman Farrell, Annotation, *Modern Status of Law as to Equitable Adoption or Adoption by Estoppel*, 122 A.L.R.5TH 205 § 3(a) (2004).

46. See Jan Ellen Rein, *Relatives By Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 767 (1984); see also Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 172 (“A so-called equitable adoption or adoption by estoppel may occur, for example, when the adoptive parent agrees to adopt the child, actually rears the child and holds it out as his own, and the child mistakenly believes it has been properly adopted.”).

47. *Williams v. Estate of Pender*, 738 So. 2d 453, 456 (Fla. Dist. Ct. App. 1999).

48. Hirsch, *supra* note 43, at 548; James R. Robinson, Comment, *Untangling the “Loose Threads”: Equitable Adoption, Equitable Legitimation, and Inheritance in Extralegal Family Arrangements*, 48 EMORY L.J. 943, 955 (1999).

49. Robinson, *supra* note 48, at 961.

50. 516 S.E.2d 35 (W. Va. 1999).

51. *Id.* at 36.

52. *Id.*

stepgrandfather declined.<sup>53</sup> She lived with her stepgrandfather until she was nineteen and later helped to care for him when he was diagnosed with cancer.<sup>54</sup>

In West Virginia, to prove equitable adoption, the child must show by “clear, cogent, and convincing evidence that he has stood from an age of tender years in a position exactly equivalent to that of a formally adopted or natural child.”<sup>55</sup> Evidence of an invalid or ineffective adoption proceeding, or the “representation to all the world that the child is a natural or adopted child,” can be introduced to prove an equitable adoption, but such evidence is not necessary.<sup>56</sup> Instead, the *Welch* court focused on such facts as the devotion between the decedent and the child, that ties were severed with the child’s natural parents, and that “the decedent specifically declined the opportunity to release himself of the responsibility for the care of the [child]” after his wife’s death.<sup>57</sup> Thus, a grandchild in our scenario may be able to inherit using the doctrine of equitable adoption in at least one state. This expansion of the equitable adoption theory allows the court to reach a fair outcome that parallels the actual structure of the family, but may do so at the cost of increased litigation.

The danger lies in expanding the doctrine of equitable adoption to a case where the child’s ties with her natural parents have not been severed. Courts could apply the doctrine not only to allow the grandchild in our scenario to inherit, but also in the much more common situation of a stepparent raising stepchildren. Many states are wary of allowing a stepchild to inherit in intestacy. California, for example, allows a stepchild to inherit in one of three ways. First, a stepchild will inherit if the decedent leaves no descendants, surviving spouse, surviving domestic partner, parents, issue of parents, grandparents, or issue of grandparents.<sup>58</sup> Alternatively, he or she may inherit as the decedent’s “child” if two requirements are met: (1) the relationship of parent and child began during the child’s minority and continued throughout the joint lifetimes of the parent and child, and (2) it is established by clear and convincing evidence that the stepparent would have adopted the person but for a legal barrier.<sup>59</sup>

Finally, a stepchild in California can inherit through the doctrine of equitable adoption, but only if the child can prove a contract to adopt between the child’s natural parents and the foster parents, or clear and convincing evidence of the foster parents’ intent to adopt.<sup>60</sup> The facts in *Estate of Ford* were sympathetic to a claim of equitable adoption. The child, Bean, had been a foster child in the Fords’ home since the age of two.<sup>61</sup> The Fords stopped taking in foster children

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53. *Id.*

54. *Id.*

55. *Id.* at 37.

56. *Id.* at 38.

57. *Id.*

58. CAL. PROB. CODE § 6402(e) (West 2005).

59. *Id.* § 6454. The most common legal barrier is the refusal of the natural parent to consent to a minor child’s adoption. *See, e.g.,* *Barnum-Smith v. Joseph (Estate of Joseph)*, 949 P.2d 472 (Cal. 1998).

60. *Estate of Ford v. Ford (Estate of Ford)*, 82 P.3d 747, 752 (Cal. 2004), *corrected*, 2004 Cal. LEXIS 903, *reh’g denied*, 2004 Cal. LEXIS 983 (2004).

61. *Id.* at 749.

when Mrs. Ford was diagnosed with cancer, but Bean continued to live with them.<sup>62</sup> After the death of his foster mother, he helped care for his foster father, was consulted on whether his foster father should receive life support, and helped to arrange his foster father's funeral.<sup>63</sup> In short, he and his foster father seemed to have the father-son relationship found by the West Virginia court in *Welch*. Nevertheless, the California Supreme Court refused to allow Bean to inherit because he could not prove a contract to adopt.<sup>64</sup> The court worried that expanding the reach of equitable adoption would "leave open to competing claims the estate of any foster parent or stepparent who treats a foster child or stepchild lovingly and on an equal basis with his or her natural or legally adopted children."<sup>65</sup> Intestacy law is designed to carry out the decedent's likely intent, but evidence of a close relationship does not, according to the California Supreme Court, shed light on to whom the decedent would want to leave his property.<sup>66</sup> This is, the court noted, "an area of law where 'consistent, bright-line rules' are greatly needed."<sup>67</sup>

Whether intestacy law is really intended to carry out the average decedent's intent, rather than to carry out public policy goals, is a subject of some debate. The 1969 Uniform Probate Code ("UPC") declared its intent to "reflect the normal desire of the owner of wealth as to disposition of his property at death," but by 1990, the stated goal had changed to "fine tuning the various sections and bringing them into line with developing public policy."<sup>68</sup> In serving either purpose, the need for bright-line rules is important in establishing a default system, such as intestacy. The bright-line rule most states have adopted is to bar stepchildren from taking from the stepparents' estates in most instances.<sup>69</sup> Thus, equitable adoption is frequently denied due to the lack of proof of a contract to adopt, even though the child took the parents' last name, called the parents "mom" and "dad," and undertook many of the responsibilities of the traditional parent-child relationship.<sup>70</sup> The requirement of proof of a contract to adopt, commonly applied where stepchildren or foster children seek to inherit, will almost always serve to bar inheritance by grandchildren as well. Unless the doctrine is greatly expanded as it was in West Virginia, equitable adoption is likely to be of little assistance to the grandchildren of caregivers who die without a will.

Just as the doctrine of equitable adoption is not likely to allow a grandchild to inherit from a grandparent, the pretermitted heir statutes are not likely to provide relief in our scenario. Most pretermitted heir statutes follow the

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62. *Id.*

63. *Id.*

64. *Id.* at 749–50.

65. *Id.* at 753–54.

66. *Id.*

67. *Id.* at 753.

68. Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1051–52 (1994).

69. Andrew L. Noble, *Intestate Succession for Stepchildren in Pennsylvania: A Proposal for Reform*, 64 U. PITT. L. REV. 835, 836 (2003).

70. *See generally* Farrell, *supra* note 45.

UPC to include children, but not grandchildren, born after the will was executed.<sup>71</sup> Thus, in the case of a grandparent who died testate, leaving a daughter A and the daughter's child B, mentioning neither in the will, A could inherit if she were born after the will was executed but B could not. Pretermitted heir statutes of a few states include grandchildren, but only in the case where the grandchild's parent is deceased.<sup>72</sup> Thus, these states would allow the grandchild to inherit only in the rare case in which the grandparent executed a will that omitted the grandchild's parent, and the parent was predeceased. Therefore, even these states would not provide relief to the grandchild in our scenario because the grandparent has no will, and the child's parent is still alive.

### *B. Solutions from Abroad: Family Maintenance*

Other countries have long had discretionary systems—commonly called family maintenance systems—that might allow a grandchild to inherit. Some commentators have recommended the adoption of a family maintenance system in the United States.<sup>73</sup> This system was originally enacted in New Zealand in 1900,<sup>74</sup> and has since been expanded and adopted by England, Wales, Australia, and many of the Canadian provinces.<sup>75</sup> The original English statute, modeled on the New Zealand law, provided for a judge to exercise discretion only in cases where the decedent's will did not make “reasonable provision” for maintaining the surviving spouse and children.<sup>76</sup> Later amendments applied the statute to intestacy in 1952 and to former spouses in 1958.<sup>77</sup> Despite criticisms concerning “the discretionary nature of the parties’ rights which, as we see it, is the fundamental cause of the present dissatisfaction with the law,”<sup>78</sup> the 1975 Inheritance Act adopted in England and Wales substantially increased the categories of those entitled to ask

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71. UNIF. PROBATE CODE § 2-302 (amended 1991 & 1993), 8 U.L.A. 135 (1998); MCGOVERN & KURTZ, *supra* note 42, at 140.

72. *E.g.*, OKLA. STAT. ANN. tit. 84, § 132 (West 2004) (providing for “the issue of any deceased child”); *accord* MASS. GEN. ANN. LAWS ch. 191, § 20 (West 2005); WIS. STAT. ANN. § 853.25(1)(d) (West 2004).

73. *See, e.g.*, Ronald Chester, *Disinheritance and the American Child: An Alternative from British Columbia*, 1998 UTAH L. REV. 1, 34–35; Note, *Family Maintenance: An Inheritance Scheme for the Living*, 8 RUTGERS-CAM. L.J. 673, 686–91 (1977) [hereinafter Note, *Family Maintenance*]; Jan Ellen Rein, *A More Rational System for the Protection of Family Members Against Disinheritance: A Critique of Washington’s Pretermitted Child Statute and Other Matters*, 15 GONZ. L. REV. 11, 47–55 (1979). China has adopted a flexible, needs-based approach to protect family members and dependants from disinheritance, and to redistribute shares in intestacy. Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199, 1219–39.

74. Foster, *supra* note 73, at 1210 n.48 (citing The Family Protection Act, 1900, S.N.Z. 64 Vict. No. 20, *as amended* by S.N.Z. 11 Geo. 6, No. 60, § 15, *as amended* by the Family Protection Act, 1955, S.N.Z. No. 88).

75. Rein, *supra* note 73, at 47.

76. Richard R. Schaul-Yoder, Note, *British Inheritance Legislation: Discretionary Distribution at Death*, 8 B.C. INT’L & COMP. L. REV. 205, 209 (1985) (citing 1938 Inheritance (Family Provision) Bill, 1 & 2 Geo. 6, c. 45 § 1(1) (Eng.)).

77. *Id.* at 210.

78. THE LAW COMMISSION, WORKING PAPER NO. 42 ¶ 0.22, *cited in* Schaul-Yoder, *supra* note 76, at 210–11 n.56.

for relief.<sup>79</sup> The 1975 Act allows “any person . . . who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased” to apply for an order on the ground that the decedent’s will or the law of intestacy did not make “reasonable financial provision” for the applicant.<sup>80</sup> “Reasonable financial provision” is broadly defined in the act as “such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance.”<sup>81</sup>

Statutes in other countries are not as broadly worded as the 1975 English Act. In several of the Canadian provinces, a surviving spouse or a child under defined circumstances is entitled to ask that the will or intestate scheme be varied to provide for that person, but others dependent on the deceased, such as a grandchild, are not.<sup>82</sup> Conversely, Manitoba, Ontario, Prince Edward Island, and Yukon Territory all expressly include a grandchild who was substantially dependent on the deceased, unless the child was placed for valuable consideration as a foster child in the deceased’s home.<sup>83</sup>

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79. Inheritance (Provision for Family and Dependents) Act 1975, c. 63 (Eng.).

80. *Id.* § (1)(e).

81. *Id.* § (2)(b).

82. The Alberta Family Relief Act provides:

If a person (a) dies testate without making in the person’s will adequate provision for the proper maintenance and support of the person’s dependants or any of them, or (b) dies intestate and the share under the Intestate Succession Act of the intestate’s dependants or any of them in the estate is inadequate for their proper maintenance and support, a judge, on application by or on behalf of the dependants or any of them, may in the judge’s discretion, notwithstanding the provisions of the will or the Intestate Succession Act, order that any provision that the judge considers adequate be made out of the estate of the deceased for the proper maintenance and support of the dependants or any of them.

Family Relief Act, R.S.A. ch. F-5, § 3(1) (2000). “Dependant” is defined in section 1(d) as:

(i) the spouse of the deceased, (ii) a child of the deceased who is under the age of 18 years at the time of the deceased’s death, and (iii) a child of the deceased who is 18 years of age or over at the time of the deceased’s death and unable by reason of mental or physical disability to earn a livelihood.

*Id.* § 1(d); *accord* Newfoundland and Labrador Family Relief Act, R.S.N.L. ch. F-3, § 2(c) (1990) (“[D]ependant” means the widow, widower or child of the deceased.”).

The Northwest Territories Dependents Relief Act defines “child” as including a stepchild; a “dependant” is defined as a surviving spouse, a child under age nineteen, a child over nineteen who is disabled, or a person who cohabited conjugally with the deceased under certain circumstances. R.S.N.W.T. ch. D-4, § 1 (1988). The Saskatchewan Dependents’ Relief Act expands the definition of “dependant” found in the Alberta statute to include persons who “by reason of need or other circumstances, . . . ought to receive a greater share of the deceased’s estate than he or she is entitled to without an order” and also includes under certain circumstances a person with whom a deceased cohabited as a spouse. Dependents’ Relief Act, S.S. ch. D-25.01, § 2(1)(c), (d) (1996).

83. Manitoba Dependents Relief Act, R.S.M. ch. D37, § 1 (1990); Ontario Succession Law Reform Act, R.S.O. ch. S. 26, § 57 (1990); Prince Edward Island Dependents of a Deceased Person Relief Act, R.S.P.E.I. ch. D-7, § 1(d)(iv) (1988) (including a “descendant of the deceased who, for a period of at least three years

The advantage of a family maintenance system is that it gives the court discretion to determine if certain categories of survivors—a spouse, child, or other dependant—have not been adequately provided for by the decedent’s will or by intestacy law. Lovers, housemates, and ex-spouses can also make claims in some jurisdictions.<sup>84</sup> Unlike a pretermitted heir statute, the court can be selective in applying a family maintenance system and can tailor the solution to the individual needs of the applicant.<sup>85</sup>

Thus, the hallmark of a family maintenance system is the enormous flexibility given to the court to fashion a remedy when someone defined as a dependant of the deceased has not been adequately provided for by the probate system. Such flexibility could benefit a surviving spouse, who otherwise would receive a fixed percentage of the decedent’s assets based on the length of the marriage under the UPC elective share system.<sup>86</sup> Likewise, a family maintenance system could provide better protection for the deceased’s minor or disabled children than the typical intestacy law, which gives a set share to each person outright.

The family maintenance system appears to work well in England, where estate planners are able to predict the likelihood of litigation and draft accordingly.<sup>87</sup> A survey of the cases brought under the 1975 Act in the eight years following its enactment concluded that judges substantially narrowed their discretion by asking “not whether it might have been reasonable for the deceased to assist [the applicant] . . . but whether in all the circumstances, looked at objectively, it is unreasonable that the effective provisions governing the estate did not do so,”<sup>88</sup> thus protecting the deceased’s freedom of testation. In addition, some English decisions have interpreted the Act’s language that the court “have regard . . . to whether the deceased had assumed any responsibility for the applicant’s maintenance”<sup>89</sup> to, in effect, require a showing that the deceased had assumed such responsibility or “had a moral obligation to provide for him.”<sup>90</sup> To limit the number of suits under the Act, some English courts have indicated in dicta that lawyers may be liable in negligence for bringing doubtful claims.<sup>91</sup>

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immediately prior to the date of the death of the deceased, was dependant upon him for maintenance and support”); Yukon Territory Dependents Relief Act, R.S.Y. ch. 56, § 1(d) (2002).

84. Note, *Family Maintenance*, *supra* note 73, at 682.

85. Rein, *supra* note 73, at 50–52.

86. Helene S. Shapo, “A Tale of Two Systems”: *Anglo-American Problems in the Modernization of Inheritance Legislation*, 60 TENN. L. REV. 707, 708–09 (1993).

87. See J. Thomas Oldham, *Should the Surviving Spouse’s Forced Share Be Retained?*, 38 CASE W. RES. L. REV. 223, 231 (1987).

88. *In re Coventry*, decd., [1980] 1 ch. 461, 488, *cited in* Schaul-Yoder, *supra* note 76, at 222.

89. Inheritance (Provision for Family and Dependents) Act 1975, c. 63, § 3(3)(a) (Eng.).

90. Schaul-Yoder, *supra* note 76, at 225 n.249.

91. *Id.* at 226–27. Schaul-Yoder notes that the usual English rule of “loser pays” has not generally been enforced in probate actions for a reasonable claim. *Id.* at 232 nn.299–300.

An examination of litigation under the Canadian statutes, however, reveals some of the problems that could be encountered were a family maintenance system adopted in the United States. In such a situation, the most frequent litigator would likely be a child or stepchild of the decedent. A recent study found that more than 71% of current will contests were brought by those two groups.<sup>92</sup> The second most likely group to sue under a family maintenance system would be spouses, who bring more than 13% of current will contests.<sup>93</sup> And what of meretricious spouses, lovers, and housemates? While some have advocated for the merits of their claims,<sup>94</sup> legislatures have proceeded much more cautiously. California, for example, recently enacted a provision allowing a domestic partner to inherit in intestacy, but only in cases where the domestic partners are registered with the state.<sup>95</sup> California, like most states, eliminated common law marriage more than 100 years ago due to fraudulent claims.<sup>96</sup> Recent cases in Ontario, which allows suits by common law spouses, suggest we should not allow a return to such marriages, which require proof in court of the intimate relationship of the couple and, in some instances, evidence on whether the marriage was consummated.<sup>97</sup>

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92. Chester, *supra* note 73, at 4. Forty-nine American states have decided that testators should be able to disinherit their children. Ralph Brashier, *Protecting the Child from Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1, 1 (1996). The one exception, Louisiana, recently amended its statute to exclude adult, nondependent children. *Id.* at 2. Despite the clear signal from legislatures that a testator need not will anything to a child, a testator who fails to provide for a child or stepchild runs the risk of a will contest.

93. Chester, *supra* note 73, at 4.

94. Marissa J. Holob, Note, *Respecting Commitment: A Proposal to Prevent Legal Barriers from Obstructing the Effectuation of Intestate Goals*, 85 CORNELL L. REV. 1492, 1495 (2000).

95. California Probate Code section 6401(c), effective January 1, 2005, provides for an intestate share for a surviving domestic partner. CAL. PROB. CODE § 6401(c) (West 2005). Section 37(a) of the California Probate Code defines a domestic partner as a person who has “filed a Declaration of Domestic Partnership with the Secretary of State . . .” *Id.* § 37(a). Under section 37(b), the surviving domestic partner will inherit in intestacy in cases where the domestic partnership is terminated by death, and Notice of Termination was not filed by either party prior to the death of the decedent. *Id.* § 37(b).

96. Holob, *supra* note 94, at 1516–17.

97. The Canadian Legal Information Institute Web site lists fifteen reported cases on the Ontario Succession Law Reform Act, R.S.O. ch. S 26 (1990), requesting a variation from the will because of dependency on the deceased. Nine out of the fifteen cases involved claims by common law spouses, requiring the court to consider whether the couple had a marriage-like relationship, and in some cases, whether the marriage had been consummated. Two cases for variation were brought by a spouse; the remaining four cases were brought by children or grandchildren. Canadian Legal Information Institute, Home Page, <http://www.canlii.org> (last visited July 28, 2005). Those fifteen cases were retrieved with a query of “Succession Law Reform Act,” and were as follows: *Re Ciona Estate*, 2004 CanLII 23485 (ON S.C.) (common law wife); *Scott v. Boterberg (Estate)*, 2004 CanLII 32327 (ON S.C.) (common law wife and child); *Barrett v. Kouril Estate*, 2003 CanLII 47493 (ON S.C.D.C.) (common law wife); *Radziwilko v. Seef*, 2003 CanLII 24366 (ON S.C.) (common law wife); *Forrest v. Estate of Lacroix*, 2000 CanLII 5728 (ON C.A.) (common law wife); *Cammack v. Martins Estate*, 2002 CanLII 4733 (ON S.C.) (common law husband); *Re Estate of Goodfriend*, 2003 CanLII 43947 (ON S.C.) (common law wife); *Robins v. Robins (Estate)*, 2003 CanLII 2225 (ON S.C.) (common law wife who later went

An examination of recent litigation in British Columbia, which allows only spouses and children to sue under the Wills Variation Act,<sup>98</sup> indicates that judges have a huge amount of discretion in deciding whether to rewrite the will. In a key decision, *Tataryn v. Tataryn Estate*, the Supreme Court of Canada held that “the Act confers a broad discretion on the court. The generosity of the language suggests that the legislature was attempting to craft a formula which would permit the courts to make orders which are just in the specific circumstances and in light of contemporary standards.”<sup>99</sup> Thus, Canadian courts should look at the testator’s legal and moral obligations to the applicant, but they do not have to find financial need.<sup>100</sup> In *Tataryn*, the testator had disliked his older son, John, for years.<sup>101</sup> He expressly excluded John from his will; he left his wife, Mary, only a life estate because he feared giving her property outright would result in her eventually giving it to John.<sup>102</sup> The will could not have been more explicit:

My wife Mary and my older son John have acted in various ways to disrupt my attempts to establish harmony in the family. Since JOHN was 12 years old he has been a difficult child for me to raise. He has turned against me and totally ignored me for the last 15 years of his life. He has been abusive to the point of profanity; he has been extremely inconsiderate and has made no effort to reconcile his differences with me. He has never been open to discussion with a view to establishing ourselves in unity. My son EDWARD is respectable and I commend him for his warm attitude towards me, his honesty, and his co-operation with me.<sup>103</sup>

The court determined that, due to Mary’s age and the length of the marriage and other factors, she should receive the bulk of the estate.<sup>104</sup> The testamentary “freedom” so highly prized by the court was preserved by distributing the rest of the estate one-third to the omitted son, John, and two-thirds to the other son, Edward.<sup>105</sup>

Because a court’s role is to determine if the testator’s reasons for omitting a spouse or child were valid and rational, a court is required to examine highly personal details of the family’s history. In *Elliott v. Clark*, involving an estate valued at \$88,000, the testator devised the bulk of her estate to her daughter, leaving a small amount of personal property to her son and bequests of \$1000 to

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through a marriage ceremony); *Hupka v. Aarts Estate*, 2003 CanLII 49303 (ON S.C.) (common law wife); *Miller v. Miller (Estate)*, 2004 CanLII 33307 (ON S.C.) (wife); *Ivanic v. Ivanic Estate*, 2005 CanLII 19805 (ON S.C.) (wife); *Sheffiel-Lambros v. Sheffiel*, 2005 CanLII 4449 (ON S.C.) (child); *Reid v. Reid*, 2005 CanLII 20793 (child and grandchildren); *Cummings v. Cummings*, 2004 CanLII 9339 (ON S.C.) (children); *McElligott Estate v. Damecour*, 2005 CanLII 33535 (children).

98. R.S.B.C. ch. 490 (1996).

99. [1994] 2 S.C.R. 807, 1994 Carswell B.C. 283, at ¶ 15.

100. *See id.* ¶ 18–33.

101. *Id.* ¶ 3.

102. *Id.* ¶ 4.

103. *Id.*

104. *Id.* ¶ 37.

105. *Id.* ¶¶ 33, 41.

each of the son's six children.<sup>106</sup> The court considered evidence on how many times the son visited his mother, whether he sent greeting cards to her, and her resentment at his refusal to invite her to visit his home at Christmas.<sup>107</sup>

In cases where the person suing under the Wills Variation Act was estranged from the testator, the court inquired into the reasons for the poor relationship; if the testator was at least partly at fault, the applicant might be granted a variation. For example, in *Evans v. Duncan*, the testator, mother to four natural children, two adopted children, and a foster child, omitted three of the seven children from her will, giving one-fifth each to four children and one-tenth each to a fifth child's two children.<sup>108</sup> One of her natural sons, Terry, sued to vary the will.<sup>109</sup> The court found that he had not seen his mother for a number of years before her death, that his contact with her consisted solely of a few greeting cards on special occasions, and that the reason for this estrangement may have been "some sort of difficulty" between the testator and Terry's wife, "thus placing him in a difficult position."<sup>110</sup> The court ordered the will varied to give Terry a share equal to that of his siblings.<sup>111</sup> Similarly, in *Rampling v. Nootebos*, the testator left \$25,000 each to his son and daughter, and the rest of his \$330,000 estate in trust for forty-one nieces and nephews.<sup>112</sup> Both the son and daughter sued, alleging that their father was physically and emotionally abusive to them, had threatened while in a drunken rage to kill their mother, and had thrown their mother out of the house.<sup>113</sup> The court determined that the testator was the primary cause for the estrangement from his children; since both children had no financial need, the court increased the bequest to each to \$75,000, leaving about \$180,000 for the nieces and nephews.<sup>114</sup>

In cases where the testator stated in the will why she was treating a child differently from the rest, the court will then inquire as to the truth of the reasons stated. In *Ryan v. Delahaye Estate*, the testator gave three reasons for leaving 80% to her son and 20% to her daughter: first, her son had been of great assistance to her; second, her daughter seldom visited or contacted her; and third, her daughter had received the daughter's grandmother's estate in 1966.<sup>115</sup> The court concluded that the first reason was accurate but failed to take into account the considerable assistance the daughter had given as well, and that the second and third reasons

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106. [1998] B.C.J. No. 2056, at ¶ 1. The court decided not to vary the terms of the will, concluding that the testator had valid and rational reasons for disinheriting her son because he had neglected and ignored her; the court also considered the small size of the estate, the bequests to the son's children, the fact that the son did not contribute to the mother's estate, and the son's lack of financial need. *Id.* ¶ 15.

107. *Id.* ¶¶ 6–9.

108. [2000] B.C.S.C. 1308, at ¶¶ 1–3.

109. *Id.*

110. *Id.* ¶ 30.

111. *Id.* ¶ 31.

112. [2003] B.C.S.C. 787, at ¶¶ 5–8.

113. *Id.* ¶¶ 19–20.

114. *Id.* ¶¶ 56, 58, 59; see also *Gray v. Nantel*, [2002] B.C.C.A. 94, at ¶¶ 17–22 (holding that the estrangement was due to the testator and ordering a variation in the will).

115. [2003] B.C.S.C. 1081, at ¶ 1.

were not accurate.<sup>116</sup> Accordingly, after noting the daughter's disability and her long periods on welfare, the court ordered that she be awarded half of her mother's estate.<sup>117</sup> Similarly, in *Sawchuk v. Mackenzie Estate*, the testator left \$10,000 of her \$4 million estate to her estranged daughter.<sup>118</sup> The trial court found that the reasons for the testator's disapproval of her daughter were not justified and, given the size of the estate and the daughter's modest standard of living, awarded her \$500,000.<sup>119</sup> On appeal, the Court of Appeals determined that amount was not sufficient for someone living in Vancouver and increased the award to \$1 million.<sup>120</sup> The issue, as stated by the Court of Appeals, was "whether \$500,000 is adequate to provide the appellant with a standard of living that a judicious parent would consider appropriate having regard to the size of the estate and the testatrix's own standard of living."<sup>121</sup>

Even in cases where the court finds that the testator had valid reasons to treat a child unequally, the court might still order variation based on the child's financial need. For example, in *Guardian of Woods v. Woods Estate*, the testator devised only \$10,000 to her daughter out of a \$450,000 estate, noting that her daughter "has not associated with [her] for ten years and has shown virtually no interest in [her] or any other members of [her] family and . . . [her] daughter does not have dependants to care for like [her] other children."<sup>122</sup> The court concluded that the testator had a good reason for treating her daughter differently from her other children, but given the daughter's age of fifty-six, her disability, and her financial need, she should still receive a greater amount than provided in the will.<sup>123</sup> The court ordered that she receive another \$20,000.<sup>124</sup> In *Pelletier v. Erb Estate*,<sup>125</sup> the testator left all his property to his two young sons, (fifteen and seventeen years old) and left nothing to his two daughters (thirty-five and thirty-six years old).<sup>126</sup> The daughters had been placed in a foster home when quite young and had been sexually abused; when they returned to their father's home, they did not get along with his new common law wife and ran away.<sup>127</sup> The daughters were financially needy, and one, addicted to cocaine, committed suicide shortly after the testator's death.<sup>128</sup> The court concluded that "a judicious father would have seen to it that his children shared equally in the estate" and so divided it evenly among the three living children and the estate of the deceased daughter.<sup>129</sup>

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116. *Id.* ¶¶ 70–74.  
117. *Id.* ¶¶ 79–80.  
118. [2000] B.C.C.A. 10, at ¶¶ 1–2.  
119. *Id.* ¶¶ 1, 12.  
120. *Id.* ¶ 17.  
121. *Id.* ¶ 13.  
122. [2002] B.C.S.C. 569, at ¶ 8.  
123. *Id.* ¶¶ 38–43.  
124. *Id.* ¶ 44.  
125. [2002] B.C.S.C. 1158.  
126. *Id.* ¶ 2.  
127. *Id.* ¶¶ 13–19.  
128. *Id.* ¶¶ 27–28.  
129. *Id.* ¶¶ 58–64.

The court's preference for equal treatment of all the testator's children appears quite strongly in these cases, especially when the children had contributed to the acquisition of the testator's property. In *Chan v. Lee*, the testator's two daughters had worked many hours in the family business without pay, but their father transferred the company, worth more than \$4 million at the father's death, to the three sons in 1964.<sup>130</sup> Upon the father's death in 1996, his will left the bulk of his estate of \$543,000 to the sons.<sup>131</sup> The court, using its equitable powers, proceeded to award substantially more to the daughters.<sup>132</sup> Variation was also made to provide more for the testator's second wife, the stepmother of his children.<sup>133</sup>

A family maintenance system—a discretionary system giving latitude to a court to vary the testator's will or the effects of the intestacy statutes—seems unsuitable for our scenario in which grandparents are serving as primary caregivers for their grandchildren. Such a system in the United States would likely mean frequent litigation and delay in the distribution of estates or pay-off settlements in many cases. New York decided not to enact a family maintenance system more than forty years ago, citing fear of excessive litigation.<sup>134</sup> As Professor Glendon has argued, the American experience “with discretionary distribution on divorce should make us extremely wary of any system that would encourage a variety of friends and relatives to challenge wills and permit a probate judge to rearrange estate plans.”<sup>135</sup> In addition, a family maintenance system violates our country's professed belief in freedom of testation, which allows a testator a great deal of latitude in choosing to whom to leave his estate.

### III. POSSIBLE NEW SOLUTIONS: STATUTES, REDEFINING “CHILD,” AND MORE

Instead of equitable adoption, pretermitted heir statutes, or a family maintenance system, the United States could have a bright-line rule that all minor children dependent on the decedent inherit in intestacy, but such a bright-line rule has its own benefits and drawbacks.<sup>136</sup> This proposed rule would allow a grandchild being raised by his grandmother to inherit a “child's portion” of the estate and thus receive a share equal to that of the child's parent. The statute could be further refined by reference to certain Canadian inheritance statutes, which

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130. *Chan v. Lee* (estate), [2002] B.C.S.C. 678, at ¶ 12, 14, 35, 157, *as modified by* [2004] B.C.C.A. 644.

131. *Id.* ¶¶ 21–22.

132. *Id.* ¶¶ 204–06.

133. *Id.*

134. Note, *Family Maintenance*, *supra* note 73, at 689 & n.119.

135. Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1189 (1986); *accord* Bruce Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1050 (1994) (“The possibility of an individual inquiry into the dispositional wishes of everyone who dies is a bureaucratic nightmare.”).

136. *See* Noble, *supra* note 69, at 847–48 (advocating that stepchildren inherit by redefining “issue” as including stepchildren residing in the decedent's household at the time of the death).

require dependency on the deceased for at least three years prior to the date of death,<sup>137</sup> thus eliminating temporary, short-term arrangements while including long-time familial relationships in which the decedent is more likely to want the dependant to have an intestate share.<sup>138</sup> Such a statute would carry out a decedent's likely intent in many cases and would also serve society's interest in protecting a minor. But the disadvantages of a rigid rule are many. For example, if foster children were to automatically inherit, some potential foster parents may be deterred from undertaking the care of such children. One of the traditional reasons to adopt children is to provide for inheritance; instituting this rule would wipe out that difference between adoption and foster care and may have the unintended consequence of discouraging adoption. The rule would also allow many stepchildren to inherit. While many commentators have urged such a result,<sup>139</sup> it is not clear that such a change would carry out the probable intent of most stepparents.<sup>140</sup>

Another possible solution is to redefine "parent" and "child" in intestacy. Several writers have already proposed this in different contexts, particularly for stepchildren in inheritance and for nontraditional families in custody rights. Margaret Mahoney has suggested that the following three criteria be met before a stepchild is allowed to inherit in intestacy: (1) the stepfamily was formed during the child's minority; (2) the stepparent acted *in loco parentis*; and (3) the relationship continued throughout the parent's and child's lifetimes.<sup>141</sup> Susan Gary has argued that intestacy statutes can be drafted to include "parents and children who function as parents and children but are not legally related either biologically or through adoption."<sup>142</sup> Her proposed statute would direct the court to look at several factors, such as whether the relationship began during the child's minority, the duration of the relationship, whether the parent held out the child as his or her own, and whether the parent provided economic and emotional support for the child, in determining whether the child should inherit in intestacy.<sup>143</sup> Katherine

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137. Cf. Yukon Territory Dependents Relief Act, R.S.Y. ch. 56, § 1 (2002); Prince Edward Island Dependents of a Deceased Person Relief Act, R.S.P.E.I. ch. D-7, § 1(d)(iv) (1988).

138. U.S. Census statistics indicate that 39% of grandparent caregivers had cared for their grandchildren for five years or more. SIMMONS & DYE, *supra* note 2. Therefore, the majority of these children would not be included if a three-year time limit is imposed.

139. Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 79–80 (2000); Thomas Hanson, *Intestate Succession for Stepchildren: California Leads the Way, But Has It Gone Far Enough?*, 47 HASTINGS L.J. 257, 279 (1995); Noble, *supra* note 69, at 847; Kim A. Feigenbaum, Note, *The Changing Family Structure: Challenging Stepchildren's Lack of Inheritance*, 66 BROOK. L. REV. 167, 197 (2000).

140. Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of its Context*, 73 FORDHAM L. REV. 1031, 1091 (2004).

141. Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917, 930–33 (1989).

142. Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 647 (2002).

143. *Id.* at 684 app.

Bartlett's proposal of a "psychological parent"<sup>144</sup> definition or Martha Minow's "functional family" concept<sup>145</sup> for visitation and custody purposes could also be applied to grandparent care of foster children. Bartlett's definition of a "psychological parent" is a parent with physical custody of the child for at least six months, whose motive is a genuine concern for the child, and who is viewed by the child as his or her parent.<sup>146</sup> Professor Bartlett proposes that this alternative to exclusive parenthood would apply only where "the child's relationship with his legal or natural parent has been interrupted,"<sup>147</sup> and where the psychological-parent relationship began with either the parent's consent or a court order.<sup>148</sup> Similarly, Professor Minow has suggested that a "parent" be defined as someone who has lived with the child for a substantial portion of the child's life and is regularly involved in the day-to-day care, nurturance, and guidance of the child; if a biological parent is also present, the biological parent must have consented to the assumption of a parental role by the person, and the child must have in fact looked to this person as a parent.<sup>149</sup> However, all these proposals suffer from the same flaws: they would most likely include a very broad range of children, including stepchildren and foster children, who traditionally have been excluded from inheritance; they would require the court to engage in extensive fact finding before the takers in intestacy could be determined;<sup>150</sup> and their broader definitions could be used to penalize these relationships in other contexts.<sup>151</sup>

#### IV. THE BEST SOLUTION MAY BE A WILL

A more straightforward solution, but more difficult to enforce, is to urge the caregiving relative to write a will providing for the child. Curiously, while Web sites like Generations United have many resources for grandparents raising their grandchildren, they say nothing about wills.<sup>152</sup> Support services usually focus

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144. Katherine Bartlett, *Rethinking Parenthood as an Exclusive Legal Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 946 (1984).

145. Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 270–76 (1991).

146. Bartlett, *supra* note 144, at 946–47.

147. *Id.* at 946.

148. *Id.* at 947.

149. Minow, *supra* note 145, at 285 n.52; *see also* Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91, 99 (1990–91) (noting that the definition of family "should have a functional basis and should recognize that a family consists of a community").

150. *Cf.* Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77, 121 (1998) (noting that the Chinese inheritance system, while offering substantial advantages over its American counterpart, is "highly labor- and time-intensive, requiring courts to identify on a case-by-case basis the 'appropriate' recipients and allocation of each decedent's estate").

151. For an eloquent discussion of the worries of expanding the definition of parent, *see* Minow, *supra* note 145, at 278–84.

152. Generations United is listed as "the only national non-profit membership organization whose mission is to promote intergenerational public policies, strategies, and programs." GENERATIONS UNITED, FACT SHEET: GRANDPARENTS AND OTHER RELATIVES

on day-to-day issues, such as obtaining government benefits or applying to be a guardian of the child.<sup>153</sup> The National Family Caregiver Support Act,<sup>154</sup> initially proposed to provide support to informal family caregivers caring for an older relative, was amended to include grandparents and other relatives raising children; however, the support services address only daily living rather than inheritance.<sup>155</sup>

Encouraging grandparents to write a will is an important first step, but not one easily accomplished. Estate planning for bequests to minor children can be complicated because a minor cannot manage property. As Jeffrey Pennell has observed, “[I]n the current estate-planning environment, . . . there are short wills and simple lawyers but probably no simple wills.”<sup>156</sup> Still, some broad suggestions can be made. The military has considerable experience in advising service personnel, often the parents of young children, in drafting wills, and has a number of articles suggesting the use of the Uniform Transfers to Minors Act (“UTMA”) language as a convenient and effective way to leave property to a young child.<sup>157</sup> All states except South Carolina and Vermont have adopted the UTMA in some form.<sup>158</sup> The UTMA allows any kind of property, real or personal, tangible or intangible, to be transferred subject to its provisions,<sup>159</sup> and allows transfers to be made by will.<sup>160</sup> Creating a transfer under the UTMA is fairly simple: the testator simply needs to execute a valid will that leaves property to a custodian for the minor child under the state’s UTMA.<sup>161</sup> But this simple suggestion requires several distinct steps. First, one has to convince the grandparent to execute a will. Most people, especially those in the lower income brackets, do not execute wills. Trying to get a busy fifty-year-old who is suddenly taking care of a grandchild and worried about paying the rent to provide for something years in the future can be difficult. Nevertheless, providing links on Web sites such as Generations United

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RAISING CHILDREN: INFORMATION AND ASSISTANCE SERVICE (Dec. 2005), [http://ipath.gu.org/documents/A0/Information\\_and\\_Assistance\\_12\\_05.pdf](http://ipath.gu.org/documents/A0/Information_and_Assistance_12_05.pdf).

153. See, for example, the Web site for the Northwestern Illinois Area Agency on Aging. NIAAA, Home Page, <http://www.nwilaaa.org> (last visited Feb. 1, 2006).

154. Pub. L. No. 106-151, 114 Stat. 2253 (2000) (codified at 42 U.S.C.A. §§ 3030s-3030s-12 (West 2005)).

155. GENERATIONS UNITED, FACT SHEET: INTERGENERATIONAL ELEMENTS IN THE OLDER AMERICANS ACT (Jan. 2001), [http://ipath.gu.org/documents/A0/OAA\\_11\\_05.pdf](http://ipath.gu.org/documents/A0/OAA_11_05.pdf).

156. Jeffrey Pennell, *Ethics, Professionalism, and Malpractice Issues in Estate Planning and Administration*, in ESTATE PLANNING IN DEPTH, SC75 A.L.I.-A.B.A. 67 (1998).

157. See, e.g., Dominick J. Delorio, *Uniform Gifts to Minors Act* (pt. 4), 112 MIL. L. REV. 159, 161 (1986) (calling the UTMA and its predecessor, the Uniform Gifts To Minors Act, “a simple and inexpensive tool for making a gift to a minor that allows for flexibility and yet protects the gift from the young spendthrift”); Instructors, Judge Advocate General’s School, *Legal Assistance Items*, ARMY LAW., Jan. 1987, at 39 [hereinafter *Legal Assistance Items*]; Paul Peterson, *The Uniform Transfers to Minors Act: A Practitioner’s Guide*, ARMY LAW., May 1995, at 3.

158. 8C U.L.A. 1-2 (2001 & Supp. 2005).

159. UNIF. TRANSFER TO MINORS ACT § 1(6) (1983), 8C U.L.A. 14 (2001).

160. *Id.* § 5.

161. Delorio, *supra* note 157, at 162. Alternatively, the will (or trust) could include language intended to cover any beneficiary who is a minor. For sample language, see *Legal Assistance Items*, *supra* note 157.

that encourage caregivers to write wills may help. Second, the will needs to contain the appropriate language to make a gift under the Uniform Act. Third, the UTMA language is most effective if the testator suggests a custodian, although the court can otherwise appoint one. Because the grandchild will need a physical custodian in any event, this may not be a huge obstacle, but the grandparent still should find someone who is financially responsible and who can take care of the property.

The UTMA language may be the best solution where there is a small amount of personal property involved, no real property, and only one minor child. The custodian can use the property for a broad array of purposes—support, maintenance, education, and benefit of the minor—with no need to write a trust instrument.<sup>162</sup> Unfortunately, the UTMA also has significant drawbacks. The first drawback is that the UTMA allows a transfer to one minor with one custodian. If the grandparent is caring for two grandchildren, the UTMA requires that the testator designate which property is being held for which grandchild. That may not be a problem if the assets are cash but may be impractical if the asset is the testator's car or furniture. The second drawback is that the property must be automatically turned over from the custodian to the minor at the age of majority. In some states, that age is eighteen;<sup>163</sup> in others, it is twenty-one.<sup>164</sup> Especially where the required age is eighteen, the child may be too immature to be entrusted with control of the property.<sup>165</sup> The last drawback is that if the testator happens to be domiciled in a state that does not allow a UTMA transfer by will, such as Michigan or Vermont, or is attempting to transfer real property located in those states, this proposal will not work.

The alternative to the UTMA is to encourage grandparents to execute a will leaving property to the minor child in trust, or to create an *inter vivos* trust. It is not a good idea to simply will the property to a minor because such an arrangement will generally require a court to appoint a guardian or conservator to manage the assets and may also make the estate ineligible for informal probate,

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162. Delorio, *supra* note 157, at 163.

163. Peterson, *supra* note 157, at 18 (listing the following jurisdictions as requiring distribution at age eighteen when the transfer is created by will: District of Columbia, Kentucky, Louisiana, Oklahoma, Rhode Island, South Carolina, South Dakota, and Texas).

164. *Id.* (listing the following jurisdictions as requiring distribution at age twenty-one: Alabama, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Washington, West Virginia, Wisconsin, and Wyoming). In the remaining states, the testator can choose an age between eighteen and twenty-one (Arkansas, Maine, New Jersey, New York, North Carolina, and Virginia) or even extend it to age twenty-five (Alaska, California, and Nevada). *Id.* Transfers by will are not allowed in Michigan and Vermont. *Id.*

165. Stephanie Stassel, *Behind the Fun, Serious Preparation for Real Life*, L.A. TIMES, June 30, 2004, at B2 (describing a contest for foster care children on the eve of emancipation, in which they must demonstrate skills such as getting housing, balancing a checkbook and so on; children in informal kinship arrangements may not have been taught such basic skills).

thus causing the estate to go through the more costly and cumbersome process of supervised probate.<sup>166</sup> Another drawback of an outright bequest to a minor is that the guardian will hold the assets only until the minor turns eighteen, which, in the case of a significant amount of property, may mean trouble.<sup>167</sup>

However, there are also drawbacks to recommending a trust. Very few people have them now, in part because they must designate the terms.<sup>168</sup> In England, by contrast, real property willed to a minor is automatically deemed to be in a trust.<sup>169</sup> California had a statutory form will with trust at one time but repealed it in 1991. The current statutory form will, California Probate Code section 6240, specifically discourages a grandparent in our scenario from using it.<sup>170</sup>

Thus, the best solution in the end may be to urge grandparents raising their grandchildren to write a will and then make it as simple as possible for them to do so. States should enact statutory form wills that are easy to understand and simple to execute.<sup>171</sup> The form should include, as standard language, a statement that any small bequest going to one person under age twenty-five should be treated as a transfer under the UTMA, or as a trust for the benefit of the recipient.<sup>172</sup> The will should also contain clear instructions on how to execute it. For the relatively small number of children who are placed in foster care by a government agency, a social service agency could encourage grandparents to execute wills at the same time they submit guardianship papers and other documents. For the vast majority of kinship providers who have not gone through a social service agency or a court, popular resources, such as Generations United and AARP, could provide links and guidance on inheritance.

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166. Dennis M. Patrick, *Living Trusts: Snake Oil or Better than Sliced Bread?*, 27 WM. MITCHELL L. REV. 1083, 1091 (2000).

167. *Id.*

168. *Supra* note 31 and accompanying text (discussing an AARP survey in which 25% of white respondents reported having a trust, compared to 3% of African-American respondents who had one).

169. See Olin Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1344–48 (1969).

170. CAL. PROB. CODE § 6240 (West 2005) (“Questions & Answers about this California statutory will. . . #8. Are there any reasons why I should NOT use this statutory will? . . . You should talk to a lawyer if you have stepchildren or foster children whom you have not adopted.”).

171. The California statutory form will, *id.* § 6240, by contrast, is not easy to execute, and testators frequently do not realize they must have witnesses sign it to make it valid. *Id.* Accordingly, in 1990, the legislature amended section 6111 (holographic wills) to add subsection (c), which provides that a statement of testamentary intent may be part of a commercially printed form will (rather than requiring it to be in the testator’s handwriting), thus allowing some commercially printed wills to be probated as holographs. *Id.* § 6111.

172. The Uniform Statutory Will Act contains language to create a trust for a child under a specified age, *see, e.g.*, MASS. GEN. LAWS ANN., ch. 191B, § 8 (West 2005), but it only applies to children of the testator. Section 9 covers persons under a disability at time of distribution. *Id.* § 9. By combining the two sections and broadening their provisions, a trust could be created for any person under a specified age or living with a disability.

### CONCLUSION

As thousands of grandchildren continue to live with their grandparents, the effects of these living arrangements on inheritance must be examined. Current intestacy laws in all states provide that the grandchild does not inherit if her parent is alive. Doctrines applied in other inheritance contexts, such as equitable adoption and pretermitted heir, do not allow the grandchild to inherit in most instances. Proposals to modify existing law, such as by adopting a family maintenance system or by redefining who is one's "child," threaten to either swamp the probate system with litigation or to allow a vast array of new beneficiaries, far more than most decedents probably intend. Instead, legislation should be enacted that will benefit these grandchildren and society as a whole by creating bright-line, easily interpreted rules. Statutes construing all bequests to a minor to be made under the UTMA or in trust, plus efforts to make the execution of wills much simpler and less intimidating, will go far in solving the problem a grandchild in our common scenario has with inheritance.