

1990

# Spousal Share in Intestate Succession: Stepparents Are Getting Shortchanged, The

Carolyn R. Glick

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

Glick, Carolyn R., "Spousal Share in Intestate Succession: Stepparents Are Getting Shortchanged, The" (1990). *Minnesota Law Review*. 966.

<https://scholarship.law.umn.edu/mlr/966>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

## Notes

### The Spousal Share in Intestate Succession: Stepparents are Getting Shortchanged

#### INTRODUCTION

American families have changed dramatically in the last twenty-five years.<sup>1</sup> The tremendous increase in the divorce rate has led to a growing number of remarriages.<sup>2</sup> Stepfamilies, formed when a child's parent marries an individual who is not the child's other biological parent,<sup>3</sup> have become common households.<sup>4</sup> The legal system, however, has not broadened its

---

1. Fine, *Perceptions of Stepparents: Variation in Stereotypes as a Function of Current Family Structure*, 48 J. MARRIAGE & FAM. 537, 537 (1986); see also Lovas, *When Is a Family Not a Family? Inheritance and the Taxation of Inheritance Within the Non-Traditional Family*, 24 IDAHO L. REV. 353, 353 (1988) (describing the wide variety of modern communal living arrangements).

2. Fine, *supra* note 1, at 537 (citing Glick, *Marriage, Divorce, and Living Arrangements: Prospective Changes*, 5 J. FAM. ISSUES 7, 10 (1984) [hereinafter Glick, *Prospective Changes*]). Remarried couples represent 21.3% of all married couples in the U.S. and stepfamilies represent 8.3% of all married couples. Glick, *Remarried Families, Stepfamilies, and Stepchildren: A Brief Demographic Profile*, 38 FAM. REL. 24, 25 (1989) [hereinafter Glick, *Demographics*]. A remarried family is "a husband and wife maintaining a household with or without children in the home and with one or both spouses in their second or subsequent marriage." *Id.* at 24. A stepfamily is "a remarried family with a child under 18 years of age who is the biological child of one of the parents and was born before the remarriage occurred." *Id.*

3. This Note uses the term "biological parent" to include both a biological parent and an adoptive parent. Similarly, the term "biological child" includes both a biological child and an adopted child.

4. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917, 917 (1989). There were an estimated 11.0 million remarried families and 4.3 million stepfamilies in the U.S. in 1987. Glick, *Demographics, supra* note 2, at 25. By the year 2000, stepfamilies may outnumber all other kinds of American families. E. VISHER & J. VISHER, *OLD LOYALTIES, NEW TIES: THERAPEUTIC STRATEGIES WITH STEPFAMILIES* ix (1988) (citing Glick, *Prospective Changes, supra* note 2, at 23-24; Glick & Lin, *Recent Changes in Divorce and Remarriage*, 48 J. MARRIAGE & FAM. 737, 744-45 (1986)). Therefore, now and for the foreseeable future, stepfamily issues will concern researchers, clinicians, and policymakers. Giles-Sims & Crosbie-Burnett, *Stepfamily Research: Implications for Policy, Clinical Interventions, and Further Research*, 38 FAM. REL. 19, 19 (1989).

A study based on the 1981 National Health Interview Survey found that 82% of stepparents were stepfathers and 18% were stepmothers. Glick,

concept of family to include stepfamilies.<sup>5</sup> Legal rights and obligations, premised on the traditional first-married family model, generally are not extended to stepfamily members.<sup>6</sup>

The spousal share provision in the Uniform Probate Code's (U.P.C.)<sup>7</sup> intestate succession statute<sup>8</sup> illustrates the legal system's differential treatment of stepfamilies. Section 2-102 of the U.P.C. allows a husband or wife to inherit part of the deceased spouse's intestate estate.<sup>9</sup> The Code gives the surviving

*Demographics*, *supra* note 2, at 26. This discrepancy results from family courts awarding child custody to mothers in approximately 90% of divorce decrees. Ihinger-Tallman, *Research on Stepfamilies*, 14 ANN. REV. SOC. 25, 28 (1988) (citing L. WEITZMAN, *THE DIVORCE REVOLUTION* 222 (1985)).

5. See Lovas, *supra* note 1, at 353 (stating that inheritance statutes generally are patterned after the traditional family, although traditional families constitute less than 50% of American households). Social norms for families reflect a cultural lag. The dominant model for expectations is the first-married family. In comparison to this idealized model, stepfamilies appear deficient. Concepts of family relationships need to be broadened to encompass the great diversity of families common in the United States today. Giles-Sims & Crosbie-Burnett, *supra* note 4, at 20.

6. Mahoney, *supra* note 4, at 918; see *infra* notes 51 & 88-89 (discussing legal treatment of stepfamily members).

7. The U.P.C. was promulgated by the United Conference of Commissioners on Uniform State Laws in 1969, and subsequently approved by the American Bar Association. Fellows, Simon & Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 323. Part 1 of Article II of the U.P.C. concerns intestate succession. UNIF. PROB. CODE art. II, pt. 1 introductory comment (1983). This Note refers to the original U.P.C. of 1969 as the current Code.

Fifteen states have officially adopted the U.P.C. in its entirety. See UNIF. PROB. CODE, 8 U.L.A. 1 (Supp. 1989). One state has adopted the U.P.C. in part. See *id.* Twenty-two states, however, follow the U.P.C.'s spousal share distribution scheme. See *infra* note 27. Thus, several states follow the U.P.C. approach without officially adopting the Code.

8. Intestate succession statutes provide a property distribution scheme for individuals who die without leaving a will. Mulder, *Intestate Succession Under the Uniform Probate Code*, 3 PROSPECTUS 301, 301 (1970). Intestacy laws also operate when a will fails to dispose of all the probate assets. Fellows, Simon & Rau, *supra* note 7, at 322 n.5. In partial intestacy situations, intestate succession statutes apply only to the property not disposed of by will. *Id.*

In a study of public attitudes about property distribution at death, a group of researchers found that approximately 45% of respondents had a will. *Id.* at 337. This proportion of living persons with wills was high in comparison with results obtained in prior studies. *Id.* at 337 n.65.

9. See UNIF. PROB. CODE § 2-102 (1983). Section 2-102 provides:

The intestate share of the surviving spouse is:

(1) if there is no surviving issue or parent of the decedent, the entire intestate estate;

(2) if there is no surviving issue but the decedent is survived by a parent or parents, the first [\$50,000], plus one-half of the balance of the intestate estate;

spouse a greater share in preference to the decedent's children only if the surviving spouse is the biological parent of the children.<sup>10</sup> The spousal share decreases if the spouse is a stepparent of surviving children.<sup>11</sup>

A proposed revision to the U.P.C.,<sup>12</sup> to take effect in 1990, makes important changes in the surviving spouse's share of the estate.<sup>13</sup> The revision, however, suffers from two flaws.<sup>14</sup> First, the revised U.P.C. continues to limit the spousal share when the surviving spouse is a stepparent of surviving children.<sup>15</sup> Second, the revision introduces more discrimination against stepfamilies by decreasing the spousal share when both a stepchild and a biological child survive the decedent.<sup>16</sup> The U.P.C.'s peremptory and unfair treatment of stepfamilies contravenes the goal of structuring intestate succession laws to reflect the decedent's dispositive wishes.<sup>17</sup> Further reforms are necessary to make the Code an accurate reflection of the needs

---

(3) if there are surviving issue all of whom are issue of the surviving spouse also, the first [\$50,000], plus one-half of the balance of the intestate estate;

(4) if there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.

*Id.*

The Code defines "issue" of a person to mean "all his lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in the Code." *Id.* § 1-201(21). A "child" includes any individual entitled to inherit from a parent, but excludes a stepchild. *Id.* § 1-201(3). A "parent" includes any person entitled to inherit as a parent, but excludes a stepparent. *Id.* § 1-201(28).

10. See *id.* § 2-102(3) (providing that "if there are surviving issue all of whom are issue of the surviving spouse also, [the spousal share is] the first [\$50,000], plus one-half of the balance of the intestate estate").

11. See *id.* § 2-102(4) (providing that "if there are surviving issue one or more of whom are not issue of the surviving spouse, [the spousal share is] one-half of the intestate estate").

12. The Joint Editorial Board for the Uniform Probate Code (JEB-UPC) and a special Drafting Committee of the National Conference of Commissioners on Uniform State Laws (NCCUSL) are revising Article II of the 1969 Code. The Article II revisions cited in this Note are draft provisions of the JEB-UPC. The revisions are in an advanced stage, but subject to change before final approval by the NCCUSL. W. Waggoner, R. Wellman, G. Alexander, M. Fellows & R. Stein, *Wills, Trusts, and Future Interests* (interim 5th ed. 1989) [hereinafter *W. Waggoner, Wills*] prefatory note (unpublished manuscript available from *Minnesota Law Review*).

13. See *infra* notes 96-100 and accompanying text.

14. See *infra* text accompanying notes 110-32 (discussing shortcomings of the revision).

15. See *infra* notes 105-07 and accompanying text.

16. See *infra* note 108 and accompanying text.

17. See *infra* notes 129-32 and accompanying text.

and desires of remarried families.<sup>18</sup>

This Note examines the treatment of stepfamilies under the spousal share provision of the U.P.C. intestacy statute. Part I examines current intestacy law as well as social policies and research that can provide guidance in developing intestate succession laws. Part II details the proposed revision of the U.P.C. spousal share provision. Part III discusses the extent to which the proposed U.P.C. reflects social policies and research findings that indicate that stepfamily members often develop important bonds and may desire to benefit one another in testamentary dispositions. Part IV proposes a model revision that better meets the goals of intestacy law by providing a donative plan that recognizes stepfamily relationships. The Note concludes that, although the revised U.P.C. makes significant improvements in the spousal share of the intestate estate, further changes are necessary to transform the U.P.C. into a statute that effectively meets the needs of stepfamilies. The U.P.C. should be revised to treat a surviving spouse who is a stepparent the same as a biological parent in situations in which a relationship between stepfamily members likely developed.

## I. THE SPOUSAL SHARE IN INTESTACY STATUTES

### A. CURRENT INTESTACY LAW: THE U.P.C. AND STATE INTESTACY SCHEMES

The U.P.C. adopts the traditional view that intestacy provisions should reflect the dispositive wishes of persons who die without wills.<sup>19</sup> The U.P.C. gives the surviving spouse the en-

---

18. See Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 39 (1984) (recognizing that the law must create new rules as family life becomes more variable and the traditional first-married family model erodes).

By continuing to reduce the spousal share in stepfamily situations, the U.P.C. influences many states to treat stepfamilies differently. Most statutes that include a special provision for a spouse who is the stepparent of surviving children follow the U.P.C.'s spousal distribution scheme. See *infra* notes 27, 29. Only nine statutes that reduce the spousal share in stepfamily situations fail to adopt a fixed-share-plus-a-fraction approach. See *id.* The U.P.C. thus has been influential in establishing intestacy laws that make special provisions for remarriage cases.

19. UNIF. PROB. CODE art. II, pt. 1 introductory comment (1983). The drafters relied on prevailing patterns in will studies to determine the distributive preferences of average persons. *Id.* An alternative view is that intestacy laws should fulfill certain societal goals. According to some commentators, "[t]here are four identifiable community aims: (1) to protect the financially dependent family; (2) to avoid complicating property titles and excessive subdivision of property; (3) to promote and encourage the nuclear family; and (4)

tire intestate estate if there is no surviving child or parent of the decedent.<sup>20</sup> When a parent survives the decedent and there are no surviving issue, the U.P.C. employs a fixed-share-plus-a-fraction approach.<sup>21</sup> Under this approach, the surviving spouse receives the first \$50,000 of the estate, plus one-half of the remainder.<sup>22</sup> If there are surviving issue, all of whom are issue of the surviving spouse, the spouse again takes the first \$50,000 and one-half of the balance.<sup>23</sup> The U.P.C. approach thus ensures that a surviving spouse receives all of a moderate estate of \$50,000 or less, and the greater part of larger estates.<sup>24</sup> If one or more of the surviving children are not the surviving spouse's issue, however, the spouse receives only one-half of the intestate estate.<sup>25</sup> Thus, in many stepfamily situations, the surviving spouse receives only a fraction of the decedent's estate, without receiving an initial fixed share.

When promulgated in 1969, the U.P.C. gave the surviving spouse a greater share of the estate than most of the then-ex-

---

to encourage the accumulation of property by individuals." Fellows, Simon & Rau, *supra* note 7, at 324 (footnotes omitted). Little conflict actually may exist between a property owner's preferences and societal interests. Fellows, *Concealing Legislative Reform in the Common-Law Tradition: The Advancements Doctrine and the Uniform Probate Code*, 37 VAND. L. REV. 671, 674 n.8 (1984).

20. UNIF. PROB. CODE § 2-102(1) (1983), *quoted at supra* note 9. Collaterals and ancestors only share in the estate when the decedent leaves no surviving spouse, issue, or parents. *See id.* § 2-103.

The U.P.C. provides an alternative provision for community property states. *Id.* § 2-102A. As to separate property, the share of the surviving spouse is the same as the share of the spouse under § 2-102. *Id.* § 2-102A(1). The spouse receives the decedent's one-half share of community property. *Id.* § 2-102A(2).

21. *See id.* § 2-102(2) (1983), *quoted at supra* note 9.

22. *Id.* The parents share equally in the portion of the estate not passing to the surviving spouse. *Id.* § 2-103.

23. *Id.* § 2-102(3), *quoted at supra* note 9. The decedent's issue share equally in the portion of the estate not passing to the surviving spouse if they are of the same degree of kinship to the decedent. *Id.* § 2-103(1). If the issue are of unequal degree, those of more remote degree take by representation. *Id.*

24. The U.P.C. fixed-share-plus-a-fraction approach is premised on the assumption that a wealthier decedent is more likely to want to distribute part of the estate to blood relatives. Fellows, Simon & Rau, *supra* note 7, at 352.

25. UNIF. PROB. CODE § 2-102(4) (1983), *quoted at supra* note 9. Adopted children cease to be children of biological parents and are treated as children of the adopting parents for inheritance purposes. *Id.* art. II, pt. 1 introductory comment. The decedent's issue share equally in the portion of the estate not passing to the surviving spouse if they are of the same degree of kinship to the decedent. *Id.* § 2-103(1). If they are of unequal degree, those of more remote degree take by representation. *Id.*

isting state intestacy schemes.<sup>26</sup> The fixed-share-plus-a-fraction approach now has become the most common intestacy plan, although a majority of states do not follow it.<sup>27</sup> Many states still retain the traditional approach of limiting the surviving spouse's share to one-third or one-half of the estate when issue survive the decedent.<sup>28</sup> Many state legislatures reduce the

---

26. UNIF. PROB. CODE art. II, pt. 1 general comment (1969).

27. Twenty-two states have adopted a fixed-share-plus-a-fraction approach. The amount of the fixed share and the fractional share in the remainder varies by state. *See* ALA. CODE § 43-8-41(2), (3) (1982); ALASKA STAT. § 13.11.010(2), (3) (1985); COLO. REV. STAT. § 15-11-102(b) (1987) (distribution applies only between the spouse and issue; the parents do not share in the estate); CONN. GEN. STAT. ANN. § 45-273a(b)(2), (3) (West Supp. 1989); DEL. CODE ANN. tit. 12, § 502(2), (3) (1987) (distribution applies only to personal property; the surviving spouse takes a life estate in all real estate); FLA. STAT. ANN. § 732.102(1)(b) (West 1976) (distribution applies only between the spouse and issue; the parents do not share in the estate); IDAHO CODE § 15-2-102(a)(2), (3) (1979) (distribution applies only to separate property; the spouse receives the decedent's share of community property); ME. REV. STAT. ANN. tit. 18-A, § 2-102(2), (3) (1981); MD. EST. & TRUSTS CODE ANN. § 3-102(c), (d) (Supp. 1989) (distribution applies only if the surviving child is an adult; if the child is a minor, the spouse receive a one-half share in the estate); MASS. ANN. LAWS ch. 190, § 1(1) (Law. Co-op. Supp. 1989) (distribution applies only between the spouse and parents; when issue survive, the spouse receives a one-half share in the estate); MICH. COMP. LAWS ANN. § 700.105(b), (c) (West 1980); MINN. STAT. § 524.2-102(2) (1988) (distribution applies only between the spouse and issue; the parents do not share in the estate); MO. REV. STAT. § 474.010(1)(b), (c) (1986); NEB. REV. STAT. § 30-2302(2), (3) (1985); N.H. REV. STAT. ANN. § 561:1(I)(b), (c) (1974); N.J. STAT. ANN. § 3B:5-3(b), (c) (West 1983); N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(a)(1)-(4) (McKinney 1981) (the balance to the spouse increases when only one child survives the decedent); N.C. GEN. STAT. § 29-14(a)-(c) (1989) (the balance to the spouse increases when only one child survives the decedent); N.D. CENT. CODE § 30.1-04-02 (2-102)(2), (3) (1976); OHIO REV. CODE ANN. § 2105.06(B), (C) (Anderson 1988) (distribution applies only between the spouse and issue; the parents do not share in the estate; the balance to the spouse increases if only one child survives the decedent); 20 PA. CONS. STAT. ANN. § 2102(2), (3) (Purdon Supp. 1989); S.D. CODIFIED LAWS ANN. § 29-1-6 (1984) (distribution applies only between the spouse and parents; when issue survive, the spouse receives a one-third share of the estate).

28. Statutes of eight states and the District of Columbia provide that the spouse receives one-third of the estate and the children share in the balance. *See* CAL. PROB. CODE § 6401(c)(3) (West Supp. 1990) (the share to the surviving spouse increases to one-half when the decedent leaves only one child; distribution applies only to separate property; the spouse receives the decedent's share of community property); D.C. CODE ANN. § 19-303 (1989); NEV. REV. STAT. §§ 123.250, 134.040 (1987) (the share to the surviving spouse increases to one-half when the decedent leaves only one child; distribution applies only to separate property; the spouse receives the decedent's share of community property); OKLA. STAT. ANN. tit. 84, § 213(A) (West Supp. 1990) (the share to the surviving spouse increases to one-half when only one child survives the decedent); S.D. CODIFIED LAWS ANN. § 29-1-5 (1984) (the share to the surviving spouse increases to one-half when only one child survives the decedent); TENN.

spousal share when the surviving spouse is not the biological parent of one or more of the decedent's surviving children.<sup>29</sup> Most statutes that make a special provision for a surviving step-parent follow the U.P.C. fixed-share-plus-a-fraction approach.<sup>30</sup>

When there are no surviving issue but the decedent is survived by a parent, many states allow the parent to share in the estate with the spouse. Although the exact division varies widely, the U.P.C. fixed-share-plus-a-fraction approach is the most common method of division in this situation.<sup>31</sup> Some

---

CODE ANN. § 31-2-104(a)(2) (1984) (the surviving spouse receives either one-third or a child's share, whichever is greater); TEX. PROB. CODE ANN. § 38(b)(1) (Vernon 1980) (distribution applies only to personal property; the surviving spouse takes a life estate in one-third of the real estate); VT. STAT. ANN. tit. 14, §§ 401, 461, 474 (1974) (the share to the surviving spouse increases to one-half when only one child survives the decedent); W. VA. CODE §§ 42-2-1, 43-1-1 (1982).

Nine state statutes provide that the spouse receives one-half of the estate with the children sharing in the remainder. See HAW. REV. STAT. § 560:2-102(2) (1985); ILL. ANN. STAT. ch. 110½, para. 2-1(a) (Smith-Hurd Supp. 1989); IND. CODE ANN. § 29-1-2-1(b)(1) (Burns 1989); KAN. STAT. ANN. §§ 59-504, -505 (1983); MASS. ANN. LAWS ch. 190, § 1(2) (Law. Co-op. Supp. 1989); R.I. GEN. LAWS §§ 33-1-10, -25-2 (1984) (distribution applies only to personal property; the surviving spouse receives a life estate in all real estate); S.C. CODE ANN. § 62-2-102(2) (Law. Co-op. 1987); WASH. REV. CODE ANN. § 11.04.015(1)(b) (1987) (distribution applies only to separate property; the spouse receives the decedent's share of community property); WYO. STAT. § 2-4-101(a)(i) (Supp. 1989).

29. Twenty-six states reduce the share to a surviving spouse who is not the biological or adoptive parent of the decedent's children. See ALA. CODE § 43-8-41(4) (1982); ALASKA STAT. § 13.11.010(4) (1985); ARIZ. REV. STAT. ANN. § 14-2102(2) (1975); COLO. REV. STAT. § 15-11-102(c) (1987); CONN. GEN. STAT. ANN. § 45-273a(b)(4) (West Supp. 1989); DEL. CODE ANN. tit. 12, § 502(4) (1987); FLA. STAT. ANN. § 732.102(c) (West 1976); IDAHO CODE § 15-2-102(a)(4) (1979) (distribution applies only to separate property; the surviving spouse receives the decedent's share of community property); IND. CODE ANN. § 29-1-2-1(c) (Burns 1989); IOWA CODE ANN. § 633.212 (West Supp. 1989); LA. CIV. CODE ANN. art. 890 (West Supp. 1989); ME. REV. STAT. ANN. tit. 18-A, § 2-102(4) (1981); MICH. COMP. LAWS ANN. § 700.105(d) (West 1980); MINN. STAT. § 524.2-102(3) (1988); MO. REV. STAT. § 474.010(1)(d) (1986); MONT. CODE ANN. § 72-2-202(2) (1987); NEB. REV. STAT. § 30-2302(4) (1985); N.H. REV. STAT. ANN. § 561:1(I)(d) (1974); N.J. STAT. ANN. § 3B:5-3(d) (West 1983); N.D. CENT. CODE § 30.1-04-02 (2-102)(4) (1976); OHIO REV. CODE ANN. § 2105.06(B), (C) (Anderson 1988) (balance to the spouse increases if only one child survives); OR. REV. STAT. § 112.025(2) (Supp. I 1988); 20 PA. CONS. STAT. ANN. § 2102(4) (Purdon Supp. 1989); UTAH CODE ANN. § 75-2-102 (Supp. 1989); VA. CODE ANN. §§ 64.1-1, -11, -19 (1987); WIS. STAT. § 852.01 (1987-1988).

30. See *supra* notes 27, 29.

31. Seventeen states and the District of Columbia have adopted statutes that grant the surviving spouse a fixed dollar amount with the spouse and parents sharing in the remainder. See *supra* note 27. Statutes of five states and the District of Columbia provide that the spouse receives one-half of the estate



states, however, require the spouse to split the estate assets in half with the parents.<sup>32</sup> The U.P.C. drafters considered the Code's approach more responsive to contemporary problems and the desires of average persons.<sup>33</sup>

#### B. PUBLIC ATTITUDES AND SOCIAL POLICIES CONCERNING PROPERTY DISTRIBUTION AT DEATH

Intestate succession laws are designed to provide an estate plan that approximates the property distribution a decedent would have made in a will.<sup>34</sup> This objective makes intestacy a unique area in which quantitative research can be valuable in evaluating a legislative scheme.<sup>35</sup> Data can be used to infer the testamentary intent of persons who die without wills. Several scholars have tried to find commonly used patterns of property disposition by conducting studies of wills filed for probate.<sup>36</sup> Other commentators have conducted surveys of living persons to determine how they wish to dispose of their property at death.<sup>37</sup> In 1978, a group of researchers published a compre-

---

and the parents take the remaining one-half. See CAL. PROB. CODE § 6401(c)(2)(B) (West Supp. 1990); D.C. CODE ANN. § 19-304 (1989); HAW. REV. STAT. § 560:2-102(2) (1985); NEV. REV. STAT. §§ 123.250, 134.050(1) (1987); OKLA. STAT. ANN. tit. 84, § 213(A) (West Supp. 1990); TEX. PROB. CODE ANN. § 38(B)(2) (Vernon 1980) (distribution applies only to real estate; the surviving spouse takes all the decedent's personal property).

Twenty states do not allow the decedent's parents to share in the estate with the surviving spouse. See ARIZ. REV. STAT. ANN. § 14-2102(1) (1975); COLO. REV. STAT. § 15-11-102(1)(a) (1987); FLA. STAT. ANN. § 732.102(1)(a) (West 1976); GA. CODE ANN. § 53-4-2(1) (Supp. 1989); ILL. ANN. STAT. ch. 110½, para. 2-1(c) (Smith-Hurd Supp. 1989); IOWA CODE ANN. § 633.211 (West Supp. 1989); KAN. STAT. ANN. § 59-504 (1983); MINN. STAT. § 524.2-102(1) (1988); MISS. CODE ANN. § 91-1-7 (1972); MONT. CODE ANN. § 72-2-202(1) (1987); N.M. STAT. ANN. § 45-2-102(A)(1) (1978); OHIO REV. CODE ANN. § 2105.06(D) (Anderson 1988); OR. REV. STAT. § 112.035 (1984); S.C. CODE ANN. § 62-2-102(1) (Law. Co-op. 1987); TENN. CODE ANN. § 31-2-104(1)(a) (1984); UTAH CODE ANN. § 75-2-102 (Supp. 1989); VA. CODE ANN. §§ 64.1-1, -11 (1987); W. VA. CODE §§ 42-1-1(b), -2-1 (1982); WIS. STAT. § 852.01(1)(a)(1) (1987-1988); WYO. STAT. § 2-4-101(a)(ii) (Supp. 1989).

32. See *supra* note 31.

33. Mulder, *supra* note 8, at 304.

34. Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 241 (1963).

35. *Id.*

36. See generally M. SUSSMAN, J. CATES & D. SMITH, *THE FAMILY AND INHERITANCE* 83-120 (1970) [hereinafter M. SUSSMAN] (analyzing distribution patterns of wills filed for probate); Dunham, *supra* note 34, at 251-55 (same); Schneider, *A Kentucky Study of Will Provisions: Implications for Intestate Succession Law*, 13 N. KY. L. REV. 409, 416-37 (1986) (same).

37. See generally Fellows, Simon & Rau, *supra* note 7, at 341-84 (analyzing distribution patterns revealed from surveys of living persons); Fellows, Si-

hensive survey of popular attitudes about property distribution at death.<sup>38</sup> The survey confirmed the results of earlier studies, showing that a majority of people want the surviving spouse to take the entire estate in preference to both the decedent's issue and parents.<sup>39</sup>

### 1. Distributing Property Between the Spouse and the Decedent's Parents and Issue

The 1978 study verified that 100 percent distribution of the estate to the spouse is the most often desired allocation as between the decedent's spouse and parents.<sup>40</sup> Because removing wealth from the decedent's blood relatives is perceived as unfair, however, legislators hesitate to exclude a surviving parent and leave the entire estate to the surviving spouse.<sup>41</sup> Such a distribution could disinherit parents who depended financially on the decedent.<sup>42</sup> Moreover, if the marriage was of a short duration, the surviving spouse may not have emerged as the primary kin obligation or as the primary object of the decedent's affection.<sup>43</sup>

---

mon, Snapp & Snapp, *An Empirical Study of the Illinois Statutory Estate Plan*, 1976 U. ILL. L. REV. 717, 723-43 [hereinafter *Illinois Study*] (same); Comment, *Intestate Succession in New Jersey: Does It Conform to Popular Expectations?*, 12 COLUM. J.L. & SOC. PROBS. 253, 266-78 (1976) (same); Comment, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1078-1119 (1978) [hereinafter Comment, *Iowa Study*] (same).

38. Fellows, Simon & Rau, *supra* note 7. The authors conducted a telephone survey of 750 persons living in Alabama, California, Massachusetts, Ohio, and Texas. *Id.* at 321. They questioned respondents to determine attitudes toward testamentary freedom, the frequency of testacy, knowledge of intestacy law, and dispositive preferences. *Id.*

39. *Id.* The percentage of respondents in the survey who indicated an intention to leave the entire estate to the spouse, however, was less than the percentage of decedent testators in prior will studies who devised the entire estate to the spouse. *See id.* at 350 n.110, 351 & n.111, 356 n.127, 359 & n.133 (comparing results of the survey with results from earlier will studies). Thus, the survey indicated that living persons are less willing than decedent testators to distribute the entire estate to the surviving spouse. *Id.* at 360. The authors attributed this discrepancy to the intercession of attorneys, who often advise their clients that distribution to the spouse will best achieve the testators' goals. *Id.*

40. *See id.* at 350 n.110, 351 n.111 (summarizing results of earlier studies).

41. *Illinois Study*, *supra* note 37, at 727. One concern is that leaving the entire estate to the spouse may permanently remove wealth from the decedent's "family of orientation." *Id.* The family of orientation is "the family into which the decedent is born." Fellows, Simon & Rau, *supra* note 7, at 340 n.75.

42. *Illinois Study*, *supra* note 37, at 727.

43. Fellows, Simon & Rau, *supra* note 7, at 348. Similarly, in remarriage situations, the second spouse may not have displaced the parents as the pri-

The 1978 study also verified that distribution of the entire estate to the spouse is the desired allocation as between the decedent's children and the surviving spouse who is the biological parent of the children.<sup>44</sup> Again, legislators have been reluctant to follow this preference.<sup>45</sup> The primary concern is that if the surviving spouse receives the entire estate, the spouse might disinherit the children or remarry and treat the decedent's children unfairly.<sup>46</sup> Furthermore, some commentators argue that the surviving children should receive a share of the decedent's estate without waiting for the surviving parent to die.<sup>47</sup> There is little evidence, however, indicating that surviving spouses disinherit their children.<sup>48</sup> The primary concern, therefore, is balancing the competing interests of the spouse and the children during the surviving spouse's lifetime.<sup>49</sup>

## 2. Distributing Property Between Spouse and Issue When the Spouse Is the Stepparent of Surviving Children

When a husband or wife dies during a remarriage and leaves children from an earlier marriage and the spouse of a current marriage, the appropriate distribution is less certain.<sup>50</sup> Conflicting interests between the surviving spouse and children are more apparent because there is some doubt that the surviving stepparent will provide for the decedent's children.<sup>51</sup> Com-

---

mary object of the decedent's affection. *Id.* Fairness may require a special provision in the intestate succession statute for this situation. *Id.* at 351 n.112.

44. *Id.* at 356 n.127, 359 n.133 (summarizing results of earlier studies).

45. See *Illinois Study*, *supra* note 37, at 728.

46. Comment, *Iowa Study*, *supra* note 37, at 1084.

47. *Illinois Study*, *supra* note 37, at 731.

48. Fellows, Simon & Rau, *supra* note 7, at 355. The will studies provide no data suggesting that surviving spouses disinherit their children. *Id.*

49. *Id.* at 355. There may be a risk of poor financial management of the decedent's estate by the surviving spouse, but it is difficult to assess and probably does not outweigh the risk of leaving the spouse without adequate financial security. *Id.*

50. *Id.* at 364.

51. *Illinois Study*, *supra* note 37, at 732. A stepparent generally has no statutory obligation to support a stepchild upon termination of the remarriage. Fine, *A Social Science Perspective on Stepfamily Law: Suggestions for Legal Reform*, 38 FAM. REL. 53, 54 (1989). Only North Dakota requires a support obligation to continue after the remarriage ends, and only if the child continues to live with the stepparent. *Id.* The common law, however, may impose support obligations on a stepparent who acts "in loco parentis." Under this doctrine, a stepparent who intentionally assumes parental obligations, such as actively participating in child-rearing decisions and attending a child's academic and recreational functions, may be treated as a biological parent. *Id.* at 54-55; see also *Fuller v. Fuller*, 247 A.2d 767, 770 (D.C. 1968) (stating that stepparent acting "in loco parentis" is required to support stepchild), *appeal de-*

paratively little data exists regarding multiple marriage cases because the possible situations are so varied.<sup>52</sup> A second marriage late in life when the children are adults creates different problems than a second marriage early in life in which the decedent leaves minor children.<sup>53</sup> The appropriate distribution also will vary depending on whether the decedent's issue live in the decedent's household or with the ex-spouse.<sup>54</sup> The situation becomes even more complex if the surviving spouse has children from an earlier marriage or if there are children from the

---

*nied per curiam*, 418 F.2d 1189 (D.C. Cir. 1969). Stepparents, however, may terminate "in loco parentis" status at any time by ceasing to act "in loco parentis." Note, *Stepfamily Law: Review and Proposals For Change*, 18 SUFFOLK U.L. REV. 701, 708 (1984). Thus, because a stepparent may terminate a support obligation at will, the doctrine has little value in imposing future obligations. Fine, *supra*, at 55. A few courts have invoked estoppel theory to abrogate the rule that a person acting "in loco parentis" may terminate that status at any time, but only in unusual circumstances. See Note, *supra*, at 710. See also *Miller v. Miller*, 97 N.J. 154, 159, 478 A.2d 351, 353 (1984) (stating that stepparent acting "in loco parentis" was estopped from denying post-divorce support obligations to stepchildren); *Gustin v. Gustin*, 108 Ohio App. 171, 174, 161 N.E.2d 68, 70 (1958) (stating that stepfather acting "in loco parentis" was required to support stepchild following dissolution of remarriage).

52. Fellows, Simon & Rau, *supra* note 7, at 364-65. The findings of the studies are conflicting. Some surveys indicate that when a spouse and a minor child of an earlier marriage each survive the decedent, the majority of persons still prefer that the surviving spouse inherit the entire estate. See *Illinois Study*, *supra* note 37, at 729 (finding that when a spouse and a minor child of an earlier marriage residing with the surviving spouse each survive the decedent, 50.3% of respondents wanted the surviving spouse to inherit the entire estate; when the surviving child lived with the decedent's former spouse, 56.7% of respondents wanted the surviving stepparent to receive all of the estate); cf. M. SUSSMAN, *supra* note 36, at 91 (finding that of 28 remarried decedents, 57% devised all of their property to their spouses or legatees of the last marriage).

In another study, however, only 29% of respondents indicated that they would allocate the entire estate to the spouse when the decedent's only survivors were the spouse and two adult children, one from the present marriage and one from a previous marriage. Comment, *Iowa Study*, *supra* note 37, at 1094-95. Instead, the respondents indicated that they would allocate an average share of 58% of the estate to the surviving spouse. *Id.*

In one other survey, respondents were asked hypothetically to distribute property between a spouse and a minor child from a previous marriage who resides with the former spouse. Fellows, Simon & Rau, *supra* note 7, at 366. Twenty-three percent of respondents would leave the spouse the entire estate and an additional 28.9% would leave the spouse between 51% and 99% of the estate. *Id.*

53. Fellows, Simon & Rau, *supra* note 7, at 365. When the second marriage occurs early in life and the children are young, an opportunity exists for the stepparent and the minor child to develop a parent-child relationship. *Id.* The parent-child relationship also is more likely to form when the minor child lives in the remarriage household. *Id.*

54. *Id.*

current marriage.<sup>55</sup>

In multiple marriage situations, legislators must decide whether to treat the stepparent in the same manner as a surviving spouse who is the biological parent of the decedent's children.<sup>56</sup> The primary reason for not treating the spouses alike is the fear that the stepparent will not pass the estate assets on to the stepchild.<sup>57</sup> Legislators may suspect that the stepparent will transfer the decedent's property to his or her children or to a new spouse in a subsequent remarriage.<sup>58</sup>

### C. STEPFAMILY RELATIONS

#### 1. Societal Attitudes Toward Stepfamilies

Social scientists in the 1980s published a growing body of research on stepfamily relationships.<sup>59</sup> The findings demonstrate a societal bias against stepfamilies.<sup>60</sup> Perceptions of

---

55. *Id.*

56. Comment, *Iowa Study*, *supra* note 37, at 1092. Legislators usually do not extend the legal rights and obligations of the biological parent-child relationship to stepfamily members. Fine, *supra* note 51, at 53; *see also supra* note 51 & *infra* notes 88-89 (discussing the legal status of stepfamily members). A breakthrough, however, recently occurred in California. The California legislature amended the California Probate Code to allow a stepchild to inherit from a stepparent or foster parent when a parent-child relationship exists between the stepfamily members. CAL. PROB. CODE § 6408(b) (West Supp. 1990). A parent-child relationship is established if "the relationship began during the person's minority and continued throughout the parties' joint lifetimes" and if "it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier." *Id.*

The California Probate Code also was amended recently to include stepchildren in class gift designations when a parent-child relationship is established. *See id.* § 6152(a), (b). This statute provides that a stepchild is included in a class gift if a stepchild would be considered a "child" for purposes of intestate succession (as established in § 6408). *Id.*; *see infra* note 126 (defining class gift).

57. Schneider, *supra* note 36, at 421. When the surviving spouse is the biological parent of all the surviving children, the surviving spouse presumably will leave his or her property to the decedent's children at some future point. Comment, *Iowa Study*, *supra* note 37, at 1094. When the surviving spouse is not the biological parent of the decedent's children, however, eventual passage of estate assets to the intestate's children is less certain. *Id.*

58. *Cf.* Schneider, *supra* note 36, at 421 (suggesting that the testator may suspect that the surviving spouse will divert the testator's property).

59. Ihinger-Tallman, *supra* note 4, at 26. Legal scholars occasionally acknowledge that social science data can provide guidance in legal decisionmaking, but this occurs infrequently in the stepfamily context. Fine, *supra* note 51, at 53. Professor Fine argues that social science research is an important resource for persons attempting to reform stepfamily law. *See id.*

60. One group of researchers measured college students' perceptions of adults and children in various family structures. Bryan, Coleman, Ganong &

stepfamily members are less positive than those of traditional, first-married families.<sup>61</sup> People may interpret a stepparent's behavior as negative simply because it fits the image of the "wicked" stepmother or the "abusive" stepfather.<sup>62</sup>

Some scholars attribute negative societal attitudes toward stepfamilies to folklore.<sup>63</sup> These authors contend that the term "step" evokes negative imagery found in fairy tales such as "Cinderella," "Hansel and Gretel," and "Snow White."<sup>64</sup> Such negative perceptions create difficulty for stepfamily members.<sup>65</sup> Stereotypes may contribute to stepfamily adjustment problems in a society that views stepfamilies prejudicially.<sup>66</sup> Negative stereotyping also may lead stepfamily members to expect negative outcomes, thereby increasing chances of family disharmony.<sup>67</sup>

---

Bryan, *Person Perception: Family Structure as a Cue for Stereotyping*, 48 J. MARRIAGE & FAM. 169, 169 (1986) [hereinafter *Stereotyping*]. The researchers found that students viewed stepfamily members less positively than members of intact families. *Id.* at 173.

Professor Fine obtained similar results in a study of college students. Fine, *supra* note 1, at 537. In addition, he found that students from single-parent and stepparent families generally had less stereotypical views of stepmothers than students from first-married homes. *Id.* at 542. Professor Fine concluded that experience with stepfamilies attenuates negative stereotypes of stepmothers. *Id.*

61. See *supra* note 60.

62. *Stereotyping, supra* note 60, at 169-73.

63. See E. VISHNER & J. VISHNER, STEPFAMILIES: A GUIDE TO WORKING WITH STEPPARENTS AND STEPCHILDREN 5-6 (1979) (discussing the effect of literature on stepfamily members); E. WALD, THE REMARRIED FAMILY: CHALLENGE AND PROMISE 54-62 (1981) (analyzing the step-theme in popular fairy tales); Schulman, *Myths that Intrude on the Adaptation of the Stepfamily*, 53 SOC. CASEWORK 131, 131 (1972) (identifying the myth of the "bad stepmother" and the countermyth of "instant love" that is expected between stepfamily members).

64. *Stereotyping, supra* note 60, at 169-73.

65. Ihinger-Tallman, *supra* note 4, at 33. Negative stereotyping can influence social interactions and expectations and may exacerbate stepfamilies' struggles to become complete, viable institutions. *Id.*

66. Fine, *supra* note 1, at 538 (citing *Stereotyping, supra* note 60, at 169). There is a widespread societal belief that "step is less." E. WALD, *supra* note 63, at 62. The term "step" has evolved to signify that anything of lesser value is "like a stepchild." Mistreatment often is verbalized as "like a stepmother." Similarly, the phrase "like a Cinderella" denotes mistreatment or neglect. *Id.* Wald identifies a trend in popular culture that seeks to change the negative orientation toward stepfamilies. *Id.* at 63. An emergent belief is that "step is not less; step is different." *Id.*

67. Fine, *supra* note 1, at 538 (citing E. WALD, *supra* note 63, at 52). Stepfamilies struggle under the handicap of negative imagery. For example, portrayals of stepmothers in folklore have evolved into a belief system about stepfamilies. Stepchildren often are unable to differentiate a story from real-

Studies indicate, however, that most stepfamilies have good relations.<sup>68</sup> Serious difficulties among family members concern a minority of stepfamilies.<sup>69</sup> In many cases, stepfamily members form important family ties.<sup>70</sup> The relationship that develops between a stepparent and stepchild can be as close and supportive as a relationship between a biological parent and his or her child.<sup>71</sup>

## 2. Factors Influencing Stepfamily Relationships

Stepfamilies do face extra challenges not present in traditional, first-married families.<sup>72</sup> Remarriage situations introduce complexities into households and the quality of relationships between stepfamily members varies according to several factors.<sup>73</sup> These factors include the age of the child, the presence of siblings, the degree of contact between the child and the noncustodial parent, and the amount of interaction between the stepparent and stepchild.<sup>74</sup> Despite the complexity of multiple

---

ity, and fear that they, too, may be harmed by a mean stepmother. E. WALD, *supra* note 63, at 61-62.

68. In a study of 88 stepfamilies, Professor Duberman found that 64% had "excellent" stepparent-stepchild relationships, 18% had "good" relationships, and only 18% reported "poor" relationships. L. DUBERMAN, *THE RECONSTITUTED FAMILY: A STUDY OF REMARRIED COUPLES AND THEIR CHILDREN* 50 (1975). Ganong and Coleman write that most stepchildren reported liking their stepparents and getting along well with them. Ganong & Coleman, *The Effects of Remarriage on Children: A Review of the Empirical Literature*, 33 *FAM. REL.* 389, 400 (1984); *see also* Fuller, *Facts and Fictions about Stepfamilies*, *EDUC. DIG.*, Oct. 1988, at 53 (stating that researchers generally agree that most stepfamilies report being happy).

69. M. IHINGER-TALLMAN & K. PASLEY, *REMARRIAGE* 103 (Family Studies Text Series Vol. 7, 1987).

70. Mahoney, *supra* note 4, at 917-18.

71. *See* Mahoney, *supra* note 18, at 54 (stating that stepfamily members may develop emotional and financial expectations based on their relationships).

72. Dukes, *The Cinderella Myth: Negative Evaluations of Stepparents*, 73 *SOC. & SOC. RES.* 67, 67 (1989). Dukes identifies five challenges unique to stepfamilies: incomplete role definitions for family members; increased complexity of role relationships within the stepfamily and resultant problems of loyalty; guilt feelings concerning the loss of earlier family relationships; lack of synchronization of roles; and immediate need to decide on the primacy of the couple relationship versus the parent relationship. *Id.*; *see also* Ininger-Tallman, *supra* note 4, at 31-39 (describing difficulties in stepfamilies).

73. M. IHINGER-TALLMAN & K. PASLEY, *supra* note 69, at 48-50.

74. Fine, *supra* note 51, at 55-56. The sex of the child may affect the quality of the stepparent-stepchild relationship, but the findings are inconsistent. Some studies show that girls have more difficulty than boys in developing a relationship with stepparents. *See, e.g.*, Clingempeel & Segal, *Stepparent-Stepchild Relationships and the Psychological Adjustment of Children in Step-*

marriage situations, these factors can help predict the success of stepfamily relationships.<sup>75</sup>

An important factor in the development of stepparent-stepchild relationships is the frequency of interaction between the family members.<sup>76</sup> Stepparents report having a closer relationship with stepchildren who live with them rather than with stepchildren who live elsewhere.<sup>77</sup> Interaction on a daily basis creates more opportunity for family members to form positive emotional bonds.<sup>78</sup> Stepfamilies can form new attachments as rules and routines become normal and habits and rituals develop.<sup>79</sup>

---

*mother and Stepfather Families*, 57 CHILD DEV. 474, 482 (1986); Santrock, Warshak, Lindbergh & Meadows, *Children's and Parents' Observed Social Behavior in Stepfather Families*, 53 CHILD DEV. 472, 479 (1982); cf. L. DUBERMAN, *supra* note 68, at 57 (finding that the sex of the child is not a factor in stepparent-stepchild relationships); Hetherington, Cox & Cox, *Effects of Divorce on Parents and Children* in NONTRADITIONAL FAMILIES: PARENTING AND CHILD DEVELOPMENT 233, 258 (M. Lamb ed. 1982) (finding that divorced mothers have more difficulty raising sons than raising daughters).

Researchers also disagree about the effect of a mutual child, a child born during the remarriage, on stepfamily relations. Compare L. DUBERMAN, *supra* note 68, at 61 (indicating that the presence of a mutual child fosters closeness and integration between stepparents and stepchildren) with Santrock & Sitterle, *Parent-Child Relationships in Stepmother Families*, in REMARRIAGE AND STEPPARENTING: CURRENT RESEARCH AND THEORY 273, 293 (1987) (finding that the birth of a mutual child has a negative impact on the parenting of a stepchild).

75. Cf. Fine, *supra* note 51, at 57 (stating that an awareness of factors affecting the stepparent-stepchild relationship can help courts assess the importance to the child of granting visitation rights to a stepparent).

76. L. DUBERMAN, *supra* note 68, at 106.

77. Ambert, *Being a Stepparent: Live-in and Visiting Stepchildren*, 48 J. MARRIAGE & FAM. 795, 798 (1986). Stepmothers who lived with their stepchildren also expressed a higher level of marital happiness than stepmothers who had young stepchildren living outside the home. *Id.* at 797. Stepfathers' satisfaction with married life, however, did not depend on a stepchild's residence. *Id.*

78. M. IHINGER-TALLMAN & K. PASLEY, *supra* note 69, at 99. Daily interaction also may create more opportunity for conflict between stepfamily members. *Id.*; see Hetherington, *Family Relations Six Years after Divorce*, in REMARRIAGE & STEPPARENTING, CURRENT RESEARCH AND THEORY 195-97 (1987); see also Fischman, *Stepdaughter Wars*, PSYCHOLOGY TODAY, Nov. 1988, at 39 (quoting psychologist James Bray). Bray states that behavioral problems disappear by two and one-half years into the remarriage and that there is no difference in reported life stress between stepfamilies and non-divorced families. *Id.*

79. M. IHINGER-TALLMAN & K. PASLEY, *supra* note 69, at 99. In the routine of daily contacts, stepparents and stepchildren develop a deeper relationship as quarrels are minimized by pleasant daily events. Ambert, *supra* note 77, at 801. In contrast, when stepchildren visit, quarrels stand out and bad feelings simmer without the opportunity for healing. *Id.*



The age of the child is another significant factor that influences the stepparent-stepchild relationship.<sup>80</sup> Stepparents report better relations with younger children.<sup>81</sup> Older children may challenge more aspects of remarried life because they tend to have greater perceptiveness, more self-confidence, and more resources for rebelling.<sup>82</sup> Younger children, on the other hand, are more accepting of the new family situation.<sup>83</sup> Moreover, if the remarriage occurs when the stepchild is young, there is more time for a bond to form between the stepparent and stepchild.<sup>84</sup>

### 3. Treatment of Stepfamilies in the Legal System

Legal circumstances of stepfamilies also may relate to the quality of stepparent-stepchild relations.<sup>85</sup> The legal system generally treats stepparents and stepchildren differently from first-married family members.<sup>86</sup> Laws regulating the rights and obligations of biological family members typically are not extended to stepparents and stepchildren.<sup>87</sup> Most intestate succession statutes, for example, do not permit stepfamily members to inherit from each other.<sup>88</sup> Similarly, a stepparent

---

80. Fine, *supra* note 51, at 56.

81. Hobart, *Parent-Child Relations in Remarried Families*, 8 J. FAM. ISSUES 259, 274 (1987); cf. L. DUBERMAN, *supra* note 68, at 57-58 (finding that younger children have better relations with stepmothers, but that age is not a factor in relations with stepfathers).

82. Hobart, *supra* note 81, at 262.

83. *Id.*; see also Fuller, *supra* note 68, at 53 (stating that most researchers agree that younger children generally make the best adjustment to stepfamilies).

84. L. DUBERMAN, *supra* note 68, at 106 (arguing that, in general, the more people interact with each other, the more they come to like each other).

85. See *infra* notes 93-95 and accompanying text.

86. Note, *supra* note 51, at 703.

87. Mahoney, *supra* note 4, at 918.

88. See *id.* at 919-20. Laws of inheritance illustrate "the peremptory manner in which the legal system ignores stepfamilies." *Id.* at 918. Under state intestacy statutes, the terms "children" and "parents" have never been so broadly defined as to include stepchildren and stepparents. *Id.* at 920. Some statutes expressly exclude stepfamily members from the definitions of "child" and "parent." *Id.* Courts often impose the same limitation by interpreting the terms "child" and "issue" to include only biological and adopted children. Note, *supra* note 51, at 704; see, e.g., *In re Paus' Estate* (Meyers v. Fraser), 324 Ill. App. 58, 61-62, 57 N.E.2d 212, 213 (1944) (holding that the children of the sister of deceased's stepfather are not heirs-at-law); *In re Smith's Estate* (Benson v. Nicholson), 49 Wash. 2d 229, 232, 299 P.2d 550, 552 (1956) (interpreting "children" to exclude stepchildren).

Mahoney argues that the exclusion of stepfamily members from rights of inheritance is unfair and inconsistent with the purpose of the intestacy laws.

is not entitled to gain custody or visitation privileges following termination of the marriage.<sup>89</sup> Nor does stepparent status include an obligation to support a stepchild upon divorce.<sup>90</sup> Occasionally, courts use the common law doctrine of "in loco parentis" to extend legal rights and duties to stepfamily members.<sup>91</sup> Under this doctrine, a person who intentionally assumes the responsibility of a biological parent can be treated as a parent for certain purposes.<sup>92</sup>

One commentator argues that these legal rules may affect relations between stepfamily members.<sup>93</sup> The lack of clear legal obligations between stepparents and stepchildren may lessen their degree of commitment.<sup>94</sup> Legal ambiguities also

---

Mahoney, *supra* note 4, at 918. In addition, Mahoney proposes an intestacy law that would allow stepfamily members to inherit from each other as "parents" and "children" in certain circumstances. Her proposal permits inheritance between stepparents and stepchildren when the remarriage is during the child's minority, an "in loco parentis" relationship exists during the child's minority, and family ties continue thereafter. *Id.* at 936.

89. Fine, *supra* note 51, at 55. Many state statutes authorize custody orders for "children of the marriage" in dissolution proceedings. *Id.* at 54. The statutes generally do not consider stepchildren as "children of the marriage," and thereby block stepparents' claims to custody under divorce and dissolution statutes. *See id.* (citing Mahoney, *supra* note 18, at 63-65). Courts often uphold this strict interpretation of divorce laws. *See, e.g.,* Morrow v. Morrow, 165 Conn. 665, 668-69, 345 A.2d 561, 562-63 (1974) (interpreting "children of marriage" to exclude stepchildren); Palmer v. Palmer, 42 Wash. 2d 715, 717, 258 P.2d 475, 476 (1953) (same). Some courts grant custody and visitation rights to a stepparent in the "best interests of the child," but not because of any legal rights of the stepparent. Note, *supra* note 51, at 711.

Recently, however, courts have granted visitation rights to stepparents who act "in loco parentis." Fine, *supra* note 51, at 54; *see, e.g.,* Carter v. Brodrick, 644 P.2d 850, 855 (Alaska 1982) (holding that a stepchild is a "child of marriage" when the stepparent acts "in loco parentis"); Perry v. Superior Ct., 108 Cal. App. 3d 480, 486, 166 Cal. Rptr. 583, 586-87 (1980) (Hopper, J., concurring) (suggesting that a stepchild becomes a "child of marriage" when the stepparent acts "in loco parentis").

90. *See supra* note 51 (discussing child support from a stepparent upon termination of the remarriage).

91. *See supra* notes 51, 89 (citing cases in which courts implement "in loco parentis").

92. *See supra* note 51 (discussing "in loco parentis" status). "In loco parentis" implies that the stepparent both assumes the parental status and discharges parental duties. *Id.* (citing Niewiadomski v. United States, 159 F.2d 683, 686 (6th Cir.), *cert. denied*, 331 U.S. 850 (1947)). If an "in loco parentis" relationship exists, a stepparent assumes the same financial responsibilities to the child as those possessed by a biological parent. Fine, *supra* note 51, at 54.

93. Fine, *supra* note 51, at 55.

94. *Id.* The quality of stepparent-stepchild relationships is tied to the degree of commitment of the family members. *Id.* The law generally requires only temporary commitments in stepfamilies. *Id.* Awareness of the temporary

perpetuate the uncertain status of stepfamilies in society and may exacerbate adjustment difficulties for family members.<sup>95</sup>

## II. THE REVISED U.P.C. INTESTACY PROVISIONS

The 1990 revision of the U.P.C. gives the surviving spouse a greater share of the intestate estate in more situations than the current Code.<sup>96</sup> The minimum spousal share in any situation is the first \$150,000 plus one-half of the balance of the estate.<sup>97</sup> The revised U.P.C. gives the surviving spouse the entire estate if the decedent has no surviving issue.<sup>98</sup> The parents of the decedent, therefore, do not share in the estate assets with the surviving spouse. The spouse also receives the entire estate when all of the decedent's surviving children are issue of the surviving spouse *and* the surviving spouse does not have children

---

nature of this relationship may lessen the quality of stepparent-stepchild interactions. *Id.*

95. *Id.* Social science studies show that "role and boundary ambiguity" may translate into adjustment problems for stepfamilies. *Id.* (citing Giles-Sims, *The Stepparent Role: Expectations, Behavior, and Sanctions*, 5 J. FAM. ISSUES 116, 117 (1984); Pasley, *Family Boundary Ambiguity: Perceptions of Adult Stepfamily Members*, in REMARRIAGE AND STEPPARENTING: CURRENT RESEARCH AND THEORY 206, 206-07 (1987)). These terms refer to the lack of clearly defined norms and guidelines relating to stepfamily relations. *Id.* Legal inconsistencies and discrepancies concerning the treatment of stepfamilies may increase uncertainties in stepfamily households. *Id.* Professor Fine also argues that the absence of a legal obligation to support stepchildren may produce family disharmony and create stressful conditions for children. *Id.*

96. Section 2-102. Share of Spouse. The intestate share of the decedent's surviving spouse is:

- (1) the entire intestate estate if:
  - (i) no descendant of the decedent survives the decedent; or
  - (ii) all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;
- (2) in other cases, the first [\$150,000], plus one-half of any balance of the intestate estate.

UNIF. PROB. CODE § 2-102 (Proposed Draft 1989).

97. *See id.* Under the current Code, the minimum spousal share is one-half of the intestate estate. *See* UNIF. PROB. CODE § 2-102 (1983), *quoted at supra* note 9.

98. UNIF. PROB. CODE § 2-102(1)(i) (Proposed Draft 1989), *quoted at supra* note 96. This provision matches the allocation that a majority of property owners prefer. Surveys show that most persons feel a primary responsibility to their spouse and that a 100% distribution to the surviving spouse is the preferred distributive scheme when no issue survive the decedent. *See supra* note 40 and accompanying text. The current Code's pattern of dividing property between the spouse and parents is obsolete. *See* Fellows, Simon & Rau, *supra* note 7, at 354-55 (concluding that the U.P.C.'s fixed dollar distribution pattern does not conform to the stated preferences of the citizenry).

from an earlier marriage.<sup>99</sup> In all other cases, the surviving spouse takes the first \$150,000 plus one-half of the remainder.<sup>100</sup>

The revised U.P.C. treats a surviving spouse who is a stepparent more generously than the current Code.<sup>101</sup> The revision, however, makes two distinctions based on stepfamily status. The statute continues to decrease the spousal share when the spouse is a stepparent of the decedent's surviving issue.<sup>102</sup> The revision also introduces a new distinction between stepfamilies and first-married families by reducing the spousal share when the surviving spouse who is the biological parent of all the decedent's surviving children also has a child from an earlier marriage.<sup>103</sup> Thus, the revised U.P.C. apparently as-

---

99. UNIF. PROB. CODE § 2-102(1)(ii) (Proposed Draft 1989), *quoted at supra* note 96. The revision's provision for 100% distribution to the spouse in preference to children who are issue of both the decedent and the surviving spouse is more responsive to dispositive preferences than the approach taken in the current Code. Surveys indicate that most people want their spouse to inherit the entire estate when issue who are biological children of the decedent and the surviving spouse survive. *See supra* note 44 and accompanying text. Because the current Code provides only a guaranteed minimum dollar amount in this situation, it does not conform to the preferences of most people.

100. UNIF. PROB. CODE § 2-102(2) (Proposed Draft 1989), *quoted at supra* note 96. The revised U.P.C. triples the lump-sum amount from \$50,000 to \$150,000. Presumably, the drafters intended to provide for the increase in the cost of living since the Commissioners promulgated the current Code in 1969. W. Waggoner, *Wills, supra* note 12, at 2-17.

101. The minimum spousal share that a stepparent receives under the revised code is \$150,000 plus one-half of the balance of the estate. *See* UNIF. PROB. CODE § 2-102 (Proposed Draft 1989), *quoted at supra* note 96. The current Code, however, gives a surviving spouse who is a stepparent only one-half of the intestate estate. *See* UNIF. PROB. CODE § 2-102(4) (1983), *quoted at supra* note 9.

102. *See* UNIF. PROB. CODE § 2-102(1)(ii) (Proposed Draft 1989), *quoted at supra* note 96 (providing that the surviving spouse receives the entire estate if "all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent").

103. *See id.* The current Code treats a surviving spouse who is the biological parent of all of the decedent's surviving children but who has a child from a former marriage the same as a surviving spouse who is the biological parent of all of the decedent's surviving children but who does not have a child from a former marriage. *See* UNIF. PROB. CODE § 2-102(3), *quoted at supra* note 9. In both situations, the surviving spouse receives the first \$50,000 plus one-half of the remainder. *Id.* In contrast, the revised U.P.C. gives a surviving spouse who has a child from an earlier marriage a less generous share of the estate than a surviving spouse without a child from an earlier marriage. *See* UNIF. PROB. CODE § 2-102 (Proposed Draft 1989), *quoted at supra* note 96. The former spouse receives the first \$150,000 plus one-half of the balance, while the latter receives the entire estate. *Id.*

sumes that when both a stepchild and a biological child survive the decedent, the decedent would want to favor a biological child over a stepchild.<sup>104</sup>

The revised U.P.C., following current Code policy, distinguishes between a spouse who is the biological parent of surviving issue and a spouse who is the stepparent of surviving issue. A surviving spouse who is the biological parent of all of the decedent's surviving children and has no children from a previous marriage receives the entire intestate estate.<sup>105</sup> A surviving spouse who is not the biological parent of one or more of the decedent's surviving children, however, receives only the first \$150,000 of the estate assets and splits the remainder with the decedent's biological children.<sup>106</sup> Thus, the stepparent receives a fixed-share-plus-a-fraction of the estate under the revised U.P.C. Although limited, the revised U.P.C. provides a more generous stepparent share than the current Code. Under the current Code, the stepparent must split the intestate estate with the decedent's children without the surviving spouse receiving an initial fixed sum.<sup>107</sup>

The revised U.P.C. creates a distinction not present in the current Code. A surviving spouse who is the biological parent of all the decedent's children, but who has issue from a previous marriage, receives less of the intestate estate than a spouse who is the biological parent of all of the decedent's issue and does not have children from a previous marriage.<sup>108</sup> Thus, when a stepchild and a biological child both survive the decedent, the spousal share decreases from the entire estate to only the first \$150,000 plus one-half of the remainder.

### III. SHORTCOMINGS OF THE REVISED U.P.C. SPOUSAL SHARE PROVISION

The revised U.P.C. makes important changes in the surviv-

---

104. The distinction produces a result whereby the biological child and the stepchild receive unequal shares of the decedent's estate. When the decedent's biological child and stepchild survive the decedent, the revised Code employs the fixed sum distribution scheme. See UNIF. PROB. CODE § 2-102 (1)(ii) (Proposed Draft 1989), *quoted at supra* note 96. The spouse receives the first \$150,000 of the estate and the decedent's issue share in the balance. Thus, for estates of more than \$150,000, a biological child of the decedent receives a share of the assets while a stepchild does not.

105. *See id.*

106. *See id.* § 2-102(2).

107. UNIF. PROB. CODE § 2-102(4) (1983), *quoted at supra* note 9.

108. *See* UNIF. PROB. CODE § 2-102(1)(ii) (Proposed Draft 1989), *quoted at supra* note 96.

ing spouse's share of the decedent's estate, but the proposal suffers from its peremptory treatment of stepfamilies. By making distinctions based solely on stepfamily status, the intestacy statute fails to meet the needs of growing numbers of remarried couples. Furthermore, the revision's differential treatment of stepfamilies perpetuates the societal bias against stepfamily members and ignores the variability of remarriage situations.<sup>109</sup>

The revised U.P.C. provision reducing the spousal share when both the decedent's stepchild and biological child survive the decedent assumes that the decedent would want to favor the biological child over the stepchild.<sup>110</sup> Demographics, however, suggest that a decedent would desire to treat the children equally.<sup>111</sup> The surviving spouse more likely will be a widow than a widower<sup>112</sup> and a widow with a child from an earlier marriage probably had physical custody of that child during the remarriage.<sup>113</sup> The decedent, therefore, would have had an opportunity to develop a close relationship with the stepchild. In these circumstances, the decedent would be likely to treat the stepchild and biological child equally.<sup>114</sup> In addition, children who have "half-siblings"<sup>115</sup> typically do not regard them as "half-siblings."<sup>116</sup> Rather, children tend to consider half-siblings the same as siblings in first-married families.<sup>117</sup>

---

109. Intestacy statutes have the greatest impact on persons with moderate-sized estates. Fellows, Simon & Rau, *supra* note 7, at 337. Thus, the U.P.C. provision limiting the spousal share to \$150,000 plus one-half of the balance may have little practical effect as a limitation because many intestate estates may not exceed \$150,000 in value. The probability, however, that most surviving spouses who are stepparents will receive the entire estate despite the limitation does not justify retaining the limitation. The provision should be eliminated because it perpetuates negative societal views of stepfamily members and does not reflect the desires of many remarried persons.

110. See *supra* note 104; see also UNIF. PROB. CODE art. II, pt. 1 introductory comment (stating that "[t]he Code attempts to reflect the normal desire of the owner of wealth as to disposition of his property at death").

111. See *infra* notes 112-14 and accompanying text.

112. Widowhood is five times more likely for women than men. Nuckols, *Widowhood, Income Maintenance, and Economic Well-Being*, MARRIAGE & FAM. REV., Fall 1982, at 40.

113. See Ihinger-Tallman, *supra* note 4, at 28 (stating that 90% of divorce decisions award custody to the mother).

114. See *supra* notes 76-79 and accompanying text.

115. Half-siblings are siblings who share one biological parent.

116. Ganong & Coleman, *Do Mutual Children Cement Bonds in Stepfamilies?*, 50 J. MARRIAGE & FAM. 687, 696 (1988). Researchers found that 82% of adults indicate that their older children did not distinguish between siblings and half-siblings (children of the remarriage). *Id.* From the child's perspective, half-siblings were no different than siblings in first-married families. *Id.*

117. *Id.*

Furthermore, the U.P.C.'s unequal treatment of a stepchild and a biological child sends the legal message that the stepchild is the more marginal child. Although demographics suggest otherwise, the Code presumes that the stepchild was less important to the decedent than the biological child. The provision does not recognize the likelihood that a close relationship developed between the decedent and the stepchild. The statute thus perpetuates negative societal views of stepfamily members.<sup>118</sup>

The revised U.P.C. gives a surviving stepparent of surviving issue a more generous share of the intestate estate than the current Code, but continues to treat a stepparent of surviving issue differently than a biological parent.<sup>119</sup> This disparate treatment of stepparents apparently reflects the greater risk that a stepparent will disinherit the decedent's children.<sup>120</sup> This concern probably is justified in some stepfamily households,<sup>121</sup> yet social science studies show that many stepfamily members form bonds with each other.<sup>122</sup> A stepparent and stepchild may form a family bond and thus become the natural objects of each other's bounty.<sup>123</sup> In such situations, the likelihood of disinheritance does not seem greater than in a first-married family context. The U.P.C.'s spousal share provision, however, does not recognize that stepfamily relationships often are as meaningful as relationships in first-married families.<sup>124</sup>

---

118. See generally M. GLENDON, *THE TRANSFORMATION OF FAMILY LAW 311* (1989) (recognizing that "[a] country's law . . . both affects and is affected by the culture in which it arises").

119. See UNIF. PROB. CODE § 2-102 (Proposed Draft 1989), *quoted at supra* note 96.

120. Fellows, Simon & Rau, *supra* note 7, at 365.

121. See Mahoney, *supra* note 4, at 929 (stating that the possibility of no genuine family ties is greater in stepfamilies than in first-married families). For example, the likelihood of important family ties developing between a stepparent and stepchild is minimal when the child is an adult at the time of the remarriage. *Id.* at 930. A stepfamily relationship also is less likely to develop when the stepchild lives outside of the remarriage home. See *supra* notes 76-79 and accompanying text. The stepparent may not desire to devise property to the stepchild when the stepparent and stepchild have not formed family ties.

122. See *supra* notes 68-71 and accompanying text.

123. Mahoney, *supra* note 4, at 949. The "natural object of the testator's bounty" includes anyone who would take in the absence of a will under state intestacy statutes. BLACK'S LAW DICTIONARY 925 (5th ed. 1979). In designating heirs, the law generally looks to the decedent's close relationships. *Id.*

124. Whenever special bonds develop between stepfamily members, property owners may make wills to protect their stepfamilies in the future. An intestacy statute, however, should not assume that stepfamily members will die

The revised U.P.C.'s spousal share provision contravenes current trends in statutory and case law. California recently amended its intestate succession law to permit stepfamily members to inherit from each other whenever a relationship developed between a child and a foster parent or stepparent.<sup>125</sup> The California legislature also amended its Probate Code to include stepchildren in class gift designations when a parent-child relationship exists.<sup>126</sup> Moreover, courts increasingly use the doctrine of "in loco parentis" to extend legal aspects of the biological parent-child relationship to the stepfamily context.<sup>127</sup> Visitation cases, in which judges have held that stepparents who act "in loco parentis" acquire visitation rights with stepchildren, reflect this trend.<sup>128</sup> Thus, the revised spousal share provision is contrary to the growing legal recognition that stepfamilies can develop important relationships.

The less generous treatment of stepparents under the revised U.P.C. reflects a societal bias against stepfamily situations.<sup>129</sup> The U.P.C. provision for surviving spouses in remarriage cases should match the dispositive wishes of remarried property owners.<sup>130</sup> Stepfamily members are more con-

---

testate. Such an assumption puts a burden on stepfamilies to make wills, while allowing first-married families to rely on intestacy schemes. Moreover, intestacy laws should provide an estate plan that approximates the property distribution a decedent would have made in a will. *See supra* note 34 and accompanying text. Intestate succession statutes, therefore, should accommodate the desires of remarried couples who would want to benefit stepfamily members in a testamentary disposition.

125. *See* CAL. PROB. CODE § 6408(b) (West Supp. 1990). A parent-child relationship exists between a stepparent and a stepchild if the relationship developed during the child's minority and continued throughout the parties' lifetimes. *See also supra* note 56 (discussing changes to § 6408(b) of the California Probate Code).

126. *See* CAL. PROB. CODE § 6152(b); *see also supra* note 56 (discussing changes to § 6152(b) of the California Probate Code). A class gift is any "gift of an aggregate sum to a body of persons uncertain in number at time of gift, to be ascertained at a future time, who are all to take in equal, or other definite proportions, the share of each being dependent for its amount upon the ultimate number." BLACK'S LAW DICTIONARY 226 (5th ed. 1979). A gift to "A's children" is a class gift. Under the California Probate Code, a stepchild of 'A' is included in the class gift if a parent-child relationship is established between 'A' and the stepchild.

127. *See* Note, *supra* note 51, at 712-14 (discussing recent cases in which courts have held that stepparents acting "in loco parentis" acquire visitation rights).

128. *Id.*

129. *See supra* notes 59-67, 118 and accompanying text (discussing society's negative views of stepfamilies).

130. The U.P.C. "attempts to reflect the normal desire of the owner of wealth as to disposition of his property at death." UNIF. PROB. CODE art. II, pt.



scious of the challenges in multiple marriage situations.<sup>131</sup> Because remarried property owners are likely to be aware that many factors affect the development of stepfamily relationships, the U.P.C. must recognize this variability. Intestate provisions for a surviving stepparent should be based on the stepparent-stepchild relationship, not on stepfamily status itself.<sup>132</sup>

#### IV. TOWARD A BROADER CONCEPT OF FAMILY

##### A. A MORE RESPONSIVE INTESTACY LAW

The spousal share provision of the revised U.P.C. remains premised on the traditional first-married family model. In stepfamily situations, the surviving spouse's share is reduced regardless of whether stepfamily members developed close relationships. Intestacy law should broaden its concept of family to treat stepfamilies as first-married families whenever family ties are likely to have developed. The following Model Spousal Share Amendment recognizes important stepfamily relationships and better responds to the needs of remarried property owners.

##### B. A MODEL AMENDMENT TO THE U.P.C.<sup>133</sup>

###### A Bill

To amend section 2-102 of the revised U.P.C. (U.P.C. § 2-102 (Proposed Draft 1989)), relating to the intestate share of a decedent's surviving spouse.

---

1 introductory comment (1983). Thus, the property distribution scheme for remarried persons should match the preferences of remarried couples.

131. See *supra* note 60. Professor Fine found that members of single-parent and stepparent families had less stereotypical views of stepmothers than students from first-married homes. Fine, *supra* note 1, at 537.

132. See Fine, *supra* note 51, at 55 (suggesting that the rights and obligations of stepfamily members should be based upon the actual nature of their relationships). A complete reversal whereby all stepparents would be treated as biological parents would be too sweeping. Mahoney, *supra* note 4, at 929. When no stepfamily ties have developed, the decedent likely would want to give some property outright to his or her issue to ensure that the stepparent does not disinherit the children. The fear that no genuine family ties have developed is justified in some stepfamily cases, and in such situations, the stepparent may prefer not to benefit the child in a testamentary disposition. See *supra* note 121 (discussing circumstances under which a parent-child relationship between stepfamily members is unlikely to form). Therefore, a provision that reflects the quality of the stepparent-stepchild relationship is desirable.

133. This Note refers to the Model Statute as the Proposed Model Amendment.

*Share of Spouse.* The intestate share of the decedent's surviving spouse is:

- (1) the entire estate if:
  - (i) no descendant of the decedent survives the decedent; or
  - (ii) all of the decedent's surviving descendants also are descendants of the surviving spouse; or
  - (iii) one or more of the decedent's surviving descendants are not descendants of the surviving spouse and all such descendants either are adults or are minors who have been living as a regular member of the household of the surviving spouse for a minimum of two years.
- (2) in all other cases, the first [\$150,000], plus one-half of any balance of the intestate estate.

### C. ADVANTAGES OF THE MODEL AMENDMENT

The proposed Model Spousal Share Amendment responds to the variability of remarriage situations. The amendment makes two desirable reforms to the revised U.P.C. One reform gives the entire estate to the surviving spouse when both a stepchild and a biological child survive the decedent.<sup>134</sup> A second reform treats a spouse who is a stepparent the same as a biological parent whenever it is likely that a stepparent-stepchild relationship has developed.<sup>135</sup> The model provision adopts the two-year living-together requirement as a convenient and workable measure of the quality of the stepparent-stepchild relationship.<sup>136</sup>

The first reform eliminates the revised U.P.C.'s distinction between a surviving spouse who is the biological parent of all the decedent's issue, but who has children from a previous marriage, and a surviving spouse who is the biological parent of all the decedent's issue, but who does not have children from a previous marriage.<sup>137</sup> The proposed amendment allows a surviving spouse who is the biological parent of all the decedent's

---

134. See Proposed Model Amendment § 2-102(1)(ii), (iii), *printed at supra* Part IV. B.

135. See Proposed Model Amendment § 2-102(1)(iii), *printed at supra* Part IV. B.

136. An intestacy statute must deal with diverse situations in a relatively simple fashion. See Schneider, *supra* note 36, at 420-22. An attempt to adopt the "in loco parentis" doctrine and make property distributions on a case-by-case basis would be contrary to the desired simplicity of intestate succession. The two-year living-together requirement in the Proposed Model Amendment thus serves as a workable substitute for a test of the quality of the stepparent-stepchild relationship.

137. Compare Proposed Model Amendment § 2-102, *printed at supra* Part IV. B. (eliminating distinction) with UNIF. PROB. CODE § 2-102(1)(ii) (Proposed Draft 1989), *quoted at supra* note 96 (maintaining distinction).

issue to inherit the entire estate, regardless of whether the spouse has children from an earlier marriage. Thus, neither the stepchild nor the biological child of the decedent would share in the intestate estate. This reform is superior to the revised U.P.C. because it matches the probable desire of the decedent, who likely would not want to favor one child over the other.<sup>138</sup> Furthermore, the amendment eliminates negative stereotyping by treating the stepchild and the biological child equally.

The second reform allows a spouse who is a stepparent of surviving issue to be treated as a biological parent based on the child's age and the length of the child's relationship and residence with the stepparent.<sup>139</sup> Social science studies show that these factors are indicative of the quality of the stepparent-stepchild relationship.<sup>140</sup> By incorporating these factors, the amendment is responsive to the variability of stepfamily relations, while retaining the desired simplicity of intestacy laws.<sup>141</sup>

The proposed amendment allows a surviving spouse who is a stepparent to receive the entire intestate estate if the decedent's surviving child either is an adult or a minor who has been living in the remarriage home with the stepparent for a minimum of two years.<sup>142</sup> This distributive pattern ensures

---

138. See *supra* notes 111-14 and accompanying text (showing that demographics indicate that the decedent would want to treat the children equally). If the surviving spouse has a minor child from a former marriage who did not reside in the remarriage household, the decedent may not want to treat the biological child and the stepchild equally. In such situations, the decedent was less likely to have developed a relationship with the stepchild. See *supra* notes 76-79 and accompanying text. Thus, the decedent may wish to give a portion of the estate outright to the biological child and thereby favor the biological child over the stepchild. The proposed amendment could incorporate a provision providing that if the surviving spouse has a minor child from a former marriage, the surviving spouse receives the entire estate only if that minor child lived in the remarriage home for a minimum of two years. The proposed amendment does not contain such a provision to preserve the desired simplicity of intestacy laws. See *supra* note 136.

139. See Proposed Model Amendment § 2-102(1)(iii), *printed at supra* Part IV. B.

140. See *supra* notes 76-84 and accompanying text.

141. See *supra* note 136.

142. See Proposed Model Amendment § 2-102(1)(iii), *printed at supra* Part IV. B. The proposed amendment does not require a surviving spouse and a minor stepchild to continue to reside together following administration of the estate. In some cases, the decedent's former spouse or blood relatives may seek custody of the surviving minor child. If the former spouse or relatives obtain custody and the stepparent and child thereby cease to reside together, the decedent may wish to give the child a share of the estate because the stepparent would less likely use estate assets for the child's support. An intestacy statute

self-sufficiency of the spouse and serves the best interests of both the spouse and child. An adult child is likely to be financially self-sufficient and less in need of the estate assets than the surviving spouse.<sup>143</sup> The spouse, however, probably was financially interdependent with the decedent<sup>144</sup> and may be at an age at which new income opportunities are reduced.<sup>145</sup> Thus, the spouse seems to have a more deserving claim to the estate assets than an adult child and the decedent more likely would have intended to provide for the spouse.<sup>146</sup>

When a minor child survives the decedent, the amendment treats a stepparent as a biological parent only when it is likely that stepfamily members developed close relationships. When a minor stepchild has lived with the stepparent for at least two years, the stepparent and stepchild often have formed ties much like those in a first-married family.<sup>147</sup> In this situation, arguments for treating a stepparent differently than a biological parent are unconvincing. Risk that the stepparent will not provide for the child seems no greater than in the first-married family context. Similarly, the argument that the stepparent will divert the decedent's property and not pass the estate assets on to the stepchild is not compelling when the stepparent and stepchild have established a relationship with one another.

Having addressed these arguments, distribution of 100 percent of the estate to the spouse best serves the needs of both

---

could contain a requirement that the surviving spouse and the minor child continue to live together after the decedent's death, to ensure that a portion of the estate assets go toward the child's support. The proposed amendment does not contain such a requirement, for reasons of simplicity and ease of administration.

143. Fellows, Simon & Rau, *supra* note 7, at 367. Because adult children are likely to be self-supporting at the decedent's death, a delay in inheritance or even permanent disinheritance does not warrant depleting the financial resources of the spouse, who probably was financially interdependent with the decedent. *Id.* at 355-56.

144. Although many married women work outside the home, the husband usually is still the principal wage earner. Nuckols, *supra* note 112, at 39. In a 1970 study of widows, researchers found that approximately two years following the husband's death, the average income of families headed by a widow was 56% of the family income before the husband's death. *Id.* at 50. Thirty percent of widows reported a "slight" decline in their living standards and 20% said their living standards were "much lower." *Id.* at 51.

145. Comment, *Iowa Study*, *supra* note 37, at 1082. In 1979, the median age of widowers was 71.4 years and of widows, 70.5 years. Nuckols, *supra* note 112, at 40. Sixty-nine percent of widowers and 68% of widows were 65 years of age or older. *Id.*

146. See Fellows, Simon & Rau, *supra* note 7, at 367.

147. See *supra* note 78.

the spouse and minor child. Generally, a minor child is better protected if the spouse receives the funds.<sup>148</sup> Distributing property to minors requires expensive and cumbersome guardianship proceedings.<sup>149</sup> Allocation of the estate assets to the spouse eliminates these expenses and thus provides more funds for the child.<sup>150</sup>

No intestacy scheme can hope to address all the various remarriage situations.<sup>151</sup> Yet the U.P.C. fails to recognize any variability in remarriage cases. The proposed reform recognizes the importance of stepfamily ties whenever stepfamily members probably developed close relationships. Thus, the proposed Model Amendment identifies cases in which a remarried decedent would want to treat the surviving stepparent as a biological parent. In addition, the reform may reduce negative stereotypes that can adversely affect stepfamily members.<sup>152</sup>

### CONCLUSION

Intestacy laws are designed to reflect the dispository

---

148. See Fellows, Simon & Rau, *supra* note 7, at 356.

149. *Id.* Attorneys generally advise clients to devise the entire estate to their spouses in preference to children to avoid complicated guardianship proceedings. *Id.* at 360.

150. *Id.* at 356.

151. *Id.* at 367. The proposed amendment may not achieve the best solution in all cases. For example, consider a situation in which Husband A marries Wife A and then Husband A dies intestate. Wife A receives all Husband A's property to the exclusion of Husband A's blood relatives. Wife A later remarries Husband B. If Wife A then also dies intestate, Husband B will receive Husband A's property. Husband A probably would have preferred that his property return to his family of orientation.

Consider a similar situation in which Husband A dies intestate, leaving Wife A and two surviving children of their marriage. Wife A again receives all of Husband A's property in preference to the children. Wife A remarries Husband B. If Wife A then dies intestate and her children from her former marriage are adults, Husband B will receive Husband A's property to the exclusion of the children. Again, Husband A probably would have wanted his property to go to his children rather than Husband B.

Lastly, assume once more that Husband A dies intestate, leaving Wife A and two surviving children of their marriage. Wife A remarries Husband B when her children are adults. Husband B then dies intestate, survived by Wife A and his stepchildren, with whom he has not developed a close relationship. Wife A inherits Husband B's property. If Wife A then also dies intestate, Husband B's property will go to his stepchildren. Because Husband B had not established a relationship with those children, he might have preferred that his property return to his family of orientation.

152. See *supra* notes 59-67 and accompanying text (discussing negative societal views of stepfamilies); see also M. GLENDON, *supra* note 118, at 311 (stating that the law can affect societal attitudes).

wishes of persons who die without wills. The current U.P.C. spousal share provision, however, fails to approximate the desires of persons in stepfamily situations regarding distribution to the surviving spouse. The newly revised U.P.C. spousal share provision makes improvements in the surviving spouse's share of the estate, but the revision does not match the desires of remarried couples, who often want to benefit surviving steprelatives in a testamentary disposition.

Reforms are necessary to make the U.P.C. more responsive to the needs and wishes of increasing numbers of remarried couples. The revised provision, which reduces the spousal share when a stepchild and a biological child survive the decedent, should be eliminated. Furthermore, the U.P.C.'s differential treatment of all spouses who are stepparents ignores the variability in remarriage situations. A spouse who is a stepparent should receive the entire intestate estate when the surviving stepchild is an adult or a minor who has been living in the remarriage home with the stepparent for a minimum of two years. Adoption of these reforms in the revised U.P.C. would produce an intestacy scheme that recognizes the importance of stepfamily relationships and reflects the needs and desires of remarried property owners.

*Carolyn R. Glick*

