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# "Grandfamilies" Amid the Opioid Crisis: An Increasing Reason to Update Pennsylvania's Outdated Intestacy Laws

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## I. INTRODUCTION

In the midst of the current opioid crisis, the country, and Pennsylvania specifically, have a growing population of "grandfamilies."[1] Grandfamilies are family units where grandparents serve as the primary caretakers for their grandchildren, whose parents are unable to care for them primarily due to substance abuse or associated treatment or death.[2] These grandparent caregivers step in to care for their grandchildren out of both love and affection and a sense of duty, and they ultimately function in the role of a parent.

Recognizing the increasing number of grandfamilies, Pennsylvania's lawmakers have undertaken efforts to provide these families with the resources they need. In light of Pennsylvania's efforts to better serve grandfamilies, and keeping in mind that for a variety of reasons grandparent caregivers are likely to die without a will, i.e., intestate, this article suggests that Pennsylvania update its intestacy laws to better serve its grandfamilies.

Part II of this article explores how the increasing number of grandfamilies are coming together as a result of the opioid crisis. Part III of this article provides an overview of intestacy laws and discusses the unfortunate result of the application of current intestacy laws to the grandfamily situation, as well as scholars' prior recommendations to avoid this unjust result, including application of the *in loco parentis* doctrine. Part IV of this article discusses Pennsylvania's use of the *in loco parentis* doctrine, specifically in the context of child custody disputes. Part V of this article suggests that Pennsylvania should expand its application of the *in loco parentis* doctrine to its intestacy laws to provide that a decedent's grandchild, or other lineal descendant to whom the decedent stood *in loco parentis,* takes a share of the decedent's estate as though he or she is one of the decedent's children. This argument is grounded in the goals of intestacy laws, namely carrying out the decedent's intent and providing for the decedent's dependents. This article suggests that Pennsylvania's current intestacy laws provide a particularly unjust result for grandfamilies who have come together in the midst of the opioid crisis and are in need of revision to avoid further injustice.

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1. GENERATIONS UNITED, RAISING THE CHILDREN OF THE OPIOID EPIDEMIC: SOLUTIONS AND SUPPORT FOR GRANDFAMILIES 1 (2018), https://www.gu.org/app/uploads/ 2018/09/Grandfamilies-Report-SOGF-Updated.pdf [hereinafter GRANDFAMILIES REPORT]; Memorandum from Representative Katharine M. Watson, Pa. State Representative, to All House Members (Feb. 14, 2018), https://www.legis.state.pa.us//cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20170&cosponId=25201.

2. GRANDFAMILIES REPORT, *supra* note 1, at 1.

## II. GRANDFAMILIES AMID THE OPIOID CRISIS

### *A. The Opioid Crisis*

The United States is in the midst of an "unprecedented opioid epidemic."[3] In sum, the opioid crisis began in the 1990s with the over-prescription of opioid pain relievers which led to a surge in the use of heroin, a "cheaper street cousin" of prescription opioids, which caused the number of opioid related deaths to increase more than five-fold between 1999 and 2016.[4] In 2017, 11.1 million people misused prescription pain relievers, and 886,000 people used heroin.[5] The Centers for Disease Control and Prevention (CDC) estimates that in 2017, 47,872 people died from an opioid overdose, which is an average of more than 115 people per day.[6] The opioid crisis has particularly affected Pennsylvania, which had the third highest overdose death rate in the country in 2017.[7]

Throughout the country, individuals, families, and communities are struggling to cope with the devastating effects of the opioid crisis.[8] Children of addicted parents are a particular population affected by the opioid crisis.[9] Children of parents with a substance abuse problem are especially affected because substance abuse affects parents' ability to adequately care for their children.[10] Parents with a substance abuse problem are more likely to abuse or neglect

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3. *Opioid Crisis*, HEALTH RESOURCES. & SERVS. ADMIN., https://www.hrsa.gov/opioids (last updated June 2019); *see also* OFFICE OF THE SURGEON GEN., U.S. DEP'T HEALTH & HUMAN SERVS., FACING ADDICTION IN AMERICA: THE SURGEON GENERAL'S SPOTLIGHT ON OPIOIDS 5 (2018), https://addiction.surgeongeneral.gov/sites/default/files/Spotlight-on-Opioids_09192018.pdf, [hereinafter SPOTLIGHT REPORT] (defining an "opioid" as "[the] class of drugs that include the illegal drug heroin, synthetic opioids such as fentanyl, and pain medications available legally by prescription, such as oxycodone, hydrocodone, codeine, morphine, and many others").

4. SPOTLIGHT REPORT, *supra* note 3 at 7; *see also* OFFICE OF THE SURGEON GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., FACING ADDICTION IN AMERICA: THE SURGEON GENERAL'S REPORT ON ALCOHOL, DRUGS, AND HEALTH 1-14 (2016), https://addiction.surgeongeneral.gov/sites/default/files/surgeon-generals-report.pdf.

5. SPOTLIGHT REPORT, *supra* note 3, at 6. These figures include people over the age of twelve. *Id.*

6. *Id.* at 7.

7. *Drug Overdose Deaths*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/data/statedeaths.html (last updated Dec. 19, 2018). Only West Virginia and Ohio had higher rates. *Id.*

8. SPOTLIGHT REPORT, *supra* note 3, at 4. The SPOTLIGHT REPORT lists various medical and social consequences of the opioid crisis including overdose deaths, neonatal abstinence syndrome, transmission of infectious diseases such as HIV and hepatitis, compromised physical and mental health, lost productivity, crime and violence, neglect of children, and expanded health care costs. *Id.*

9. Lorna Collier, *Young Victims of the Opioid Crisis*, 49 AM. PSYCHOL. ASS'N 18 (2018).

10. CHILDREN'S BUREAU, PARENTAL SUBSTANCE USE AND THE CHILD WELFARE SYSTEM 3 (2014), https://www.childwelfare.gov/pubs/factsheets/parentalsubabuse.cfm.

their children than other parents.[11] Drug addiction affects the ability to parent in a variety of ways, including "[s]pending limited funds on alcohol and drugs rather than food or other household needs[,] [s]pending time seeking out, manufacturing, or using alcohol or other drugs," and being incarcerated.[12] As a result, the children's basic needs—namely "nutrition, supervision, and nurturing"—go unmet.[13]

Children of parents with a substance abuse problem are more likely to be placed in out-of-home care than other children.[14] The number of children removed from their parents' care because of substance abuse has increased by thirteen percent in recent years, due in part to the opioid crisis.[15] Notably, in Pennsylvania, parental drug use is the most common reason children are removed from their homes.[16] Children may be placed in out-of-home care through the foster care system, or through a more informal arrangement.[17] A common arrangement is for these children to be placed with relatives, most often their grandparents.[18]

### *B. Grandfamilies*

More than 2.6 million children, which is approximately four percent of all children in the United States, are presently being raised by grandparents or relatives other than their parents.[19] Consistent with the national average, four percent of children in Pennsylvania live with a relative other than their parents.[20] In Pennsylvania,

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11. *Id.* at 2-3 (noting that "[w]hile the link between substance abuse and child maltreatment is well documented, it is not clear how much is a direct causal connection and how much can be attributed to other co-occurring issues").

12. *Id.* at 3.

13. *Id.*

14. *Id.* at 2.

15. *Grandparents Raising Grandchildren as Opioid Epidemic Takes Toll*, CBS NEWS (Aug. 31, 2018, 4:19 PM), https://www.cbsnews.com/news/grandparents-raising-grandchildren-amid-opioid-epidemic.

16. GRANDFAMILIES REPORT, *supra* note 1, at 3.

17. *See id.* at 2; THE ANNIE E. CASEY FOUND., STEPPING UP FOR KIDS: WHAT GOVERNMENT AND COMMUNITIES SHOULD DO TO SUPPORT KINSHIP FAMILIES 1 (2012), https://www.aecf.org/m/resourcedoc/AECF-SteppingUpForKids-2012.pdf.

18. GRANDFAMILIES REPORT, *supra* note 1, at 1; THE ANNIE E. CASEY FOUND., *supra* note 17, at 4.

19. GRANDFAMILIES REPORT, *supra* note 1, at 2. Notably, only one out of every twenty children who are living in kinship care are placed in that arrangement through the foster care system, while the other nineteen children are placed into such an arrangement through an informal process. *Id.*

20. GRANDFAMILES.ORG, GRANDFACTS: STATE FACT SHEETS FOR GRANDFAMILIES 1 (2018), http://www.grandfamilies.org/Portals/0/State%20Fact%20Sheets/Grandfamilies-Fact-Sheet-Pennsylvania.pdf.

approximately eighty-two thousand grandparents are the sole caregivers for nearly eighty-nine thousand grandchildren.[21] Grandfamilies are becoming increasingly common amid the opioid crisis because many children's natural parents are unable to care for them because they have died, are incarcerated, are using drugs, are in a treatment program, or are otherwise unable to take care of their children.[22]

Sometimes the children's parents ask the grandparents to step in, while other times the grandparents step in without being asked.[23] Grandparent caregivers step in to care for the grandchildren for a variety of reasons, including: to keep the children with family and out of the foster care system, to ensure the children's safety and well-being, to provide the children with a sense of belonging, due to a sense of obligation, out of love, and due to spiritual influence.[24] "You do it because you love them, and you want them to have a good life," explained a great-grandmother who is caring for her ten- and thirteen-year-old great-granddaughters.[25]

The story of a Utah grandmother who stepped in to care for her nine-year-old and seven-year-old granddaughters is illustrative.[26] Through the court system the grandmother obtained custody of her granddaughters, who, along with their mother, were homeless.[27] The grandmother used data from a tracking device that she placed on her daughter's (the granddaughters' mother) vehicle to prove that her daughter was exposing her granddaughters to drug dens and drug dealers.[28]

Another Utah grandfamily came together with much less preparation.[29] One of the grandchildren, whose father previously abandoned them and whose mother was addicted to opioids, called the

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21. Press Release, Pa. Governor's Office, Governor Wolf Thanks House for Passage of 'Grandfamilies' Legislation, Urges Senate to Vote (Apr. 17, 2018), https://www.governor.pa.gov/governor-wolf-thanks-house-passage-grandfamilies-legislation-urges-senate-vote. Any reference to "grandchildren" in this article includes grandchildren, great-grandchildren, great-great-grandchildren, and so on.

22. GRANDFAMILIES REPORT, *supra* note 1, at 1.

23. James P. Gleeson et al., *Becoming Involved in Raising a Relative's Child: Reasons, Caregiver Motivations and Pathways to Informal Kinship Care*, 14 CHILD & FAM. SOC. WORK 300, 307 (2009).

24. *Id.* at 306.

25. Michael Hedges, *The New Caregivers*, AARP (May 24, 2017), https://www.aarp.org/health/drugs-supplements/info-2017/opiates-addiction-grandparents-raising-grandchildren.html.

26. *See* Bill Whitaker, *Opioid Epidemic Leaving Grandparents to Raise Grandchildren*, CBS NEWS (May 13, 2018), https://www.cbsnews.com/news/opioid-epidemic-leaving-grandparents-to-raise-grandchildren.

27. *Id.*

28. *Id.*

29. *See id.*

grandchildren's grandmother from the school bus stop one day because their mother never came to pick them up.[30] While the grandparents thought they would only have the grandchildren for a few days, a few days turned into weeks, which turned into months, which turned into years, and ultimately a permanent arrangement.[31] The grandfather indicated, "we can't not [care for the grandchildren]. They are our grandkids. They're our family."[32]

In these circumstances, grandparents may seek some form of legal relationship with the grandchildren in order to carry out the duties traditionally performed by parents including making decisions regarding the grandchildren's medical care, education, and religion.[33] Grandparents may obtain such a legal relationship through consent or a power of attorney from the child's natural parent, by obtaining legal and/or physical custody, by obtaining a guardianship, or by adopting the child.[34] However, the reality is that these grandfamily arrangements, for a variety of reasons, are mostly informally established within the family.[35]

Moreover, grandparents often do not seek formal adoption because of the perceived temporary nature of the arrangement or because they do not want to permanently deprive their own children of their legal parental rights.[36] Additionally, court proceedings associated with formal adoption can be expensive and stressful, and these grandparents may not have access to legal advice or necessary information.[37] Even if grandparents do obtain a formal guardianship or custody, this relationship is still not equivalent to an adoption.[38] Regardless of the level of formality of the arrangement, grandparent caregivers nevertheless intend to and do function as the grandchildren's parents.[39] As one grandparent caregiver explained, "[y]ou just love them just like they're your very own."[40]

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30. *Id.*

31. *Id.* At the time of the interview, the grandparents had been the primary caregivers for their grandchildren for nearly three years. *Id.*

32. *Id.*

33. *See* Carla Schiff Donnelly, *When Custody of the Grandkids Is at Issue: One of the Most Difficult Areas of Pennsylvania Family Law Offers Unique Challenges and Opportunities for Grandparents*, PA. LAW., Nov./Dec. 2014, at 22, 23-24. *See generally* Ana Beltran, *Care-Custody—Summary & Analysis*, GRANDFAMILIES.ORG, http://www.grandfamilies.org/Topics/Care-Custody/Care-Custody-Summary-Analysis#ft1%2010 (last visited Oct. 31, 2018).

34. Beltran, *supra* note 33, at 1-2.

35. THE ANNIE E. CASEY FOUND., *supra* note 17, at 1.

36. Neta Sazonov, Note, *Expanding the Statutory Definition of "Child" in Intestacy Law: A Just Solution for the Inheritance Difficulties Grandparent Caregivers' Grandchildren Currently Face*, 17 ELDER L.J. 401, 408 (2010).

37. *Id.* at 408, 410.

38. *Id.* at 405-06.

39. *Id.* at 405.

40. *Grandparents Raising Grandchildren as Opioid Epidemic Takes Toll*, *supra* note 15.

### *C. Pennsylvania's Efforts to Assist Grandfamilies*

Recognizing the increasing number of grandfamilies, Pennsylvania's lawmakers have undertaken efforts to provide Pennsylvania's grandfamilies with the resources they need. These efforts include initiating a "Grandparents Raising Grandchildren Listening Tour" to "listen and capture where issues or gaps exist in the spaces where grandparents are attempting to navigate the health, human services, education, and legal systems as they find themselves parenting for the second time around" with the ultimate goal of "implement[ing] solutions that better serve, support, and protect Pennsylvania's grandparents and the children they are raising."[41]

Additionally, Pennsylvania amended its Standby Guardianship Act to provide for the appointment of a family member as a temporary guardian of a minor child "when the minor's custodial parent has entered a rehabilitation facility for treatment of drug or alcohol addiction or has been subject to emergency medical intervention due to abuse of drugs or alcohol."[42] This amendment provides a way for a grandparent to obtain a temporary guardianship of his or her grandchild to enable the grandparent to take certain necessary actions on the minor child's behalf, such as taking the child to the doctor or enrolling the child in school.[43] Pennsylvania also established a Kinship Caregiver Navigator Program within the Department of Human Services as an informational resource for grandparents who are raising their grandchildren but who are not involved with the formal child welfare system.[44] In light of these recent efforts by Pennsylvania to assist grandfamilies, updating Pennsylvania's intestacy laws to better serve its grandfamilies is seemingly ripe for consideration.

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41. Press Release, Pa. Dep't of Educ., Wolf Administration & Pennsylvania Family Support Alliance Introduce Grandparents Raising Grandchildren Listening Tour (Sept. 28, 2018), https://www.media.pa.gov/Pages/Education-Details.aspx?newsid=520. Additionally, Pennsylvania's Joint State Government Commission, pursuant to House Resolution Number 390 of 2017, conducted a study of the trends of grandfamilies in Pennsylvania and reported its findings and recommendations. *See generally* JOINT STATE GOV'T COMM'N, GRANDFAMILIES IN PENNSYLVANIA: "THE SECOND TIME AROUND" (2019), http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2019-04-30%20GRAND FAMILIES%20Updated%20Report%205.1.19.pdf.

42. H.R. 1539, 2017 Reg. Sess. (Pa. 2018) (enacted as Act of Oct. 23, 2018, Pub. L. 583, No. 88 (2018)).

43. Memorandum from Representative Eddie Day Pashinski, Pa. State Representative, to All House Members (May 19, 2017), https://www.legis.state.pa.us//cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20170&cosponId=23948.

44. Watson, *supra* note 1.

## III. INTESTACY

A person who dies without a valid will dies intestate.[45] Intestacy laws provide an "estate plan" developed by the legislature that governs distribution of the assets of a person who dies without a will.[46] The overarching goal of intestacy laws is to give the decedent's property to the decedent's family.[47] Intestacy laws define "family" as persons related by blood, marriage or adoption.[48] The most commonly identified goal of intestacy laws is to distribute the property of a person who dies without a will in accordance with the probable intent of most testators.[49] Scholars have also identified other goals such as providing economic support for the decedent's family.[50]

Intestate statutes generally transfer the decedent's estate to the decedent's spouse and descendants or issue.[51] Descendants and issue are synonymous terms that refer to a multiple-generation class that includes all generational levels down the decedent's descending line, i.e., children, grandchildren, and great-grandchildren.[52] Generally, where a decedent leaves a surviving spouse and no issue, the decedent's spouse takes the decedent's entire estate.[53] If the decedent leaves a spouse and issue, the spouse typically takes a percentage of the estate as prescribed by statute plus one-half or one-third of the remaining estate.[54] The remainder of the decedent's estate passes to the decedent's issue.[55] If the decedent does not have a spouse but does have issue, the issue take the entire intestate estate in shares.[56]

The decedent's issue take shares of the decedent's estate by one of several systems of "representation."[57] The common, principal feature of each system of representation is that the decedent's estate is divided among the living issue who are nearest to the decedent

45. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 2.1 (AM. LAW INST. 1999).
46. ROGER W. ANDERSEN & IRA MARK BLOOM, FUNDAMENTALS OF TRUSTS AND ESTATES 37 (4th ed. 2012).
47. Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 L. & INEQ. 1, 3 (2000).
48. *Id.* at 5.
49. *Id.* at 7.
50. *Id.* at 9.
51. *See* ROGER W. ANDERSEN & SUSAN N. GARY, UNDERSTANDING TRUSTS AND ESTATES 14 (6th ed. 2018).
52. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 2.3 cmt. b (AM. LAW INST. 1999).
53. *Id.* § 2.2.
54. *Id.*
55. *Id.* § 2.3.
56. *Id.*
57. *Id.*

in each descending line.[58] The three recognized systems of representation are strict per stirpes, per capita with representation, and per capita at each generation.[59]

Under the system of strict per stirpes, the decedent's estate is divided into equal shares at the generation nearest to the decedent (i.e., at the children's generation).[60] Each living child takes one equal share.[61] The share of any child who predeceased the decedent leaving behind issue passes to the predeceased child's children in equal shares.[62] For example, if an intestate decedent had two children, one of whom survived the decedent and one who predeceased the decedent leaving behind two children (i.e., the decedent's grandchildren), half of the decedent's assets would pass to the surviving child and the other half of the decedent's assets would pass to the predeceased child's children (i.e., the decedent's grandchildren) in equal shares (i.e., one quarter of the decedent's assets to each grandchild).[63]

The per capita with representation system is similar to the strict per stirpes system, except the decedent's estate is divided into equal shares beginning with the generation nearest to the decedent *that contains at least one living member*.[64] Under the per capita at each generation system, the decedent's estate is similarly divided into equal shares at the generation nearest to the decedent that contains at least one living member.[65] Each living member takes a share.[66] The predeceased members' shares are then combined and divided into equal shares among the first generation of their issue, and so on.[67] Notably, under all of the systems of representation, a

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58. *Id.* § 2.3 cmt. c.

59. *Id.*

60. *Id.* § 2.3 cmt. d. The degree of relationship to the decedent is called "consanguinity." Consanguinity is defined as "[t]he relationship of persons of the same blood or origin." *Consanguinity*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also Degree of Consanguinity*, BOUVIER LAW DICTIONARY (2012) ("A degree of consanguinity is a measure of the levels of family between one person and another. The particular family members in the same degree of consanguinity varies according to the law in that jurisdiction. At common law, a parent or child is in the same degree of consanguinity relative to one another. A third cousin is in the same degree of consanguinity to all third cousins of the same remove and to second cousins of one less remove."). Children that the decedent formally adopted are included in the nearest degree to the decedent (i.e., the decedent's children). RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 2.5.

61. *Id.* § 2.3 cmt. d.

62. *Id.* A child that predeceases the decedent without leaving issue is not allocated a share. *Id.*

63. ANDERSEN & GARY, *supra* note 51, at 15.

64. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 2.3 cmt. e.

65. *Id.* § 2.3 cmt. g.

66. *Id.*

67. *Id.*

living survivor cuts off issue further down the line.[68] That is, if a decedent leaves behind children and grandchildren, where a decedent's child survives the decedent, that child's children (i.e., the decedent's grandchildren) do not inherit any portion of the decedent's estate.[69]

If the decedent dies without a spouse or issue, the decedent's estate passes to the second parentela, that is to the decedent's parents, or, if the decedent's parents have predeceased the decedent, to the decedent's parents' issue, i.e., the decedent's siblings and/or nieces and nephews.[70] If the decedent dies without a spouse, issue, parents, siblings, or nieces and nephews, then the decedent's estate passes to the third parentela, that is the decedent's grandparents or, if the decedent's grandparents have predeceased the decedent, to the grandparents' issue, i.e., the decedent's aunts and uncles or their issue.[71] Importantly, status as a decedent's heir not only provides the right to inherit a portion of the decedent's estate but also confers certain rights relating to the decedent's estate.[72]

### *A. Pennsylvania's Intestacy Laws*

Pennsylvania's current intestacy laws use the strict per stirpes representation system.[73] Pennsylvania's statute provides, in relevant part, that if a person dies without a will, the decedent's estate:

> shall be divided into as many equal shares as there shall be persons in the nearest degree of consanguinity to the decedent living and taking shares therein and persons in that degree who have died before the decedent and have left issue to survive him who take shares therein. One equal share shall pass to each such living person in the nearest degree and one equal

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68. ANDERSEN & GARY, *supra* note 51, at 15; *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 2.3 cmt. c ("A descendant who has a living ancestor who is also a descendant of the decedent is not an eligible taker.").

69. *See id.* § 2.3 cmt. c.

70. *Id.* § 2.4. A "parentela" is a line of descent from a common ancestor. *See Parentela*, BLACK'S LAW DICTIONARY (10th ed. 2014).

71. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 2.4.

72. *See* Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 644 (2002). Notably, intestacy statutes also serve as a basis for determining whether a legatee named in a decedent's will is the "natural object[] of the decedent's bounty" in the context of a will contest, which could very likely arise if a grandparent caregiver does execute a will that benefits his or her grandchildren and excludes an addicted child. *Id.* Additionally, who is defined as an "heir" under intestacy laws determines whether a person has standing to initiate and/or participate in certain actions related to the decedent's estate. *Id.* at 645; *see, e.g.*, 20 PA. CONS. STAT. § 908 (2010) (right to appeal a decree of the register of wills); 20 PA. CONS. STAT. § 3155 (right to compel administration of the estate).

73. *See generally* 20 PA. CONS. STAT. § 2104.

> share shall pass by representation to the issue of each such deceased person . . . .[74]

The first degree of consanguinity to the decedent is the decedent's children.[75] Thus, the decedent's estate is divided equally by the number of children the decedent has, with each child being allocated an equal share.[76] Each living child takes a share.[77] If one of the decedent's children has predeceased the decedent, then the predeceased child's share passes to the predeceased child's children, i.e., the decedent's grandchildren, in equal shares.[78] While Pennsylvania's statute does not define "issue," the Pennsylvania Supreme Court adopted the Restatement (Second) of Property's definition of "issue" as "a multigenerational term meaning all succeeding generations."[79] The court confirmed that "it is well settled that . . . children do not take concurrently or per capita with their parents, but take per stirpes."[80]

Presumably, when a person dies intestate, an estate will need to be opened to wrap up the decedent's affairs, including distribution of the decedent's assets.[81] Where a decedent dies intestate, the person appointed to administer the decedent's estate is called an administrator.[82] Notably, the persons eligible to serve as administrator of an intestate decedent's estate include, in the following order: the decedent's surviving spouse, the decedent's intestate heirs, the decedent's creditors, or "[o]ther fit persons."[83]

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74. *Id.*

75. *See* ANDERSEN & BLOOM, *supra* note 46, at 71. This includes adopted children. *See supra* text accompanying note 48.

76. 20 PA. CONS. STAT. § 2104.

77. *Id.*

78. *Id.*

79. *In re* Estate of Harrison, 689 A.2d 939, 944 (Pa. Super. Ct. 1997).

80. *Id.*

81. The objectives of administering an estate are "to gather the assets of the decedent; to pay the debts of the decedent, including the tax liabilities of the decedent and the estate; and to distribute the net remaining estate to the heirs who are entitled to distribution either under the intestate laws or to the beneficiaries pursuant to the provisions of the decedent's will." 1 SUELLEN WOLFE, LEXISNEXIS PRACTICE GUIDE: PENNSYLVANIA PROBATE AND ESTATE ADMINISTRATION § 3.03 (2019), LEXIS [hereinafter PROBATE PRACTICE GUIDE]. However, an estate may not be required where a decedent has no creditors and the decedent's assets "can be transferred by delivery, as in the case of cash in hand, furniture, jewelry, negotiable unregistered securities and personal effects." 1 PAUL C. HEINZ ET AL., REMICK'S PENNSYLVANIA ORPHANS' COURT PRACTICE § 1.03 (2018), LEXIS. In that case, the decedent's property may be distributed pursuant to an agreement among the decedent's heirs. *Id.*

82. HEINZ ET AL., *supra* note 81, at § 1.01. Where a decedent dies having a will, the person appointed to administer the estate is called an executor. *Id.*

83. 20 PA. CONS. STAT § 3155 (providing that there is no standing to petition for letters of administration if the person has no financial interest in the estate or marital or consanguineous relationship to the decedent); Brokans v. Melnick, 569 A.2d 1373, 1376 (Pa. Super. Ct. 1989) (holding that "appellant had no standing to petition for letters of administration

To obtain authority to administer an estate, a petition for grant of letters is filed with the Register of Wills of the county of the decedent's domicile.[84] In the case of intestacy, the application is for the grant of letters of administration.[85] The petition must contain certain information about the decedent including the name and address of the decedent's surviving spouse and "the names, relationships and residence addresses of [the decedent's] other heirs."[86] The administrator must advertise the fact that the estate has been opened, generally in one newspaper of general circulation and one legal periodical.[87] The administrator must also provide notice to the decedent's heirs.[88]

Generally, the administrator must file with the court an account of his or her administration of the estate, which includes a proposed decree of distribution.[89] Any party in interest may file objections to the account, proposed distribution, or both.[90] After the resolution of any objections, the Orphans' Court will expressly confirm the account and distribution and specify the names of the persons to whom the balance available for distribution is awarded and the amount or share awarded to each.[91] A party in interest may file a petition to review any decree of distribution.[92]

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for an estate in which he admittedly has no financial interest"). A person who is entitled to serve as administrator may renounce his or her right to do so and may nominate another person to serve. 20 PA. CONS. STAT. § 3155(b)(6).

84. 20 PA. CONS. STAT. § 901 (conferring on the Register of Wills jurisdiction of the probate of wills, the grant of letters to a personal representative, and any other matter as provided by law); 20 PA. CONS. STAT. § 3151 (providing that a decedent's estate must be opened in the county of the decedent's domicile); 20 PA. CONS. STAT. § 3153 (prescribing the contents of a petition for grant of letters). Letters are almost always necessary to administer a decedent's estate. HEINZ ET AL., *supra* note 81, at § 1.01 (noting that "[h]ardly any conceivable act of administration can be successfully, or conveniently, performed without letters").

85. PROBATE PRACTICE GUIDE, *supra* note 81, at § 4.02. Letters of administration constitute the official certificate of authority to represent the decedent's estate. This includes gathering together the decedent's assets, discharging the decedent's obligations and making distribution to the heirs. *Id.* at § 3.02.

86. 20 PA. CONS. STAT. § 3153.

87. 20 PA. CONS. STAT. § 3162.

88. PA. SUP. ORPHANS' CT. R. 10.5.

89. 20 PA. CONS. STAT. § 3513; PA. SUP. ORPHANS' CT. R. 2.4(a).

90. PA. SUP. ORPHANS' CT. R. 2.7. Standing to file Objections to the Account is limited to parties in interest who can demonstrate some legal or beneficial interest in the estate. *See* Megargel Estate, 36 A.2d 319, 320 (Pa. 1944); Thompson Estate, 33 Pa. D. & C.2d 656, 659 (Pa. Orphans' Ct. 1964). The administrator can file preliminary objections to any objections for lack of jurisdiction over the subject matter and lack of standing. PA. SUP. ORPHANS' CT. R. 2.8(b).

91. 20 PA. CONS. STAT. § 3514.

92. 20 PA. CONS. STAT. § 3521. The Orphans' Court may grant relief as equity and justice require. *Id.*

### *B. Intestacy Laws as Applied to Grandfamilies*

Grandfamilies are particularly impacted by intestacy laws because grandparent caregivers disproportionately rely on the intestacy laws. This is because grandparent caregivers are likely to die intestate due to their age, education, and socioeconomic status. A January 2017 study indicated that sixty percent of American adults do not have an estate plan in place.[93] The top reasons surveyed adults provided for not having an estate plan were that they "hadn't gotten around to it" or they "don't have enough assets to leave to anyone."[94] Notably, many individuals who do not have a will believe that their family members would automatically get their assets.[95]

Factors that affect a person's likelihood of having a will are age, wealth, occupation, education, marital status, and gender.[96] The likelihood of having a will increases with age, wealth, occupation, and education.[97] Women, especially widows, are more likely to have wills.[98]

Grandparent caregivers are more likely to be poor, single, older, less educated, and unemployed than families in which at least one natural parent is present.[99] Grandparent caregivers are also likely to be busy and unlikely to take the time to write a will.[100] Additionally, due to many grandparent caregivers' socioeconomic class, they may have neither the knowledge nor the financial means to arrange to have a will prepared.[101] Due to a lack of proper education, grandparent caregivers may never contemplate estate planning and may simply assume that their grandchildren will automatically inherit because they raised the grandchildren as their own.[102] Accordingly, "[b]y not providing inheritance rights to the grandchildren of grandparent caregivers under intestacy law, the law 'creates a trap for

93. Barbranda Lumpkins Walls, *Haven't Done a Will Yet?: You've Got Company. Neither Have 6 in 10 U.S. Adults*, AARP (Feb. 24, 2017), https://www.aarp.org/money/investing/info-2017/half-of-adults-do-not-have-wills.html.

94. *Id.*

95. Gary, *supra* note 47, at 19.

96. *Id.* at 16-17.

97. *Id.* at 17.

98. *Id.*

99. THE ANNIE E. CASEY FOUND., *supra* note 17, at 5-6.

100. Kristine S. Knaplund, *Grandparents Raising Grandchildren and the Implications for Inheritance*, 48 ARIZ. L. REV. 1, 5 (2006).

101. *See* Sazonov, *supra* note 36, at 410; *see also* THE ANNIE E. CASEY FOUND., *supra* note 17, at 8 (noting that "[m]any caregivers earn too much to qualify for free or low-cost legal services, but too little to afford the high cost of a private attorney").

102. Sazanov, *supra* note 36, at 410.

the ignorant or misinformed,' which may describe many grandparent caregivers."[103]

The result, under current intestacy laws, is that if a grandparent caregiver who has not formally adopted the grandchild to whom the grandparent is functioning as a parent dies intestate, the grandchild's living natural parent will inherit a share of the grandparent's estate, but the grandchild will inherit nothing.[104] The Pennsylvania Supreme Court specifically applied Pennsylvania's intestacy laws to a grandchild whose grandparents held him out as their child for his entire life but never formally adopted him in *Bahl v. Lambert Farms, Inc.*[105] The court held that the grandchild could not inherit from his grandmother's estate, despite having been held out as her child, reasoning that:

> it is apparent that the General Assembly intended, as a general rule, to limit 'issue' to those in the decedent's blood line and did not intend to include as first degree 'issue' individuals without the requisite consanguinity who had merely been treated like, or held out as, the decedent's children.[106]

Thus, the current state of Pennsylvania's intestacy laws is that where a grandparent functions as the parent of his or her grandchild during his or her lifetime and dies intestate, the grandchild is not entitled to inherit a child's share of the grandparent's estate.

### C. *The Argument for Updating Intestacy Laws to Better Reflect Modern Families*

Recognizing that current intestacy statutes nationwide presume a nuclear family, scholars have recommended updating current intestacy laws to better reflect the composition of modern families.[107] Scholars have suggested updating intestacy laws to reflect modern

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103. *Id.* at 427-28 (quoting Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 321, 324 (2006)).

104. *See* Knaplund, *supra* note 100, at 2; Sazonov, *supra* note 36, at 405-06.

105. 819 A.2d 534, 535-37 (Pa. 2003). Bahl's biological mother conceived Bahl in 1921 when she was seventeen years old. *Id.* at 535. Bahl's biological mother's parents raised Bahl as their own child from Bahl's birth until the grandmother's death forty-eight years later in 1969. *Id.* at 535-36.

106. *Id.* at 538.

107. *See, e.g.*, Danaya C. Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Nontraditional Families*, 25 CORNELL J.L. & PUB. POL'Y 1, 3 (2015) (noting that nearly seventy percent of children in the United States are being raised in nontraditional homes). Danaya C. Wright is a professor at the University of Florida Levin College of Law and is an expert in estates and trusts and family law. *Danaya C. Wright*, U.F. LAW, https://www.law.ufl.edu/faculty/danaya-c-wright (last visited Apr. 17, 2020).

families including stepfamilies and grandfamilies.[108] Scholars note that in the case of grandfamilies, the permanent nature of the parent-child relationship between the grandparent caregiver and grandchild is so similar to that of legally adoptive parents, to extend inheritance rights "should not be a great leap, because intestacy law currently recognizes inheritance rights for legally adopted children."[109]

The argument advanced for updating intestacy laws is grounded in the objectives of intestacy laws, which are "to carry out the probable intent of the average intestate decedent" and "[to preserve] the economic health of the family after a death."[110] Current intestacy laws likely do not give effect to most grandparent caregivers' intent, which is presumably to transfer a portion of their estate to their grandchildren, whom they have ultimately treated as their own children.[111] Moreover, it is reasonable to assume that grandparents would not intend that their estates pass to parents who are unable or unwilling to care for, and have not been caring for, the grandchildren, with nothing passing to the grandchildren.[112] Further, if no portion of the grandparent caregiver's estate passes to his or her grandchildren, and the natural parent of those children, to whom the estate did pass, either cannot or will not care for the grandchildren, it is likely that the state will assume responsibility of providing for the grandchildren, which frustrates the second objective of intestacy laws, which is providing for the decedent's family.[113] Accordingly, the state, itself, has an interest in assuring some inheritance for these grandchildren.[114]

Scholars have proposed numerous statutory schemes that employ a functional definition of a "family" or a "parent-child" relationship.[115] For example, Professor Kristine Knaplund proposed a

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108. *See, e.g.*, Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917, 919 (1989); Sazonov, *supra* note 36, at 401. Margaret M. Mahoney is a professor emeritus at University of Pittsburgh School of Law and is an expert on the legal issues surrounding nontraditional families. *Margaret M. Mahoney*, U. PITT. SCH. LAW, https://www.law.pitt.edu/people/margaret-m-mahoney (last visited Apr. 22, 2019). Neta Sazonov is an associate editor and a published author of the Elder Law Journal. *Neta [Sazonov] Nodelman*, SHAW L. LTD., http://shawlawltd.com/neta-s-nodelman (last visited Apr. 17, 2019).

109. Sazonov, *supra* note 36, at 409-10.

110. Michelle Harris, Note, *Why a Limited Family Maintenance System Could Help American "Grandfamilies": A Response to Kristine Knaplund's Article on Intestacy Laws and Their Implications for Grandparents Raising Grandchildren*, 3 NAELA J. 239, 248 (2007).

111. *Id.*; *see also* Sazonov, *supra* note 36, at 412-13.

112. Harris, *supra* note 110, at 248.

113. *Id.*

114. *Id.*

115. *See, e.g.*, Knaplund, *supra* note 100, at 17.

brightline rule that "all minor children dependent on the decedent" take an intestate share.[116] Professor Knapland further suggested that "dependent" requires that the child depended on the decedent for at least three years prior to the date of death to avoid granting an intestate share based on a temporary relationship.[117] Another suggestion is to redefine the terms "parent" and "child" in intestate statutes.[118] For example, Professor Dayana C. Wright proposed defining "child" as "[a]ny child who functions as a child to any parent who functions as a parent . . . unless the parent explicitly provides otherwise, in writing, that the child is not to be recognized as a child for purposes of inheritance."[119]

To make the determination of whether a functional parent-child relationship exists, scholars have proposed a variety of factors to be considered.[120] These scholars propose that the existence of these factors should give rise to a presumption that the relationship was a parent-child relationship, which can then be rebutted only by clear and convincing evidence that the relationship was not functionally that of a parent and a child.[121] These proposed factors include the relationship between the parent and child beginning during the child's minority,[122] the duration of the relationship for the formation of a parent-child bond,[123] whether the parent held the child out as his or her child (and vice versa),[124] whether the parent treated the child the same as the parent treated his or her own children,[125] the economic and emotional support provided for the child (and vice versa),[126] whether the parent named the child as a beneficiary on non-probate instruments including (but not limited to)

116. *Id.* at 16-17. Kristine Knaplund is an associate professor at Pepperdine University School of Law who has published extensive research and scholarship regarding estates, specifically issues in intestacy. *See Kristine S. Knaplund*, PEPP. U. SCH. LAW, https://law.pepperdine.edu/faculty-research/kristine-knaplund (last visited Apr. 17, 2019).

117. Knaplund, *supra* note 100, at 17.

118. *See, e.g.*, *id.*

119. Wright, *supra* note 107, at 79.

120. *See, e.g.*, *id.* at 79-80; Gary, *supra* note 47, at 81-82; Sazonov, *supra* note 36, at 429-30. Susan N. Gary is a professor at the University of Oregon School of Law. *Susan N. Gary*, U. OR. SCH. LAW, https://law.uoregon.edu/explore/susan-gary (last visited Apr. 17, 2019).

121. Gary, *supra* note 47, at 77-78.

122. *Id.* at 81; Wright, *supra* note 107, at 80; Sazonov, *supra* note 36, at 430.

123. Gary, *supra* note 47, at 81; Wright, *supra* note 107, at 80; Sazonov, *supra* note 36, at 430.

124. Gary, *supra* note 47, at 81; Wright, *supra* note 107, at 80; Sazonov, *supra* note 36, at 430.

125. Gary, *supra* note 47, at 81; Sazonov, *supra* note 36, at 430.

126. Gary, *supra* note 47, at 81; Wright, *supra* note 107, at 80; Sazonov, *supra* note 36, at 430.

life insurance, joint bank accounts, or employee benefit plans,[127] and whether the parent and child maintained a parent-child relationship after the child reached the age of majority.[128] These factors have been discussed under, inter alia, the conceptual headings of "functional parent," "de facto parent," and "in loco parentis."[129] Pennsylvania courts recognize, and have applied, the doctrine of *in loco parentis* in several contexts, but have not yet used the doctrine to determine whether an individual is an intestate heir.

## IV. PENNSYLVANIA'S *IN LOCO PARENTIS* DOCTRINE

Pennsylvania courts apply the doctrine of *in loco parentis* in determining whether a third party, i.e., a person other than a child's natural parent, has standing to petition the court for custody of the child.[130] "The phrase '*in loco parentis*' refers to a person who puts oneself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption."[131] "The status of *in loco parentis* embodies two ideas; first, the assumption of a parental status, and, second, the discharge of parental duties."[132] The Pennsylvania Supreme Court indicated that an *in loco parentis* relationship exists "where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent."[133]

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127. Gary, *supra* note 47, at 81; Wright, *supra* note 107, at 80; Sazonov, *supra* note 36, at 430.

128. Wright, *supra* note 107, at 80.

129. *See* Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. REV. 367, 402 (2009).

130. *See, e.g.*, T.B. v. L.R.M., 786 A.2d 913, 914 (Pa. 2001); *see also* 23 PA. CONS. STAT. § 5324 (2014) (conferring standing to petition the court for custody of a child on "[a] person who stands in loco parentis to the child" or "[a] grandparent of the child who is not in loco parentis to the child" if certain conditions are present). The doctrine is now used "almost exclusively" in child custody matters. *T.B.*, 786 A.2d at 916. However, in the past, Pennsylvania courts have applied the doctrine in the context of life insurance, *see, e.g.*, Young v. Hipple, 117 A. 185, 188 (Pa. 1922), and workers' compensation benefits, *see, e.g.*, Kransky v. Glen Alden Coal Co., 47 A.2d 645, 646 (Pa. 1946). Importantly, a finding of an *in loco parentis* relationship establishes a "prima facie right to custody," which only confers standing to petition for custody and is not conclusive of a right to custody (i.e., the party petitioning for custody must still sustain his or her evidentiary burden that its action would be in the child's best interest). McDonel v. Sohn, 762 A.2d 1101, 1107 (Pa. Super. Ct. 2000); *see also* J.A.L. v. E.P.H., 682 A.2d 1314, 1319 (Pa. Super. Ct. 1996).

131. *T.B.*, 786 A.2d at 916.

132. *Id.* at 916-17 (citing Commonwealth v. Gerstner, 656 A.2d 108, 112 (Pa. 1995); Commonwealth *ex rel.* Morgan v. Smith, 241 A.2d 531, 533 (Pa. 1968)).

133. *Id.* at 917 (quoting *J.A.L.*, 682 A.2d at 1320).

Application of the doctrine often arises in the context of the separation of non-traditional families involving children.[134] "Close relatives who assume parenting responsibilities in a time of need can also stand *in loco parentis* to a child."[135] For example, the Pennsylvania Superior Court found that a child's aunt and uncle stood *in loco parentis* to a child where the aunt and uncle assumed essentially all parenting responsibility when the child's mother died and the father was largely absent from the child's life.[136] Specifically, the superior court considered that the child stayed with her aunt and uncle for long periods of time, during which they performed parental duties such as enrolling the child in school and taking her to the doctor when necessary.[137] However, where the relative functions more as a babysitter, a court is less likely to find that the relative stands *in loco parentis* to the child.[138]

Pennsylvania courts have indicated that the rights and liabilities arising out of an *in loco parentis* relationship are exactly the same as between parent and child.[139] However, the rights and responsibilities of those acting *in loco parentis* are actually limited in some respects, notably that a child to whom a person stood *in loco parentis* and treated as his or her own child during his or her lifetime is not treated as that person's child for inheritance purposes.[140]

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134. *See, e.g.*, C.G. v. J. H., 193 A.3d 891, 893 (Pa. 2018) (same-sex, unmarried partners); *T.B.*, 786 A.2d at 914-15 (same-sex, unmarried partners); Bupp v. Bupp, 718 A.2d 1278, 1279-80 (Pa. Super. Ct. 1998) (unmarried couple involving mother of two children and father who was biological parent of only one of the children).

135. D.G. v. D.B., 91 A.3d 706, 710 (Pa. Super. Ct. 2014).

136. McDonel v. Sohn, 762 A.2d 1101, 1103 (Pa. Super. Ct. 2000).

137. *Id.* at 1106.

138. *See D.G.*, 91 A.3d at 711 (holding that a grandmother did not stand *in loco parentis* to her grandchild, reasoning that the grandmother's actions of providing occasional shelter, meals, laundry, and transportation to and from medical appointments to her grandchild were more consistent with helping her daughter through a period of need than with assuming the responsibilities of a parent). *See also* Argenio v. Fenton, 703 A.2d 1042, 1044 (Pa. Super. Ct. 1997) (declining to find that a grandmother stood *in loco parentis* to her grandchild, reasoning that the record did not indicate that the grandmother informally adopted the child such that she assumed the rights and obligations of parenthood or that she "intended to be bound to the legal duties and obligations of a parent").

139. *See, e.g.*, *T.B.*, 786 A.2d at 917 (citing Spells v. Spells, 378 A.2d 879, 882 (Pa. Super. Ct. 1977)).

140. *See* Peters v. Costello, 891 A.2d 705, 720 (Pa. 2005) (Eakin, J., dissenting) (noting that pursuant to 20 PA. CONS. STAT. § 2103(1) (2010), a child to whom the decedent stood *in loco parentis* will not be recognized as an heir entitled to a share of the decedent's estate as shares of an intestate estate pass to, among others, issue of the decedent, and there is no provision for a share of the decedent's estate to pass to someone with whom the decedent had an informal relationship).

## V. PENNSYLVANIA'S INTESTACY LAWS SHOULD BE UPDATED TO PROVIDE AN INTESTATE SHARE OF A DECEDENT'S ESTATE TO THOSE OF THE DECEDENT'S ISSUE TO WHOM THE DECEDENT STOOD *IN LOCO PARENTIS*

The increasing number of grandfamilies and the current efforts to assess their needs warrants consideration of updating Pennsylvania's intestacy law to better meet its grandfamilies' needs. Pennsylvania's current law, as applied to grandfamilies, does not meet the overarching objectives of intestacy laws, those being to effectuate decedents' intent and to provide for decedents' surviving family members. Pennsylvania's grandfamilies would be better served if Pennsylvania's intestacy law was updated to provide that those of the decedent's issue to whom the decedent stood *in loco parentis* during the decedent's lifetime take a child's share of the decedent's estate, with the determination of whether an *in loco parentis* relationship existed being based on the totality of a variety of factors.

### *A. Pennsylvania's Current Intestacy Laws as Applied to Grandfamilies Do Not Meet the Objectives of Intestacy Laws*

The reality is that grandparent caregivers are likely to die intestate.[141] Therefore, it is likely that most grandparent caregivers' estates will be distributed according to Pennsylvania's intestacy laws. Under Pennsylvania's intestacy laws, if a grandparent caregiver dies, the grandchild's natural parent is still living, and if the grandfamily arrangement is anything less formal than an adoption, the grandchild, to whom the grandparent is functioning as a parent, does not inherit a share of the grandparent's estate.[142] Yet, a portion of the grandparent's estate does go to the grandparent's child, i.e., the grandchild's natural parent who is not in the picture.[143] This result can lead to dire financial circumstances for the grandchild.[144] Moreover, this result is not in accord with the goals of intestacy laws, which are carrying out the average decedent's intent and providing for a decedent's dependents.[145]

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141. *See supra* Part III.B.
142. *See* Knaplund, *supra* note 100, at 2; Sazonov, *supra* note 36, at 405-06.
143. *See* Knaplund, *supra* note 100, at 2.
144. *See* Wright, *supra* note 107, at 5.
145. *See* Gary, *supra* note 47, at 7-9.

### *1. Decedent's Intent*

The average grandparent caregiver probably would not intend that his or her grandchild, to whom the grandparent functions as a parent, not receive any portion of his or her estate. Moreover, the grandparent caregiver likely would not intend that a portion of his or her estate passes to the grandchild's natural parent, who is not in the picture, while the grandchild receives nothing. Keeping in mind that grandparent caregivers step in to care for their grandchildren out of love and to ensure the grandchildren's wellbeing, the deceased grandparent caregiver probably would have wished for his or her grandchildren to inherit at least a portion of the estate for symbolic and practical reasons.[146] Moreover, it is highly unlikely that a grandparent caregiver would intend that his or her addicted child receive free and clear title to possibly the grandparent caregiver's entire estate without any protective measures to keep the assets from being used to fund the child's addiction as opposed to the grandchild's needs.[147]

### *2. Providing for Family*

Even if grandparent caregivers do not have a will, they may still have valuable assets, such as a house, a car, a bank account, or furniture.[148] Even if these assets are modest, the assets are still valuable to the family members the grandparent caregivers leave behind, especially to children who rely on the grandparent caregivers for support.[149] If these assets are left to the addicted natural parent, it is unlikely the assets will be used to provide for the grandchild for whom the grandparent had been caring, as the reason the grandchild ended up in the grandparent's care in the first place was because his or her needs were not being met by his or her natural parent. Even if a natural parent predeceased the grandparent caregiver, if the natural parent left more than one minor child who relied on the grandparent for support, each grandchild would only receive a fractional share of what the grandparent's other children

146. *See* Sazonov, *supra* note 36, at 412-13.

147. Chris Taylor, *The Financial Toll of Living with a Drug Addict*, NBC NEWS (Dec. 11, 2013, 7:38 AM), https://www.nbcnews.com/businessmain/financial-toll-living-drug-addict-2D11724265. Taylor commented that "sending money to a drug addict is like giving a loaded gun to someone who is suicidal." *Id.*

148. Knapland, *supra* note 100, at 5.

149. *More Than Half of American Adults Don't Have a Will, 2017 Survey Shows*, CARING.COM, https://www.caring.com/articles/wills-survey-2017 (last visited Nov. 24, 2019).

receive as the grandchildren would be further subdividing the share of one child.[150]

### *B. Applying the Doctrine of In Loco Parentis to Pennsylvania's Intestacy Laws*

Pennsylvania's doctrine of *in loco parentis*, which presently confers standing on a grandparent to seek custody of his or her grandchildren, should be translated to the context of Pennsylvania's intestacy laws. Specifically, Pennsylvania's intestacy laws should be modified to provide an intestate share of a grandparent caregiver's estate to a grandchild (or great-grandchild) to whom the decedent stood *in loco parentis*.[151] To that end, the language of Pennsylvania's intestacy statute should be revised to provide for the nearest degree of consanguinity to the decedent to include those of the decedent's issue to whom the decedent stood *in loco parentis* during the decedent's lifetime. This would allow a grandchild to whom the decedent functioned as a parent to inherit a child's share of the decedent's estate.

This proposal would not unduly disrupt the present intestacy scheme because it limits the provision to the decedent's issue (i.e., descendants) who would inherit from the decedent in the first parentela.[152] This does not cause an overreaching result of the child inheriting an intestate share from a relative from a different parentela, such as an aunt or uncle, that the child would not otherwise inherit from except in the unlikely event that there were several empty degrees of consanguinity.

Application of the *in loco parentis* doctrine to Pennsylvania's intestacy laws should employ the same factors that the Pennsylvania courts already consider in the context of custody cases and that have been proposed by the scholars who have made similar proposals. The determination of whether an *in loco parentis* relationship exists should be based on the totality of the circumstances and weight of each of the proposed factors.

The two factors that should be given the greatest weight should be (1) that the grandparent assumed the role of the child's parent during the child's minority and (2) that the grandparent and grandchild lived together.[153] Assuming the role of a parent includes, at a

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150. *See supra* Part III.

151. As previously noted, any reference to "grandchildren" in this article includes grandchildren, great-grandchildren, great-great-grandchildren, and so on.

152. *See* sources cited *supra* note 70 and accompanying text.

153. *See* Megan L. Dolbin-MacNab & Margaret K. Keiley, *Navigating Interdependence: How Adolescents Raised Solely by Grandparents Experience Their Family Relationships*, 58

minimum, providing economic and emotional support for the child.[154] The factors Pennsylvania courts already consider, such as making medical and educational decisions and providing for the child's basic needs, tend to suggest a parent-child relationship, especially when the grandparent is making those determinations and provisions without any input or assistance from the grandchild's natural parent(s).[155] Indeed, a parent-child relationship between a grandparent caregiver and a grandchild is particularly apparent when the grandchild's natural parents are not in the picture at all, whether due to death, abandonment, or other reasons.[156]

The living arrangement should track the family law concept of primary physical custody, which involves having physical possession of a child for the majority of the time.[157] This would suggest that the grandparent was the child's primary caregiver, but would not preclude the finding of an *in loco parentis* relationship if the grandchild still maintained occasional contact and visits with his or her natural parent(s).

Another factor to be given substantial weight is whether the grandparent treated the grandchild as the grandparent treated his or her own children, evidence of which may include, inter alia, imposing moral or religious beliefs, discipline, or assigning responsibilities, such as household chores. Taking responsibility for the

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FAM. REL. 162, 170 (2009) (reporting that results of a study of grandchildren being raised by their grandparents indicated that grandchildren who were raised by their grandparents since infancy equated the bond to a parent-child relationship). This is not to suggest that the grandparent caregiver and grandchild must live together at the time of the grandparent's death, but rather for the time that children typically reside with their parents before moving to live on their own. Notably, by age twenty-seven, ninety percent of children leave their parents' home. *See* Judith G. Dey & Charles R. Pierret, *Independence for Young Millennials: Moving Out and Boomeranging Back*, U.S. BUREAU LAB. STAT. (Dec. 2014), https://www.bls.gov/opub/mlr/2014/article/independence-for-young-millennials-moving-out-and-boomeranging-back.htm.

154. Providing economic and emotional support for the child is in accord with the Pennsylvania Supreme Court's idea that a person who "assum[es] in the child's eye a stature like that of a parent" stands *in loco parentis* to the child. T.B. v. L.R.M., 786 A.2d 913, 917 (Pa. 2001) (quoting J.A.L. v. E.P.H., 682 A.2d 1314, 1320 (Pa. Super. Ct. 1996)). Moreover, economic and emotional support can be considered "vital caregiving functions" which form the basis of a "powerful attachment" between a child and adult caregiver. *See* Robert A. Simon, *The Psychological Impact of Having Multiple "Parents" in a Child's Life*, FAM. ADVOC., Summer 2013, at 35, 36.

155. *See, e.g.*, McDonel v. Sohn, 762 A.2d 1101, 1106 (Pa. Super. Ct. 2000) (finding that a child's aunt and uncle stood *in loco parentis* to the child where the child's natural parents were largely absent from her life, the child lived with the aunt and uncle, and the aunt and uncle provided for the child's needs by, for example, enrolling her in school and taking her to the doctor).

156. Where the grandchild's natural parents are not in the picture, the grandchild would be more likely to view the grandparent in the "stature like that of a parent." *T.B.*, 786 A.2d at 917 (quoting *J.A.L.*, 682 A.2d at 1320).

157. *See* 23 PA. CONS. STAT. § 5322 (2014).

grandchild's development and long-term well-being, as opposed to deferring to the grandchild's natural parent(s) on such matters, would indicate an intent to function as a parent rather than in a more removed role as a grandparent.

As to the factor of holding the child out as the parent's own, it does seem unlikely in the context of a grandfamily that a grandparent would hold the grandchild out as being his or her own child.[158] However, an equivalent may be communicating the grandparent's situation to others by, for example, taking time off work for the child's doctor's appointment or declining a social engagement with friends to attend a function at the child's school.[159] One grandparent caregiver tells her retired peers "who are always telling [her] about their next cruise to Hawaii," that "I go on cruises every day. I cruise to school, I cruise to the doctor's office, I cruise to the skateboarding park."[160]

The duration of the parent-child relationship should be considered because if the relationship spans only days, weeks, or months, the relationship would seem more akin to a grandparent helping his or her own child in a time of need as opposed to functioning as the grandchild's parent. While requiring a fixed, minimum amount of time is simply not feasible, a strong indicator may be whether the duration of the relationship was actually or perceived to be indefinite. The standard should be whether the grandparent expected and/or was prepared to assume the role of the grandchild's parent indefinitely.[161]

A particularly relevant factor would be the extent to which the grandparent provided for the grandchild and to which the grandchild was dependent on the grandparent. Factors relevant to this determination would include whether the grandparent was the primary source of, and thus that the grandchild depended on the grandparent to provide, the grandchild's basic necessities such as

158. It is unlikely because the grandparent and grandchild likely either had a typical grandparent-grandchild relationship prior to the grandfamily arrangement or, even if the grandparent cared for the grandchild since birth, the grandparent likely tried to maintain at least some contact between the grandchild and his or her natural parent(s).

159. Other examples could include buying holiday gifts for the child or hosting birthday parties. On the other hand, some grandparent caregivers may prefer to keep their situation a secret because they do not want their peers to know about their situation which may result in social isolation and depression. GRANDFAMILIES REPORT, *supra* note 1, at 7.

160. *Id.* The grandmother affectionately noted that "Joey is my 'cruise to Hawaii' and you know what, I wouldn't trade my cruise for theirs." *Id.*

161. Evidence that the grandparent intended to assume the role indefinitely could come from the grandparent's own expressions or could include, for example, relocating his or her residence to better accommodate the grandchild.

food, clothing, and shelter. Additionally, a particularly strong indicator that the grandparent intended to provide for the grandchild would be naming the child as a beneficiary on his or her life insurance, joint bank account, or employee benefit plan.[162] Even if the grandparent did not have the knowledge or resources to prepare a will, naming the grandchild on these will-substitutes would be a strong indicator of the grandparent's intent to provide for the grandchild upon the grandparent's death.

Finally, if the grandchild in question is an adult, the fact that the grandparent and grandchild maintained a parent-child relationship after the child reached the age of majority would serve to bolster the conclusion that the grandparent stood *in loco parentis* to the grandchild.[163]

In sum, an *in loco parentis* relationship should be found where the grandparent and grandchild, beginning during the child's minority, lived together as a family unit wherein the grandparent undertook the primary responsibility for providing for the child both during the grandparent's lifetime and in anticipation of death.

### *C. Procedural Considerations*

Substantive application of the *in loco parentis* doctrine to the law of intestacy does not appear to differ greatly from applying the doctrine to the relationship between an adult and a child in child custody disputes, which Pennsylvania courts already have experience doing and a body of case law with which to work. However, by their very nature, custody disputes require the court's involvement and resolution, whereas intestacy laws are usually applied in a much different context.

As discussed in Section III.A, when a grandparent caregiver dies intestate, an estate presumably will need to be opened to transfer his or her property.[164] Opening and administering the estate will presumably involve the assistance of an attorney. It is in this context that the doctrine will generally need to be applied, which begs the question of "how"?

Presumably, a person close to the grandparent will consult with the attorney. When the attorney interviews the person who came

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162. Gary, *supra* note 47, at 81; Wright, *supra* note 107, at 80; Sazonov, *supra* note 36, at 430.

163. This could include the grandchild maintaining regular contact with and even caring for the grandparent in his or her old age.

164. This discussion is limited to the application of the doctrine of *in loco parentis* in the context of an intestate estate. Application of the doctrine in the context of transfers outside of an intestate estate is beyond the scope of this article.

to the attorney for assistance, the attorney may be able to learn of the grandchild in the same way that the attorney would learn of the grandparent's children.[165] For example, the attorney may inquire how many children the grandparent has and whether any of the grandparent's children had predeceased the grandparent. The attorney may also inquire into the grandparent's living arrangements, which may reveal the parent-child relationship with the grandchild.

If there is an indication that a parent-child relationship exists between the decedent and his or her grandchild (or great-grandchild), the determination of whether the grandchild will inherit a child's share of the decedent's estate will begin with the attorney. In this case, the attorney could either (1) treat the grandchild as one of the decedent's children for purposes of estate administration and distribution, (2) seek a declaratory judgment as to the grandchild's status and right to inherit, or (3) treat the grandchild as a grandchild for inheritance purposes.

If the attorney is confident in the existence of a parent-child relationship and chooses the first option, he or she could include the grandchild as an heir entitled to a child's share of the decedent's estate on all filings with the court, including the petition and proposed distribution.[166] This would put the rest of the heirs on notice of the proposed share to be distributed to the grandchild. If the other heirs disagree with a child's share of the estate being distributed to the grandchild, those heirs can object to the proposed distribution, which would bring the issue of the grandchild's status before the court for resolution.[167] Of course, if the other heirs acknowledge the relationship and agree that the grandchild should be treated as the decedent's child for inheritance purposes, the other heirs would simply not object and the grandchild would proceed to inherit a share of the estate as set forth in the proposed distribution.

If the attorney was unsure about the grandchild's status and anticipated a dispute by other heirs, the attorney could preemptively seek a declaratory judgment as to the grandchild's status and right

165. Indeed, depending upon age and various other factors, it may be the grandchild who consults the attorney.

166. The "relationship" on the petition for grant of letters of administration could be listed as "*in loco parentis*" to indicate that the grandchild takes a child's share and to provide the requisite legal support for that determination.

167. PA. SUP. ORPHANS' CT. R. 2.7 (providing that objections may be filed to a proposed distribution).

to inherit under the intestate statute.[168] Filing a declaratory judgment action would bring the matter before the court for resolution.

If the attorney either determined that a parent-child relationship did not exist or was unaware of the relationship, the attorney may treat the grandchild as a grandchild for inheritance purposes. In this case, a grandchild who did have a parent-child relationship with the decedent could seek appropriate relief from the court by objecting to the proposed distribution that the administrator files with the court.[169] This too would bring the matter before the court for resolution.

Notably, the grandchild's status as an intestate heir entitled to a share of the decedent's estate would enable the grandchild to serve as administrator of the decedent's estate and also give the grandchild standing to seek the above relief. If there is any challenge to the grandchild's standing, the court would then have to determine, as a preliminary matter, whether an *in loco parentis* relationship existed, much the same way as the court has done in deciding whether a grandparent has standing to seek custody.[170]

In sum, if all of the decedent's heirs agreed that the grandchild should take a child's share, to effectuate that distribution, the administrator of the estate, presumably through an attorney, would need only to provide that the grandchild take a child's share of the estate in the documents filed in administering the estate. On the other hand, if any of the heirs disagreed with the proposed distribution to the grandchild, whether it be the decedent's other heirs or the grandchild, the matter would find its way to the court for resolution through one of several avenues.

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168. *See* 42 PA. CONS. STAT. § 7533 (2015) (providing that "[a]ny person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder").

169. The proposed statutory provision including the grandchild as an heir entitled to take in the first degree of consanguinity would also confer standing on the grandchild to object as a party in interest. The inherent problem with this is that if the grandchild is still a minor and relying on the grandparent for support, the grandchild is likely not familiar with his or her rights under the law so as to be able to recognize the issue and seek enforcement of his or her rights. However, presumably, upon the grandparent's death, an adult other than the minor child's absentee natural parent(s) will take over caring for the child. Presumably this adult, even if for no other reason than need of resources to care for the child he or she is now responsible for, will already be aware of or discover the child's right to inherit from the grandparent based on the child's relationship with the grandparent. A discussion of the procedure by which the adult would enforce the child's right to inherit on the child's behalf and the rules surrounding the distribution of money to minors are beyond the scope of this article.

170. *See supra* note 130 and accompanying text.

## VI. CONCLUSION

Pennsylvania has a growing population of grandfamilies as a result of the ongoing opioid epidemic. Pennsylvania's lawmakers have recently undertaken efforts to assist Pennsylvania's grandfamilies, but one issue that still requires lawmakers' attention is the ill fit of Pennsylvania's outdated intestacy laws to this growing number of non-traditional families. Under Pennsylvania's current intestacy laws, when a grandparent caregiver who functioned as a parent to his or her grandchild during his or her lifetime passes away, the grandchild will likely be left with nothing. That is because Pennsylvania's current rigid intestacy laws provide that where the grandparent caregiver's child (i.e., the grandchild's natural parent) is still living, the grandchild, who is further down the line of descent, is cut off from inheriting from the grandparent's estate, despite having a parent-child relationship with the grandparent, while the grandchild's natural parent, who is not willing or able to care for the child, does receive an inheritance, which will likely not be used to care for the grandchild. This result is not only unjust, but frustrates the goals of intestacy laws, namely effectuating decedents' intent and providing for decedents' surviving family members.

This unjust result can be avoided by updating Pennsylvania's intestacy laws to provide a child's share of a decedent's estate to those of the decedent's issue to whom the decedent stood *in loco parentis*. This revision would come closer to achieving most decedents' intent to provide for their families. Additionally, this revision likely would not be overly burdensome to Pennsylvania's courts as they have already considered and applied the *in loco parentis* doctrine in other family-related contexts. In light of Pennsylvania's increasing number of grandfamilies, and lawmakers' apparent desire and efforts to help these families, the time to update Pennsylvania's outdated intestacy laws is now.