Recovery By Stepchildren in Wrongful Death Actions

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I. INTRODUCTION

Approximately one divorce is granted for every two marriages performed in the United States.¹ Three out of every four divorced women and five out of every six divorced men will remarry.² As a result, stepparent-stepchild relationships are becoming increasingly commonplace. This trend is reflected in the following statistics. In 1982 twenty-five percent of American children did not live with both biological parents, and this figure was expected to rise to forty percent by 1990.³ In 1985 one of every five American married couples with children had a stepchild residing with them.⁴ In a recent survey, seventy-two percent of American children of divorced parents included their resident stepfather when asked to name the members of their family.⁵

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¹ During the one-year period ending March 31, 1988, an estimated 2,397,000 couples married and 1,167,000 couples divorced according to the National Center for Health Statistics, U.S. Dep't of Health and Human Services. THE WORLD ALMANAC AND BOOK OF FACTS 806 (Mark S. Hoffman ed., 1989).

² Frank F. Furstenberg, Jr. & Christine W. Nord, Parenting Apart: Patterns of Childrearing After Marital Disruption, 47 J. MARRIAGE & FAM. 893, 893 (1985) (citing Paul C. Glick, Marriage, Divorce, and Living Arrangements: Prospective Changes, 5 J. FAM. ISSUES 7 (1984)).

³ Katharine T. Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed, 70 VA. L. REV. 879, 880-81 (1984). Others have estimated that almost half of all children will not live with both their biological parents continuously through childhood. Furstenberg & Nord, supra note 2, at 894.

⁴ U.S. Census Bureau data as reported in THE PHILADELPHIA INQUIRER, Feb. 5, 1990, at D1. This statistic converts to 4,425,000 two-parent families with resident stepchildren. Furthermore, estimates indicate that 25% of all American children live, or will live, in families that include a stepparent. Elizabeth J. Aulik, Comment, Stepparent Custody: An Alternative to Stepparent Adoption, 12 U.C. DAVIS L. REV. 604, 604-05 (1979) (citing D. MAYLEAS, REWEDDED BLISS 7 (1977)).

⁵ Furstenberg & Nord, supra note 2, at 899. What is more startling is that in the same survey only 50% of the children regarded their noncustodial biological parent as a member of their family. Id.
These changing demographics have a significant economic impact upon America's children. Barely half of the custodial parents awarded child support received the full amount of the support due them during 1987, while almost one-quarter received no payment at all. Those parents fortunate enough to actually receive support are often grossly underpaid. In 1987 the mean amount of child support received by custodial parents was $2,710 annually. This figure equates to approximately $226 per month in child support assistance. When support is either nonexistent or inadequate, the burden of supporting the child rests with the resident family, including the custodial parent and resident stepparent, if any.

While these statistics should not shock the informed reader, the facts raise questions about the ability of our legal system to respond to these societal changes. One issue worth considering is how our tort system, which consists primarily of judge-made law, is or should be adapting to these evolving demographics. This Article examines one segment of this broad problem: Recovery by stepchildren for the wrongful death of their stepparents.

Unlike most tort actions, wrongful death actions are based primarily on statutes. As in all statutory actions, courts must interpret the underlying wrongful death act when presented with situations that either are not addressed explicitly in the statute or that may not have been contemplated by the enacting legislators. Therefore, this Article will analyze both what the judicial and legislative response to the increasing number of relationships by

7. Id.
8. Support is provided on both a financial level and an emotional level. See Bartlett, supra note 3, at 881 & n.10. In the eyes of their spouse and the children, stepparents are an integral part of parenting. An overwhelming majority of remarried custodial parents are satisfied with the level of assistance they receive in parenting from their current spouse (the stepparent). Furstenberg & Nord, supra note 2, at 900-01. Most stepfamilies develop strong emotional ties. In one study, 82% of 88 stepfamilies surveyed reported excellent or good stepparent-stepchild relationships. Lucile Duberman, The Reconstituted Family: A Study of Remarried Couples 50, tbl. 5.3 (1975). See also Lawrence H. Ganong & Marilyn Coleman, The Effects of Remarriage on Children: A Review of the Empirical Literature, 33 Fam. Rel. 389 (1984) (analyzing 38 empirical studies).
10. The first wrongful death actions in the United States were patterned after Lord Campbell's Act (Fatal Accidents Act) 1846, 9 & 10 Vict., ch. 93 (Eng.). W. Page Keeton et al., Prosser and Keeton on the Law of Torts 946 (5th ed. 1984). However, wrongful death actions were not unknown at common law. See infra notes 25-43 and accompanying text.
affinity has been and what it should be. Ultimately, this Article seeks to reconcile the two responses to determine whether stepchildren can be protected by the wrongful death statutes as currently written.

II. Common-Law Background

Wrongful death statutes were adopted in the nineteenth century to cure the perceived inequity of the common law. In 1808 Lord Ellenborough, at nisi prius, decided Baker v. Bolton, the case that would be the cornerstone of future cases denying recovery for wrongful death at common law. Lord Ellenborough stated, without citation of authority, that no cause of action for death could lie at common law. The distinguished jurist did not explain the reasoning behind this pronouncement. However, several bases for the decision have been advanced. Some courts and commentators have postulated that the felony merger doctrine was the early basis for the rule, because most acts resulting in wrongful death during Lord Ellenborough's time amounted to felonies.

11. "Relation which one spouse because of marriage has to blood relatives of the other . . . . The husband has the same relation, by affinity, to his wife's blood relatives as she has to them by consanguinity and vice versa." BLACK'S LAW DICTIONARY 54 (5th ed. 1979).

12. Nisi prius is roughly equivalent to our trial court level. See THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 165-67 (1956). Justices of nisi prius journeyed to outlying English counties to preside over the trial and receive the jury verdict. Id. at 166-67.

13. 170 Eng. Rep. 1033, 1033 (1808). The report of Baker v. Bolton was a reporter's synopsis of the judge's jury instruction at trial on the issue of damages for the death of the wife as opposed to damages incurred by the widower before his wife's death. Id. The jury was allowed to consider only the damages arising from the time of the accident to the moment of the wife's death. Id.

14. Id. Two earlier cases, Smith v. Sykes, 89 Eng. Rep. 160 (1677) and Higgins v. Butcher, 80 Eng. Rep. 61 (1606), held that no civil recovery could be made for death caused by a felony because the offense was criminal in nature and therefore, an offense against the Crown. Neither case considered recovery for death caused by nonfelonious actions.

15. As reported, the case says no more than that death cannot be complained of as an injury in a civil court. Baker, 170 Eng. Rep. at 1033.

16. See, e.g., Wex S. Malone, The Genesis of Wrongful Death, 17 STAN. L. REV. 1043, 1043 (1965). The felony merger doctrine arose in Anglo-Saxon England when felons were punished by forfeiture of all possessions or by execution for the crime of murder. Id. at 1055-57. The theory behind the felony merger doctrine was that the private wrong occasioned upon the victim merged with the offense against the Crown. Higgins, 80 Eng. Rep. at 61. Several American courts recognized that this doctrine may have been at the basis of Lord Ellenborough's decision in Baker, although each court rejected the application of the felony merger doctrine in their jurisdiction. See, e.g., Plummer v. Webb, 19 F. Cas. 894, 895-96 (D. Me. 1825) (No. 11, 234); Carey v. Berkshire R.R. Co., 55 Mass. (1 Cush.) 475, 477-78 (1848); Hyatt v. Adams, 16 Mich. 180, 185-89 (1867).
American courts have generally rejected this doctrine. Scholars and courts have advanced other reasons as well for the common-law rule denying recovery for wrongful death. Practicality suggested several reasons underlying the rule: difficulties in proof, the potential for an unjust result with one party to the incident dead, and the impossibility of recovery in a civil action due to the forfeiture of all possessions to the Crown upon the commission of a felony. Finally, at least one court reasoned that only barbarous societies would permit recovery for death.

Interestingly, no American or English case cited or relied on Baker v. Bolton for forty years. During that time, one American court even acknowledged the viability of a wrongful death suit, while no court denied recovery. After forty years, however, courts on both sides of the ocean suddenly seized upon Lord Ellenborough's declaration as if it had been carved on a holy stone tablet. At least one state that had formerly permitted recovery in death actions overruled earlier decisions on the authority of Baker v. Bolton. Over the years, the courts have routinely accepted, with-


20. The Michigan Supreme Court in Hyatt reasoned that Christian nations hold human life most sacred while "barbarous and half civilized nations" placed a price on death based on social rank of the victim. Id. at 191. The court characterized the placing of a price on human life as "revolting." Id. at 192.

21. Plummer, 19 F. Cas. at 896.


out thorough analysis, that recovery for wrongful death was unavailable at common law.24

However, despite most courts' declarations to the contrary, monetary recovery for death was possible at common law.25 In early Anglo-Saxon law, vengeance for a person's death was appeased by a monetary payment to the deceased's family.26 The amount paid (wer) was based on the status and rank of the deceased.27 Additionally, reparations (wite) were paid to the sovereign for breach of the peace.28 This system gradually evolved into one more criminal in nature, with payment only going to the King and not the deceased's family.29 Families used the threat of making an appeal of felony to the King to receive compensation from the perpetrator for the death.30 As forfeiture of all possessions upon a felony conviction became the law in England, the perpetrator's poverty became a practical bar to financial recovery by the survivors.31

In the American colonies, the common law also provided for compensation for death.32 In William Penn's colony, the victim's family received one-third of the felon's estate.33 Criminal punishments often included compensation to victims or their families as well as fines.34 In Massachusetts, families were compensated within the criminal proceeding.35 In post-colonial America, several courts


26. Id. at 1055.

27. Id.

28. Id.

29. Id.


32. Id. at 1062-66.

33. Id. at 1062.

34. Id. at 1063.

35. Id. at 1064.
permitted actions for wrongful death prior to the enactment of the first wrongful death act.\textsuperscript{36} Moreover, until 1848, no American court had denied recovery for wrongful death.\textsuperscript{37}

In the 1794 case, \textit{Cross v. Guthery},\textsuperscript{38} the Connecticut Supreme Court permitted a husband's recovery for his wife's wrongful death caused by the negligence of a surgeon retained by the husband to treat her. The court rejected the defendant-surgeon's contention that his acts amounted to a felony, and that the civil action thus merged with the public offense to deny recovery.\textsuperscript{39} The court held instead that the felony merger doctrine applied, if at all, only to capital crimes and did not preclude recovery in this malpractice case.\textsuperscript{40} Several state courts later agreed with the Connecticut court's rejection of the felony merger doctrine and permitted recovery for damages resulting from a family member's death in the absence of a wrongful death statute.\textsuperscript{41} In an early maritime case, \textit{Plummer v. Webb},\textsuperscript{42} Judge Ware acknowledged the existence of a father's cause of action for his own damages occasioned by the battery and resulting death of his son. The court held that the death did not preclude recovery, but aggravated the damages sustained by the father.\textsuperscript{43}

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\item \textsuperscript{36} Plummer v. Webb, 19 F. Cas. 894, 896-97 (D. Me. 1825) (No. 11,234); Cross v. Guthery, 2 Root 90 (Conn. 1794) (a cause of action lies by husband against doctor for negligent operation on wife despite her death); Shields v. Yonge, 15 Ga. 349, 355, 357 (1854) (father has, in absence of statute, a cause of action for death of son who rendered services to the father); James v. Christy, 18 Mo. 162, 164 (1853) (father has cause of action for death of son); Lynch v. Davis, 12 How. Pr. 322 (N.Y. Rens. Spec. Term 1855); Ford v. Monroe, 20 Wend. 210, 211 (N.Y. Cir. 1853) (father could recover for loss of services of child due to child's death); Button v. Godfrey, 4 Records & Files of the Quarterly Courts of Essex County, 1667-71 (1914). \textit{Lynch} and \textit{Ford} were overruled in Greer v. Hudson River R.R. Co., 41 N.Y. 294, 28 Barb. 9, 20 (1858), \textit{aff'd}, 2 Abb. App. Dec. 277 (1866).
\item \textsuperscript{37} Carey v. Berkshire R.R., 55 Mass. 475 (1848), is the first reported case in the United States that denied civil recovery for death. See Malone, \textit{supra} note 16, at 1067-72.
\item \textsuperscript{38} 2 Root 90 (Conn. 1794).
\item \textsuperscript{39} \textit{Id.} at 92.
\item \textsuperscript{40} \textit{Id.} Although the opinion does not state whether the case was maintained in tort or contract, it would appear from the allegations of the plaintiff's pleadings, as related by the court, that the action sounded in contract. \textit{Id.} at 91.
\item \textsuperscript{41} Shields v. Yonge, 15 Ga. 349, 357 (1854); Lynch v. Davis, 12 How. Pr. 322 (N.Y. Rens. Spec. Term 1855); Ford v. Monroe, 20 Wend. 210, 211 (N.Y. 1853).
\item \textsuperscript{42} 19 F. Cas. 894, 895-96 (D. Me. 1825) (No. 11,234).
\item \textsuperscript{43} \textit{Id.} at 896. While recognizing the existence of the right, the court found that under the circumstances of the case, the father could not recover because he had placed his son in the hands of the master of a ship for training and service. Under their agreement, the father was not entitled to any compensation for the son's services unless the master chose to provide compensation at the end of two voyages. Since the father was not entitled to the son's services or compensation for those services at the time of his death, the damages due to the loss of services occasioned by the death flowed to the defendant, master of the ship. Therefore, the boy's father had sustained no actual damages. \textit{Id.} at 897.
\end{itemize}
Courts that accepted the law as stated in *Baker v. Bolton* either rejected these cases as aberrant or distinguished them as not holding what they apparently held: that recovery could be had for wrongful death in the absence of a wrongful death statute. Some courts acknowledged the harshness of this perceived rule, but felt that it was beyond their power to correct. By routinely accepting the premise that wrongful death statutes are in derogation of the common law, American courts have laid the groundwork for strict construction and narrow interpretation of the statutes when such

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45. See, e.g., Greer v. Hudson River R.R., 41 N.Y. 294, 28 Barb. 9, 20 (Sup. Ct. Spec. 1858), aff'd, 2 Abb. App. Dec. 277 (N.Y. 1866). In Greer, the court reasoned that *Ford v. Monroe* did not really hold that a father could recover damages caused by the death of a child. *Id.* at 20-21. The court reasoned that since such a decision could not be supported in the law, the case could not have meant to permit such a recovery. *Id.* at 21.

46. Major v. Burlington C.R. & N. Ry., 88 N.W. 815, 816 (Iowa 1902); Grosso v. Delaware, L. & W.R.R., 13 A. 233, 235 (N.J. 1888) (regardless of the current inapplicability of reasons for the rule, it is "so crystallized as to be immovable except by legislative power"); *Greer*, 41 N.Y. 294, 28 Barb. at 15. One must question why a court cannot reject judge-made law as inequitable and unsound. If the courts have the power to create such an unfair law, it would seem that the courts have the power to abolish such a law. Hawaii did just that in rejecting the British common-law rule as "harsh" and as having its "origin in feudal times" and in finding that a common-law action for death was "consonant with natural law and reason." *Kake v. Horton*, 2 Haw. 209, 212 (1860). For a thorough analysis of the history of the common-law rule and ultimate rejection of it, see *Moragne*, 398 U.S. at 381-88 (overruling The Harrisburg, 119 U.S. 199 (1886), and finding a cause of action for death under general maritime law).

47. Several courts have held that wrongful death statutes, being in derogation of the common law, must be strictly construed. Limbaugh v. Woodall, 175 S.E.2d 135, 138 (Ga. Ct. App. 1970); *In re Estate of Edwards*, 435 N.E.2d 1379, 1382 (Ill. App. Ct. 1982); *Thornburg v. American Strawboard Co.*, 40 N.E. 1062, 1063 (Ind. 1895); Flores v. King, 282 A.2d 521, 523 (Md. 1971). For an example of a court's stretching strict construction of a wrongful death act almost beyond the bounds of logic, see *Nebeker v. Piper Aircraft Corp.*, 747 P.2d 18 (Idaho 1987) (recovery to children of mother-decedent denied as she was survived by husband and did not leave $50,000 in separate property; therefore, children would not inherit from her estate and thus were not her "heirs" for wrongful death). *But see* Wycko v. Gnodtke, 105 N.W.2d 118, 122 (Mich. 1960) (wrongful death statutes, though in derogation of the common law, should be liberally construed to effectuate their remedial purpose); Ferguson v. Orr, 427 N.E.2d 732, 734-35 (Minn. Ct. App. 1988) (wrongful death statutes are remedial; therefore, the court has a duty to liberally construe them in light of current social conditions); Gray v. Goodson, 378 P.2d 413, 415 (Wash. 1963) (wrongful death statute is remedial in nature and should be liberally construed). For a discussion of the many different rules of statutory construction available to judges to justify their decisions, see Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed, 3 VAND. L. REV. 395, 401-06 (1940) (noting that for almost every rule of statutory construction, there is a rule available to justify the opposite construction as well).
construction is not mandated by the history or purpose of wrongful death recovery.

III. Wrongful Death Legislation

Although the majority of courts refused to permit common-law recovery for wrongful death after 1850, certain societal changes heightened the need for recompense for tortiously caused death—the Industrial Revolution and the advent of the railroad.\(^{48}\) Workplace injuries, derailments, and other train accidents replaced felonious killings and occasional carriage accidents as the basis of death claims.\(^{49}\) American legislatures looked to the example set by the British for an answer to the increased need for wrongful death recovery. The British Parliament, in response to the perceived harshness of the courts' rejection of wrongful death actions, passed the Fatal Accidents Act, commonly known as Lord Campbell’s Act, in 1846.\(^{50}\) Lord Campbell’s Act permitted recovery for the damages sustained as a result of the death to the same extent that recovery could have been had, if death had not ensued.\(^{51}\) Soon thereafter, the American states began to follow suit. Most early American acts were patterned, directly or indirectly, after the British Act.\(^{52}\)

A. Purpose of Wrongful Death Recovery

The early statutes and their predecessors were adopted to ameliorate the harsh results of cases denying recovery, by providing a remedy to those damaged by tortiously caused death. The modern trend in the United States has been to broaden recovery for wrongful death in furtherance of this purpose. In recent years,

\(^{48}\) Hyatt v. Adams, 16 Mich. 180, 192 (1867); Rowe v. Richards, 151 N.W. 1001, 1003 (S.D. 1915); Smedley, supra note 18, at 623-24. This is also obvious from a cursory review of the titles of the majority of wrongful death cases of the times. See cases cited supra notes 23-24. The dearth of wrongful death case law was to be expected in the agrarian society existing before the Industrial Revolution.


\(^{50}\) 9 & 10 Vict., ch. 93 (Eng.).

\(^{51}\) 9 & 10 Vict., ch. 93, § 1 (Eng.). This Act has been amended several times since its enactment, most recently in 1976. See Fatal Accidents Act 1976. Each version has generally provided for recovery of pecuniary damages by dependent relatives of the deceased.

\(^{52}\) E.g., Va. Rev. Code, ch. 145, p. 996 (1873); Walker v. Walker, 350 S.E.2d 547, 549 (W. Va. 1986) (West Virginia’s wrongful death act patterned after Lord Campbell’s Act), see also W. Page Keeton et al., supra note 10, at 946.
states have expanded both the number of persons permitted to recover as well as the items of damages recoverable. This trend is consistent with the generally recognized purpose of wrongful death acts: to shift losses from an innocent survivor to the wrongdoer. Most courts focus on the compensatory and remedial nature of the statutes. Courts have variously held that the purpose of a wrongful death act is: (1) to provide a remedy to the decedent’s family for loss of maintenance and assistance occasioned by the death; (2) to allow suit by those persons most likely affected by the death; (3) to provide support after death.


54. Early death statutes only permitted recovery for pecuniary loss. See, e.g., Va. REV. CODE, ch. 145, p. 996 (1873); 1883 Fla. Laws, ch. 3439, §§ 1-2 forming the basis of **FLA. STAT. §§ 768.01-.03** (1967). Many states still only permit recovery for pecuniary loss. *E.g.*, Ill. ANN. STAT. ch. 70, ¶ 2 (Smith-Hurd 1989); Minn. STAT. ANN. § 573.02 (1988); Neb. REV. STAT. § 30-810 (1989). A growing number of states now permit recovery, at least to some extent, for noneconomic damages, such as loss of consortium, companionship, mental anguish, and grief. *E.g.*, Ark. CODE ANN. § 16-62-102 (Michie 1987); Colo. REV. STAT. § 13-21-203 (1989) (noneconomic loss limited to $250,000); Del. Code Ann. tit. 10, § 3724 (1988); Fla. STAT. § 768.29 (1989); Kan. STAT. ANN. § 60-1903 (Supp. 1991) (nonpecuniary damages limited to $100,000); Me. REV. STAT. ANN. tit. 18A, § 2-804 (West Supp. 1989) (damages for comfort, society, and companionship limited to $75,000); Or. REV. STAT. § 30.020 (1989) (pecuniary damages and loss of society, companionship, and services to surviving spouse and children); W. Va. Code § 55-7-6 (1989); see also Selders v. Armentrout, 207 N.W.2d 686, 688-89 (Neb. 1973) (extended recovery for death of child from value of services expected of child less cost of raising child, to include recovery for loss of child’s services, society, comfort, and companionship).

55. *E.g.*, FLA. STAT. ANN. § 768.17 (West 1986).


of a parent;\textsuperscript{59} and (4) to compensate those who suffer a direct loss due to the tortiously caused death.\textsuperscript{60} Although a majority of the courts emphasize the remedial nature of the statutes, a few courts do not ascribe to the remedial purpose behind the wrongful death acts and instead view the statutes more as a means of civil punishment.\textsuperscript{61}

Notwithstanding the compensatory purpose of wrongful death statutes, courts do not permit all persons damaged by the death to recover damages.\textsuperscript{62} Courts have rejected the claims of children by equitable adoption,\textsuperscript{63} parents by equitable adoption,\textsuperscript{64} meretricious spouses,\textsuperscript{65} fiancées,\textsuperscript{66} common-law spouses,\textsuperscript{67} former

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\item \textsuperscript{59} See Jordan v. Delta Drilling Co., 541 P.2d 39, 46 (Wyo. 1975).
\item \textsuperscript{61} See, e.g., Wilson v. Smith, 267 So. 2d 446, 446 (Ala. 1972) (wrongful death act intended to punish wrongdoer, not to compensate, and thereby prevent wrongfully caused deaths); State Docks Comm'n v. Barnes, 143 So. 581 (Ala. 1932) (wrongful death act intended to punish wrongdoer, not to compensate, and thereby prevent wrongfully caused deaths); Smith v. Louisville & Nashville R.R., 104 Ala. 449, 450 (1883) (wrongful death action highly penal in its terms and must be construed as penal statute); Wilson v. Wylie, 518 P.2d 1213, 1223 (N.M. Ct. App. 1973) (Sutin, J., dissenting in part) (purpose of wrongful death act is more than compensation; purpose is also to promote safety and deter wrongful conduct causing death); McKirdy v. Cascio, 111 A.2d 555, 557 (Conn. 1955) (civil liability for wrongful death is one of the consequences of causing death; damages not based upon any loss suffered by the family).
\item \textsuperscript{66} See Nieto v. City of Los Angeles, 188 Cal. Rptr. 31, 34 (Ct. App. 1982).
\item \textsuperscript{67} Tidewater Marine Towing, Inc. v. Curran-Houston, Inc., 785 F.2d 1317, 1320 (5th Cir. 1986) (common-law wife not recognized under Louisiana law is unable to recover for death under general maritime law); Aspinall v. McDonnell Douglas Corp., 625 F.2d 325, 327 (9th Cir. 1980) (applying California law); In re Paris Air Crash, 420 F. Supp. 880, 881 (C.D. Cal. 1976) (court dismissed case because no allegation was made that a common-law wife would qualify as a putative spouse); Bell v. Tug Shrike, 215 F. Supp. 377, 380
spouses,\textsuperscript{68} and corporations.\textsuperscript{69} Courts have denied these claims for various reasons including the belief that wrongful death statutes are in derogation of the common law and thus, must be strictly construed,\textsuperscript{70} and the lack of the necessary legal relationship between the claimant and decedent.\textsuperscript{71} Stepchildren are substantially different from the members of these classes, however, because stepchildren are often dependent upon their stepparent and have a legally recognized relationship with the deceased.

Courts frequently consider dependency a criterion for determining who may recover in a wrongful death action.\textsuperscript{72} Dependence usually connotes pecuniary benefit but need not be confined to actual monetary support.\textsuperscript{73} For example, dependence may involve reliance upon another for services, such as those a parent provides a child.\textsuperscript{74} Dependence has been defined broadly as a need on the part of one that is recognized by another.\textsuperscript{75} Thus, strict legal dependency, in the sense of a legally enforceable obligation of support, is generally not required for recovery in wrongful death


70. See, e.g., Limbaugh v. Woodall, 175 S.E.2d 135, 138 (Ga. Ct. App. 1970); Whitchurch v. Perry, 408 A.2d 627, 638 (Vt. 1979) (equitable adoption status does not equate to next of kin relationship necessary to maintain action).

71. E.g., Nieto v. City of Los Angeles, 188 Cal. Rptr. 31, 33-34 (Ct. App. 1982) (unmarried cohabitants are excluded from bringing a wrongful death action); Grant v. Sedco Corp., 364 So. 2d 774, 775 (Fla. Dist. Ct. App. 1978) (nature of equitable adoption forms contract right, not parent-child relationship).

72. In Domijan v. Harp, 340 S.W.2d 728, 734 (Mo. 1960), the Supreme Court of Missouri stated that, "[T]he test of the right of recovery under our death statutes is the reasonable probability of pecuniary benefit from the continued life of the deceased, or a pecuniary injury from the death . . . ."; see also Florida Wrongful Death Act, FLA. STAT. ANN. §§ 768.16-768.27 (1989); MacDonald v. Quimby, 85 N.W.2d 157, 163 (Mich. 1957) (wrongful death action for death of son who contributed to mother's support). Dependency is not the sole criterion, however. Parents are generally permitted to recover the loss of services, society, comfort, and companionship resulting from the death of their minor child even though they are not dependent upon the child. Selders v. Armentrout, 207 N.W.2d 686, 688-89 (Neb. 1973). \textit{See generally} Florida Wrongful Death Act; MICH. COMP. LAWS ANN. § 600.2922 (1986).


As noted above, stepchildren frequently depend upon their stepparent. Although stepchildren do not have a legally enforceable claim for support from their stepparents at common law, they may have an enforceable claim if provided for by statute or by the courts. Even without an enforceable claim for support against their stepparent, stepchildren are typically dependent in fact on their stepparents because they are members of the same family unit.

The use of dependence in fact as a threshold requirement for recovery by stepchildren is consistent with the goals and purposes of wrongful death statutes and the case law construing them.

76. Novak v. Chicago & Calumet Dist. Transit Co., 135 N.E.2d 1, 3 (Ind. 1956); Domijan, 340 S.W.2d at 734; Wente v. Shaver, 169 S.W.2d 947, 954 (Mo. 1943); Bond v. City of Huntington, 276 S.E.2d 539, 544 (W.Va. 1981).

77. Duval v. Hunt, 15 So. 876, 880-81 (Fla. 1894); Burgh v. Carroll, 217 So. 2d 353, 354-55 (Fla. Dist. Ct. App. 1969); Bond, 276 S.E.2d at 544 n.5; see Craig, supra note 73, at 225.

78. See supra notes 6-8 and accompanying text.

79. Hereinafter, dependence is used to mean dependence in fact for financial or emotional support or services.

80. Johnson v. Midland Constructors, Inc., 11 So. 2d 895, 896 (Fla. 1943) (once a stepparent accepts the stepchild into the home, treats the child as their child, and assumes the support of the stepchild, the duty of the stepparent to support that child is the same as the duty toward a biological child); Kelley v. Iowa Dep't of Social Servs., 197 N.W.2d 192, 199 (Iowa 1972) (holding under common law that stepparent living with stepchild has obligation of support); Niesen v. Niesen, 157 N.W.2d 660, 664 (Wis. 1968) (stepfather who takes child into his family and places child under his care evidencing his intent to assume the position of father may assume obligation of support). The support obligation is generally limited to the time period in which the child remains in the stepparent’s home. Franklin v. Franklin, 253 P.2d 337, 340 (Ariz. 1953). Some states have imposed a statutory obligation on a stepparent to support their stepchild during the duration of the marriage. E.g., DEL. CODE ANN. tit. 13, § 501(b) (1981); ILL. REV. STAT. ch. 68, ¶ 51-52 (1991); IOWA CODE §§ 252A.2 (1985), 252A.3 (Supp. 1990); MO. REV. STAT. § 568.040 (1986); NEB. REV. STAT. § 28-705 (1989); N.H. REV. STAT. ANN. §§ 546-A:1 (IV), 546-A:2 (1976); N.J. REV. STAT. §§ 9:6-2, 9:6-8.21 (Supp. 1990); OR. REV. STAT. § 109.053 (1989); S.C. CODE ANN. §§ 20-7-30, 20-7-40 (Law. Co-op. 1989); S.D. CODIFIED LAWS ANN. § 25-7-8 (1984); UTAH CODE ANN. § 78-45-4.1 (1987); VT. STAT. ANN. tit. 15, § 291 (Supp. 1989); WASH. REV. CODE ANN. § 26.16.205 (West 1983). Two states impose the obligation of support if the stepchild is in need. ALASKA STAT. § 47.25.320 (1990); N.Y. FAM. CT. ACT § 415 (McKinney 1983). See also Janet M. Riley, Stepparents’ Responsibility of Support, 44 LA. L. REV. 1753 (1984); Patricia J. Lamkin, Annotation, Validity, Construction, and Application of Statute Imposing Upon Stepparent Obligation to Support Child, 75 A.L.R.3d 1129 (1977).

81. In In re United States, 418 F.2d 264 (1st Cir. 1969), the First Circuit Court of Appeals when considering the loss suffered by a stepchild for the death of the stepparent, ably noted, “Whether such a loss is suffered has nothing to do with whether the relationship is one of blood or of affinity.” Id. at 271.
Requiring either a legal obligation to support on the part of the deceased stepparent or dependence in fact as a precondition to a stepchild's recovery, protects those who have suffered the most and yet does not undermine the aim of compensating minor stepchildren who have sustained actual damages due to their stepparent’s death. Thus, to allay concerns over subjecting the courts to a flood of frivolous claims, recovery can logically be limited to stepchildren who have an established parent-child relationship with and dependence upon the deceased.

Yet, dependence alone is insufficient to differentiate between the classes of persons entitled to recover and those denied recovery. Membership in a class to whom recovery has been denied may depend upon the deceased’s relation to the claimant, particularly in the situation of equitably adopted children. Beyond dependence, then, courts and legislatures generally also require a legally recognized relationship between the claimant and decedent. This

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82. This argument is not a persuasive basis for denying all claims by stepchildren. A step-relationship is easily established, unlike relationships such as that of a meretricious spouse or an equitably adopted child, which require subjective proof on the threshold issue of whether a relationship exists. Furthermore, judges (through the devices of summary judgment and directed verdict) and juries weed out frivolous claims as a matter of course. A jury has no more difficulty in determining if a dependent stepchild has suffered damages than in determining whether a biological or adopted child has. Denial of recovery to prevent frivolous claims merely provides protection for the wrongdoer at the expense of the innocent survivors.

83. See supra notes 63-69.

84. One court has noted that the dependence by stepchildren is peculiarly different from dependence by one adult on another, in this instance, a fiancée. Nieto v. City of Los Angeles, 188 Cal. Rptr. 31, 34-35 (Ct. App. 1982). In comparing stepchildren to a meretricious spouse, the court said, “Children are a particularly vulnerable class in their dependency; in no manner are they similarly situated with unmarried adults who choose to cohabit, whatever level of dependency such adults contract for. It is entirely reasonable for the Legislature to draw a distinction between dependent children and dependent unmarried cohabiting adults.” Id.

85. An equitable or virtual adoption may be recognized in equity when prospective parent(s) obtain custody of a child based on a contract or agreement to adopt. The child acts and is treated as a child of the prospective parent(s) but for some reason (typically neglect on the part of the prospective parents) a legal adoption is never consummated. In re Estate of Wilson, 168 Cal. Rptr. 533, 536 (Ct. App. 1980); Whitchurch v. Perry, 408 A.2d 627, 631 (Vt. 1979). Under the doctrine of equitable adoption, equity will regard as done what ought to have been done and permit the innocent child to recover under the laws of intestacy. Id. at 535; see also Note, Equitable Adoption: They Took Him into Their Home and Called Him Fred, 58 VA. L. REV. 727 (1972).

86. The courts’ focus in reviewing the claims of meretricious spouses or affianced persons appears to be with their perception of the legislatures’ intent to promote the formal (legal) institution of marriage. See Vogel v. Pan Am. World Airways, Inc., 450 F. Supp. 224, 226 (S.D.N.Y. 1978); Nieto, 188 Cal. Rptr. at 34. Courts denying recovery to equitable
precondition to recovery is motivated at least in part, by perceived problems of proof and the courts’ deference to the legislature. The courts’ constraining deference may be due to several factors: the perception that wrongful death statutes derogate the common law and thus must be strictly construed; the view that the legislature has created a new cause of action where none had existed at common law; or the belief that because the legislature has occupied the field, courts cannot expand the classes of persons entitled to recover.

The reasonableness and appropriateness of this threshold relationship requirement need not be addressed because the law recognizes the stepparent-stepchild relationship and its incumbent rights and obligations. A review of the treatment of stepchildren in other areas of the law demonstrates that courts and legislatures accept relationships by affinity as legal relationships and not merely factual relationships without legal significance. Thus, significantly, courts have recognized the relationship between a stepparent and stepchild in other areas of tort law. Courts have found the stepparent-stepchild relationship to be a sufficient basis for recovery for the torts of outrage and negligent infliction of emotional distress. Moreover, courts have considered stepchildren as rela-

adoptees or parents concentrate on equity’s inability to create a parent-child relationship. See In re Estate of Edwards, 435 N.E.2d 1379, 1382 (Ill. App. Ct. 1982); Whitchurch, 408 A.2d at 632. But see Lewis v. Regional Ctr., 220 Cal. Rptr. 89, 92 (Ct. App. 1985) (grandparents who were legal guardians but not heirs were not entitled to recover for grandchild’s wrongful death when deceased was survived by parents and half brother disclaimed any interest in the estate).

87. Vogel 450 F. Supp. at 226 (meretricious spouse would have to prove relationship through subjective proof and thus claim more difficult to evaluate); Nieto, 188 Cal. Rptr. at 35.


91. See In re United States, 418 F.2d 264, 271 & n.5 (1st Cir. 1969) (“relative” usually means relative by blood or affinity; only in specialized areas such as wills and intestate succession are relatives limited to blood); Justus, 565 P.2d at 129; Trotter v. Ashbaugh, 274 S.E.2d 127, 129 (Ga. Ct. App. 1980) (stepfather that shares custody and control of children with their mother becomes in loco parentis and assumes status and obligation of a parent). This is also evidenced by the number of jurisdictions that recognize an obligation of support flowing from the stepparent to the stepchild. See supra note 80.

92. See Strickland v. Deaconess Hosp., 735 P.2d 74, 78 (Wash. Ct. App. 1987) (only members of immediate family, including stepchildren, entitled to bring action for severe emotional distress caused by extreme and outrageous conduct directed at family member in their presence).

93. See Grandstaff v. City of Borger, 767 F.2d 161, 172 (5th Cir. 1985) (widow and
tives when applying the doctrine of interfamily immunity as a bar to tort actions. At least one state has included stepchildren, along with other relatives, within the purview of their guest statute. Another court has held that a psychiatrist owes a duty to both the biological mother and the stepfather to properly diagnose, treat, or control their child.

Similarly, relatives by marriage are accepted, virtually without exception, as "relatives" for the purposes of insurance coverage.

Stepsons could recover damages under Texas law for a closely related bystander's negligent infliction of emotional distress; Leong v. Takasaki, 520 P.2d 758, 766 (Haw. 1974) (ten-year-old boy could recover for mental distress sustained as result of seeing his stepgrandmother killed by car); Meredith v. Hanson, 697 P.2d 602, 604 (Wash. Ct. App. 1985) (stepchildren entitled to recover for negligent infliction of emotional distress as a result of witnessing stepfather killed by car); see also John S. Herbrand, Annotation, Relationship Between Victim and Plaintiff-Witness as Affecting Right to Recover Damages in Negligence for Shock or Mental Anguish at Witnessing Victim's Injury or Death, 94 A.L.R.3d 486 (1979). But see Valdivieso Ortiz v. Burgos, 807 F.2d 6, 7-8 (1st Cir. 1986) (stepfather and biological brother did not have constitutionally protected liberty interest in companionship of adult sufficient to permit recovery under 42 U.S.C. § 1983); Mendoza v. B.L.H. Elec., 530 N.E.2d 349, 350 (Mass. 1988) (adult stepson could not recover loss of consortium for negligently inflicted injury to his stepmother).

94. Trotter v. Ashbaugh, 274 S.E.2d 127, 129 (Ga. Ct. App. 1980) (stepfather who shares custody and control of child with his wife, the child's mother, stands in loco parentis and would be entitled to interfamily immunity); Lawber v. Doil, 547 N.E.2d 752, 753-54 (Ill. App. Ct. 1989) (stepfather who behaved as father of child stood in loco parentis and is entitled to parental-tort immunity in action for death of child); Workman v. Workman, 498 P.2d 1384, 1386 (Okla. 1972) (stepfather who stood in loco parentis could not be sued by stepchild injured in automobile accident caused by the negligence of stepfather). But see Rayburn v. Moore, 241 So. 2d 675, 676 (Miss. 1970) (court refused to extend parental-immunity doctrine to stepparents and noted several jurisdictions had repudiated interfamily immunity in its entirety).

95. Ind. Code Ann. § 9-3-3-1 (Burns 1987) provides that an owner or operator of a motor vehicle is not liable for injuries or death caused by simple negligence to a parent, spouse, child or stepchild, or sibling.


Furthermore, stepchildren have an insurable interest in the life of their stepparent. The implications of insurance coverage and applicability, particularly the law regarding automobile liability and uninsured motorist claims, are important and closely related to tort law. Thus, consistency in the treatment of classes of individuals between these areas of the law is to be expected.

Under the laws of most states, dependent stepchildren are entitled to recover worker's compensation death benefits for the death of their stepparent. Worker’s compensation statutes are analogous to wrongful death acts: the benefits are statutorily based and, when death ensues, are intended to provide a remedy for the family of the deceased employee—a remedy supplied in nonemployment situations by wrongful death acts. Therefore, inclusion of stepchildren as beneficiaries of death benefits within the worker’s compensation system is instructive.


100. See, e.g., ALA. CODE § 25-5-1(2) (1986) (defines child to include stepchildren if they were members of the deceased's family at the time of the accident); ARIZ. REV. STAT. ANN. §§ 23-1046, 23-1064 (Supp. 1991) (includes dependent stepchildren and dependent stepparents as children and parents, respectively); FLA. STAT. ANN. §§ 440.01-60 (West 1991 & Supp. 1992) (§ 440.02(5) defines “child” to include stepchild dependent upon the deceased); LA. REV. STAT. ANN. § 23-1021(3) (West 1985) (term “child” includes stepchild for purposes of Louisiana Worker's Compensation Law); MINN. STAT. ANN. § 176.011 Subd. 2 (West Supp. 1992) (includes stepchild who is member of family and dependent upon deceased employee at the time of injury); OKLA. STAT. ANN. tit. 85, § 3.1(3) (West Supp. 1992) (includes actually dependent stepchild within definition of child for purposes of the Oklahoma Worker's Compensation Act); VA. CODE ANN. §§ 65.1-65 to 65.1-66 (Michie 1990) (§ 65.1-66 defines “child” to include stepchild and “parent” to include stepparent); St. Paul Fire & Marine Ins. Co. v. Miniweather, 168 S.E.2d 341, 342 (Ga. Ct. App. 1969) (minor unmarried stepchildren of deceased employee are considered children and conclusively presumed dependent upon employee under Georgia's Workmen's Compensation Act, GA. CODE ANN. § 114-414 (1969)); Blair v. Keller, 241 N.E.2d 767, 768-69 (Ohio 1968) (holding stepchildren are members of deceased employee's family under the Ohio worker's compensation law); see also 33 U.S.C. § 902(14) (1988) (term “child” includes stepchild for purposes of Longshore and Harbor Worker's Compensation Law).

101. Miniweather, 168 S.E.2d at 342.

102. See, e.g., Blair, 241 N.E.2d at 768.
The courts and legislatures have also recognized the relationship between a stepparent and stepchild in family law matters. Only in the specialized area of the law pertaining to descent and distribution have stepchildren been consistently excluded from the class of relatives. However, it is not uncommon for intestate statutes to provide for descent to stepchildren in the absence of blood kindred. The consensus, then, is that stepchildren are relatives of their stepparents in the eyes of the law, particularly tort law, with the relationship found insufficient to generate rights only with regard to inheritance through intestacy.

Consistency dictates that if a stepchild is treated in the law as a relative when injured or killed by a stepparent, or when the stepchild sees the stepparent’s death, that same child should be treated as a relative when the child suffers as a result of the death of the stepparent. In the same fashion, if a stepchild can receive insurance benefits upon the stepparent’s death, or worker’s compensation benefits when the stepparent’s death occurs on the job,

103. E.g., GA. CODE ANN. §53-105 (Michie 1982) (prohibiting person from marrying stepparent or parent-in-law, daughter- or son-in-law, stepchild, or stepgrandchild); FLA. STAT. ANN. §§ 63.012-63.301 (West 1985 & Supp. 1992) (Florida Adoption Act classifies stepparents along with relatives within the third degree when waiving certain procedural requirements for adoption); TENN. CODE ANN. § 36-302 (1991) (providing visitation rights to stepparents who contribute to the child’s support, if in the best interest of the child); Bryan v. Bryan, 645 P.2d 1267, 1274 (Ariz. Ct. App. 1982) (stepfather, only father child had ever known, entitled to visitation rights); Strawhorn v. Strawhorn, 435 A.2d 466, 470 (Md. Ct. Spec. App. 1981) (stepson of divorced husband could be considered “child” within statute permitting spouses with children to retain use and possession of marital home upon dissolution); In re Marriage of Allen, 626 P.2d 16, 21, 23 (Wash. Ct. App. 1981) (awarding custody to stepmother who devoted herself to and integrated deaf stepchild into her family upon dissolution of her marriage to child’s natural father).

104. COLO. REV. STAT. § 15-10-201(5) (1987) (Colorado Probate Code defining “child” to exclude stepchild); FLA. STAT. ANN. §§ 732.101-.111 (West 1986 & Supp. 1992) (limiting intestate succession to lineal descendents as opposed to children); In re Estate of Davis, 165 Cal. Rptr. 543, 544 (Ct. App. 1980); see also L. S. Tellier, Annotation, Descent and Distribution from Stepparents to Stepchildren or Vice Versa, 63 A.L.R.2d 303 (1959). It has been suggested that this distinction is based on the desire to keep one’s property within the “blood” family. See Mary L. Fellows et al., An Empirical Study of the Illinois Statutory Estate Plan, 1976 U. ILL. L.F. 717, 727. For a critique of the disparate treatment of stepfamilies in intestate estates, see Carolyn R. Glick, Note, The Spousal Share in Intestate Succession: Stepparents are Getting Shortchanged, 74 Minn. L. REV. 631 (1990). This desire to keep property in the biological family is not a factor in wrongful-death law as the recovery is never the right or property of the decedent. But see CAL. PROB. CODE § 6408(e) (West 1990) (stepchildren can inherit as children of deceased stepparent if the parent-child relationship began during the child’s minority and continued throughout the lifetimes of both parent and child and it is established by clear and convincing evidence that the stepparent would have adopted the child but for some legal barrier).

105. CAL. PROB. CODE § 228 (West 1986); FLA. STAT. ANN. § 732.103 (West Supp. 1992); KY. REV. STAT. § 391.010(6) (Michie 1984).
reason requires that recovery should also be available when death occurs due to a third party’s negligence. The happenstance of whether the injury occurred while working or while on personal time should not determine whether dependent stepchildren are entitled to recover. No logical distinction exists for treating stepchildren as relatives in some areas of tort law but not in others. In short, stepchildren should be recognized as legally related to their stepparents for the purposes of recovery under wrongful death statutes.

Inclusion of dependent stepchildren within the scope of wrongful death statutes is not only consistent with the treatment of stepchildren in other areas of the law, it is also consonant with the well-reasoned goals and purposes underlying wrongful death actions, which are to provide a remedy for those likely to suffer as a result of the tortiously caused death and to shift losses from the survivor to the wrongdoer. As one court has observed, “A stepparent might often be the sole, or an important source of support for dependent stepchildren. To refuse recovery to such stepchildren for a stepparent’s death could cause severe economic hardship, and would not be in accordance with the [Wrongful Death] Act’s remedial purpose.”

The two criteria determinative in defining who should recover—dependency and legally recognized relationship—are both satisfied in the case of stepchildren, particularly if dependency is a prerequisite for recovery. In those states imposing an obligation of support upon the stepparent, denying recovery to the dependent stepchild results in the loss of a legally enforceable right to support without adequate justification. Exclusion of these innocent victims will only serve to benefit the wrongdoer at the expense of a child who lacks control over who will act as their parent on a day-to-day basis. This result thwarts the remedial and compensatory purposes underlying wrongful death actions. Only by permitting recovery by dependent stepchildren will the goals of wrongful death legislation be achieved and the law be consistent and equitable.

B. Construction of Wrongful Death Legislation

Interestingly, when the states adopted the heart of Lord Campbell’s Act, the British wrongful death act, they ignored the all important construction section. For in that section, Great Britain,

as early as 1846, dealt with the issue most states have only recently addressed, if they have done so at all: Recovery by stepchildren for the wrongful death of their stepparent. Lord Campbell’s Act defines the term “child” to include a stepchild.¹⁰⁷ For over a century and a half, the British Parliament has provided for the protection of children dependent upon their parent by affinity. Unfortunately, the United States has been much slower to respond to these children’s needs.

1. In the Courts

Several American courts have had occasion to decide whether stepchildren should be included within the purview of wrongful death statutes. Most of these courts, basing their decision on strict construction of wrongful death statutes, have denied recovery to dependent stepchildren for the wrongful death of their stepparent.¹⁰⁸ In *Flores v. King,*¹⁰⁹ the Maryland Court of Special Appeals became the first modern court¹¹⁰ to hold that stepchildren did not

¹⁰⁷. The Fatal Accidents Act, 1846 (9 & 10 Vict. ch. 93) provided in subsection 5, entitled “Construction of Act” that:

1 The following words and expressions are intended to have the meanings hereby assigned to them respectively . . . ; and the word “parent” shall include father and mother, and grandfather and grandmother, and stepfather and stepmother; and the word “child” shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter.


¹¹⁰. One other court in the twentieth century had mentioned recovery by relatives by affinity. Kelley v. Burch, 415 P.2d 693 (Idaho 1966) noted, without deciding, that a
have a right of recovery for the death of their stepparent. In that case, the deceased was survived by a spouse, the stepchild’s mother, as well as the stepchild. The stepdaughter argued that she was completely dependent upon her deceased stepfather for support. The court acknowledged her argument that she reasonably could have expected to receive continued support in the future. However, the Maryland statute provided that the action must be brought for the benefit of the surviving spouse, children, and parents, or if none, for the benefit of any wholly dependent relative by blood or marriage. The court relied heavily on the strict construction of wrongful death statutes, as in derogation of the common law, to deny the stepchild recovery. From this inaccurate premise, the court concluded that if the legislature had intended to include a stepchild as a child they would have said so. The court could have reasoned just as soundly that because relatives by blood or marriage were included for recovery in the reversion clause, the specific relatives defined in the primary clause included children by affinity. This reasoning would have been consistent with the purpose of wrongful death statutes: to provide for those most likely to suffer from the death, which in this case included a dependent stepchild.

The next major judicial consideration of this issue was the California case of Steed v. Imperial Airlines. In its original decision in the Steed case, the California Supreme Court permitted recovery by the stepchild. However, after a vacancy on the court was filled with a permanent replacement for the temporarily assigned justice who had participated in the initial hearing, the case was reheard and recovery by the dependent stepchild was denied by a 4-3 vote. The California court was faced with

stepfather was properly dropped from the suit since he had not adopted the deceased child and therefore, was not entitled to make a claim. Id. at 695. Idaho has since statutorily provided for recovery by stepchildren in wrongful death actions. See infra note 142.

111. Flores, 282 A.2d at 522.
112. See id. at 523.
113. Id.
114. Id. (citing Md. Ann. Code art. 67, § 4 (1957)).
115. Flores, 282 A.2d at 523.
116. Id. at 524.
117. 524 P.2d 801 (Cal. 1974).
118. Steed v. Imperial Airlines, 515 P.2d 7, 22 (Cal. 1973) (denying recovery to stepdaughter who had suffered damages indistinguishable from those suffered by natural child violated equal protection of the laws).
119. Steed, 515 P.2d at 17, 23. Wright, J. was the only dissenting judge in the first Steed case. Id. at 23. Judge Wright subsequently wrote the majority opinion in the rehearing of Steed.
120. Steed v. Imperial Airlines, 524 P.2d 801, 808 (Cal. 1974).
interpreting the term "heirs" as used in the California Wrongful Death Act. The court chose to restrict the term "heirs" to those persons "who would have been eligible to inherit from the decedent's estate had he died intestate." Since the deceased stepfather was also survived by a spouse and biological child (a half sister to the claimant), his stepchild would not be eligible to inherit and therefore, could not recover. The court rejected a broader interpretation of "heirs" that would have permitted recovery by the wholly dependent stepchild, on the faulty premise that wrongful death recovery was solely created by statutes because recovery was unknown at common law, and that the court therefore could not expand the classes entitled to recover. As a result, the court, to the sole benefit of the tortfeasor, rejected the claim of a minor child who was wholly dependent upon the deceased and whom the deceased had held out to be his child.

Many courts have followed the Flores and Steed cases and rejected the claims of stepchildren. In several instances, a court's rejection of stepchildren's claims has generated vigorous dissents and scholarly disagreement. In each case, the court has refused

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123. In limited situations, stepchildren can inherit when the stepparent dies intestate in California. Cal. Prob. Code § 228 (West Supp. 1974). This is limited to situations where the stepparent dies without leaving a surviving spouse or issue. See Douglas W. Beck, Note, Stepchild's Right to Sue for Wrongful Death, 63 Cal. L. Rev. 343, 344 n.8 (1975).
125. Aymond v. State Dep't of Highways, 333 So. 2d 380, 381-82 (La. Ct. App. 1976) (wrongful death actions extend right of recovery only to biological and adopted children); Versland v. Caron Trans., 671 P.2d 583, 588 (Mont. 1983) (interpreting "heir" to exclude stepchild); In re Estate of Jones, 350 P.2d 34, 36-37 (Or. 1974) (construing "dependents" narrowly to include only those to whom decedent had legal obligation to support thus, excluding stepchildren); Brown v. Brown, 309 S.E.2d 586, 590 (Va. 1983) (interpreting "child" to exclude stepchild); Klossner v. San Juan County, 605 P.2d 330, 332 (Wash. 1980) (interpreting "child" to exclude stepchild).
126. Klossner, 605 P.2d at 333-34 (dissenting opinion of Doliver, J. in which Horowitz, Brachtenbach, and Wright, JJ., concurred) (purpose of wrongful death statute is to provide a remedy to those who might naturally expect maintenance from the decedent and this purpose is furthered by inclusion of stepchildren); Steed, 524 P.2d at 808 (dissenting opinion of Burke, J., in which Tobriner and Mosk, JJ., concur) (construction of statute to exclude dependent stepchild denies equal protection of the law).
127. See generally Douglas E. Beck, supra note 123 (questioning the California court's rejection of the stepchild's claim in Steed v. Imperial Airlines); Celia E. Holuk, Comment,
to further the purposes of the applicable statute through broadly interpreting its provisions. These courts instead have confined themselves within a narrow reading of the statutory provisions thereby excluding deserving survivors and benefitting wrongdoers, a result inconsistent with the intent behind wrongful death legislation. These courts, in other words, have consistently given wrongful death statutes a narrow construction despite their remedial purpose.

Not all courts have rejected the claims of stepchildren in death actions. The federal courts have consistently permitted stepchildren to recover in admiralty actions,\textsuperscript{128} and a few state courts have followed suit.\textsuperscript{129} At least in dicta, one court has refused to exclude the possibility that stepchildren, dependent upon the deceased stepparent, might recover in a wrongful death action even if the decedent is survived by a spouse or biological children.\textsuperscript{130}

In \textit{Moon Distributors, Inc. v. White},\textsuperscript{131} the Arkansas Supreme Court expanded the damages recoverable by stepchildren in wrongful death actions to include pecuniary damages not explicitly

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allowed to stepchildren in the wrongful death statute. The statute only expressly stated that persons to whom the deceased stood *in loco parentis* (including stepchildren) could recover for mental anguish. The Arkansas court was persuaded by the remedial purpose of the wrongful death act to close the gap created by the statute and permit full recovery by the stepchild. The court reasoned that permitting stepchildren to recover fully for their damages was consonant with the aim of the statute and therefore, recovery for pecuniary losses, although not addressed in the statute, would be allowed.

While *Moon Distributors, Inc.* did not expand the classes of persons entitled to recover to include stepchildren, *Greer Tank & Welding, Inc. v. Boettger* did. In that case, the Alaska Supreme Court held that an unadopted stepson who was dependent upon the decedent for support was an "other dependent" and thus, entitled to recover under the Alaska Wrongful Death Act. The defendants had contended that dependence should be construed to mean legal obligation to support. Without such an obligation, they argued, the court could not determine how long the deceased would continue to support the stepchild. The court rejected this contention and found that the category "other dependents" was intended to include those persons who, like a spouse or biological child, were likely to suffer as a result of the death. Since stepchildren are clearly within that class, the court reasoned that they could recover upon a showing of actual dependency. Like the Arkansas court in *Moon Distributors*, the *Greer Tank* court was persuaded that a broad interpretation of the provisions of the wrongful death act would effectuate the legislative intent to provide a remedy to those who suffered damages due to wrongful death.

2. Legislative Response

Fortunately, stepchildren have fared slightly better in the legislatures. Legislative dissatisfaction with court rulings is a not infre-
quent impetus for legislative action. Two legislatures, California and Washington, amended their wrongful death statutes following their state courts’ denial of recovery to stepchildren.141 Other legislatures have not waited until their courts denied claims to protect stepchildren.142

The Conference of Commissioners on Uniform State Laws addressed this issue over a decade ago. Their Model Survival and Death Act proposed in 1979 includes dependent relatives by marriage within the category of survivors entitled to recover.143 Unfortunately, no state appears to have adopted this Act. Most state legislatures simply have not considered the issue of stepchild recovery under their statutes.144 In these states, the welfare of the surviving stepchild has been left to the courts, with less than satisfactory results.145


142. Ark. Code Ann. § 16-62-102(d) (Michie 1987) (beneficiaries include persons to whom deceased stood in loco parentis); Del. Code Ann. tit. 10, § 3724 (1988) (provides that persons to whom decedent stood in loco parentis may recover for mental anguish occasioned by the death); Idaho Code § 5-311(2)(b) (1990) (includes stepchildren as beneficiaries in wrongful death actions); Mich. Comp. Laws § 600.2922(3)(b) (1986) (providing that children of the decedent’s spouse are entitled to damages in wrongful death action). Cf. Wyo. Stat. Ann. §§ 1-38-102(c) (1988) (providing that “[e]very person for whose benefit such action is brought may prove . . . [their] respective damages”) in conjunction with Saffels v. Bennett, 630 P.2d 505, 511 (Wyo. 1981) (Raper, J., noting in his dissent that the motion for partial summary judgment was directed only to ex-wife; the right to recovery on behalf of stepchildren was not challenged).


145. See supra notes 108-25 and accompanying text.
3. A Proposal for Response

The specific provisions of each state’s wrongful death act vary. In some states, wrongful death recovery is directly tied to intestate succession, either through the definition of beneficiaries or through the distribution of the proceeds from the wrongful death settlement or judgment. States that permit recovery only by heirs and exclude stepchildren from the definition of “heirs” can only provide recovery for stepchildren by legislative action. Similarly, states that distribute the proceeds according to the rules of intestate succession, which exclude stepchildren, must also look to a legislative revamping to protect these children. Yet, many states statutorily go beyond the narrow categories used in statutes of descent and permit “dependents,” “relatives,” or “children” to recover. The question becomes whether the courts in these states can (and should) broadly interpret these terms to permit recovery by stepchildren, or narrowly confine the terms to traditional-normative definitions and thereby exclude stepchildren.

Our society is well beyond punishing children for the socially unacceptable acts of their parents. Society’s attitude toward and
treatment of children should not be dictated by its disapproval of
the parents’ actions. Just as children born out of wedlock are no
longer penalized or stigmatized for their parents’ actions, step-
children should not be disadvantaged merely because their biolog-
ical parents have terminated their marriage and because the day-
to-day parenting now rests with a stepparent. The loss sustained
by a dependent stepchild does not differ from the loss sustained
by a dependent biological child within the same family simply
because the former relationship arose through the legal institu-
tion of marriage and the other through birth. Courts, in interpreting
statutes, should look at the reality of the present family situation
and not be bound by societal notions of the typical, nuclear family
of the past. As one justice expressed in dissenting from the denial
of a stepchild’s wrongful death claim, “While the narrow view
might well have fitted the outlook and mores of Victoria’s England,
it hardly comports with either the realities of or the appropriate
value systems of today.”

Regardless of whether a court broadly or narrowly interprets
statutory language, the court is placing its stamp on the statute
and making law. Excluding stepchildren from wrongful death
recovery, when it is not mandated by the statute or its legislative
intent, is creating law to the same extent that permitting stepchil-
dren to recover is. Defining terms of a statute that have not been
statutorily defined, requires the court to engraft its interpretation
on the statute. True deference to the legislature only requires the
court’s deference to effectuating legislative intent. Since wrongful
death statutes are not truly in derogation of the common law and are intended to provide a remedy to those who have suffered
damages due to the death, a liberal interpretation to permit
recovery by stepchildren is consistent with and furthers legislative
intent.

The protection of stepchildren is within the court’s proper role
and is consistent with the general legislative, remedial purpose. In
the absence of a specific limiting definition, a court interpreting
the term “dependents” can include stepchildren who are actually

149. Klossner v. San Juan County, 605 P.2d 330, 334 (Wash. 1980) (Dolliver, J.,
dissenting). Justice Dolliver also noted that the modern trend is to look to the welfare of
the child and to accord stepchildren the same rights as biological or adopted children. Id.
at 334.
(cardinal rule of statutory construction is that statute should be construed to give effect to
legislative intent).
151. See discussion supra part I.
152. See discussion supra part II.A.
dependent\footnote{This is particularly true in those states that impose a legal obligation on a stepparent to support a stepchild. See supra note 80.} as the Alaska Supreme Court did in \textit{Greer Tank & Welding, Inc. v. Boettger}.\footnote{See supra notes 136-40 and accompanying text.} However, can the term “child” logically be interpreted to include stepchildren for purposes of wrongful death recovery?\footnote{At least one court foresaw that such an inquiry would arise under a broadened wrongful death statute. \textit{Jordan v. Delta Drilling Co.}, 541 P.2d 39, 42 (Wyo. 1975).} A look at a representative statute demonstrates that the term can be so interpreted within this context, consistent with logic and the law.

Florida’s Wrongful Death Act\footnote{\textit{FLA. STAT. ANN.} §§ 768.16-768.27 (West 1991). The Florida act was chosen because it used the term “child” without defining it vis-a-vis stepchild and by its terms is to be liberally construed, obviating the need to convince a court to discard the archaic notion of strict construction of wrongful death acts.} provides for recovery by “decedent’s spouse, children, parents, and, when partly or wholly dependent on decedent for support or services, any blood relatives and adoptive brothers and sisters.”\footnote{\textit{FLA. STAT. ANN.} § 768.18 (1) (West Supp. 1992).} The statute also specifically provides that the public policy of Florida is “to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer.”\footnote{\textit{FLA. STAT. ANN.} § 768.17 (West 1986).} The act provides that it is “remedial and shall be liberally construed.”\footnote{Id.} To recover under the Florida Wrongful Death Act, a stepchild must be seen as the decedent’s child. Thus, recovery may be had only if the term “child” can encompass stepchildren.\footnote{The term “child” is not so clear and unambiguous as to prevent judicial interpretation of its meaning. \textit{BLACK’S LAW DICTIONARY} 239 (5th ed. 1979) includes five definitions of the word “child”. It states “The term ‘child’ or ‘children’ may include or apply to: adopted, after-born, or illegitimate children; step-child; child by second or former marriage; issue.” Id. Because the Florida legislature did not choose which accepted definition should be utilized in interpreting the Wrongful Death Act, the courts must decide. An early Florida case, \textit{Houston v. McKinney}, 45 So. 480, 481 (Fla. 1907) held that the primary sense of the word “child” was offspring and did not include a stepchild. However, this case was interpreting the term “child” within the purview of the statute of descent. Id. at 481. Florida, like other states, adopts a narrower view of relationships for purposes of heirship than it does in other areas of the law. See supra note 104 and infra notes 166-68.} For the purposes of a remedial wrongful death statute, construing “child” to include a stepchild is not unreasonable in light of our changing society.\footnote{Although the meaning of the word “children” is examined here solely in the context of wrongful death actions, this construction may not be unreasonable in other areas of the law as well. Whether the legal distinction between parent-child relationships created by marriage or by blood is still viable given the changes in today’s society is an issue worthy of exploration; however, it is well beyond the scope of this Article.}
belief that a child can have only one mother and one father. In reality, stepchildren may see themselves as having three or more parents: their custodial biological parent, their resident stepparent, their noncustodial biological parent, and perhaps, their noncustodial stepparent. Financially, a stepchild may be dependent on more than two parents as well. In applying this statute, the court should look closely at the situation of the family to determine if a parent-child relationship exists between the decedent and the surviving stepchild.

Including stepchildren within the term "child" is consistent with the statute's purpose whenever an actual parent-child relationship exists. The legislative intent is to shift losses from those damaged by the death to those causing the losses. The objective of this statute is to "allow a full recovery on behalf of those who were dependent on the deceased and who have sustained demonstrable losses of support and services by the wrongful death." Recovery by dependent stepchildren with a demonstrable parent-child relationship clearly furthers this purpose. Given the compulsory mandate to liberally construe the Act to effectuate legislative intent, Florida courts cannot and have not narrowly interpreted other aspects of the Act. A liberal interpretation to effectuate legislative

162. This entire concept is ably attacked in Bartlett, supra note 3.
163. Florida Law Revision Commission, Recommendations and Report on Florida Wrongful Death Statutes 7-8 (1969). The Florida Law Revision Commission was appointed by the Florida legislature to examine current law and recommend changes to correct defects and inequities. See id. at 3 (citing Fla. Stat. §§ 13.90-13.996 (1967)). In the course of their review, the Commission recommended a complete overhaul of the Florida wrongful death statutes. See id. at 9-12.
164. Section 768.17, entitled "Legislative Intent," states that the statute is "remedial and shall be liberally construed." Fla. Stat. Ann. § 768.17 (West 1986). Thus, liberal construction is mandatory. Cf. Delta Air Lines, Inc. v. Ageloff, 552 So. 2d 1089, 1092 (Fla. 1989) (court must heed legislative admonition that statute is remedial and shall be liberally construed); Vildibill v. Johnson, 492 So. 2d 1047, 1049 (Fla. 1986) (legislative intent of wrongful death act must be given effect).
165. See Delta Air Lines, 552 So. 2d at 1092 (liberally interpreting the phrase "net accumulations" to include investment return on future savings); Vildibill, 492 So. 2d at 1049 (broadly interpreting provisions of statute to permit nondependent parents to recover net accumulations in seeming contradiction of express language of statute); Zimmerman v. Cruz & Garcia, 449 So. 2d 996, 998 (Fla. Dist. Ct. App. 1984) (term "dependent" under Florida Wrongful Death Act does not refer solely to financial dependence but also includes dependence for support and services); Bermudez v. Florida Power & Light Co., 433 So. 2d 565, 567 (Fla. Dist. Ct. App. 1983) (legislative intent requires liberal construction and is intended to avoid procedural morass of earlier statute). But see Stern v. Miller, 348 So. 2d 303, 307 (Fla. 1977) (precluding recovery for the wrongful death of a fetus based on a prior decision denying recovery—which preceded the change in the statute—and the legislature's failure to change the relevant language when amending the statute).
intent would permit the inclusion of stepchildren within the term "children."

Recovery by stepchildren is also compatible with Florida's treatment of stepchildren in other areas of the law. Florida includes stepchildren within the definition of children for purposes of entitlement to death benefits under the Florida Worker's Compensation Act. Moreover, Florida's Motor Vehicle No-Fault Law defines "relative" as relatives by blood or marriage residing in the same home. Finally, in Florida a stepparent, like other close relatives, can adopt through a procedure less rigorous than that followed in non-relative adoptions. Thus, it is logically consistent to interpret the word "child" to include stepchild for purposes of recovery under Florida's Wrongful Death Act.

This interpretation is further supported by Florida case law on statutory construction. Florida courts have held that a law should be construed together and in harmony with other statutes having the same purpose even if the statutes were not enacted at the same time. The remedial purposes underlying entitlement to death benefits received pursuant to the Worker's Compensation Act and recovery for wrongful death are the same, and it follows that the term "child" should be interpreted to have the same meaning under both Acts. Since dependent stepchildren recover (receive death benefits) as the decedent's children if their stepparent is killed on the job pursuant to the Florida Worker's Compensation Act, dependent stepchildren also should recover as decedent's children under the Wrongful Death Act if their stepparent is killed due to a third party's negligence.

The reasoning supporting recovery under the Florida Wrongful Death Act is applicable to the statutes of other states that have the same or similar language and underlying policies. The remedial purposes that underlie wrongful death legislation are best served

166. Fla. Stat. Ann. § 440.02(5) defines "child" to include stepchild. See generally Fla. Stat. §§ 440.01-440.60 (West 1991). The Florida Supreme Court went so far as to say that "[w]hen the stepfather assumes responsibility for the support of the wife's minor children, they are in no different status from natural children." Johnson v. Midland Constructors, 11 So. 2d 895, 896 (Fla. 1943).


169. Wakulla County v. Davis, 395 So. 2d 540, 542 (Fla. 1981); Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation Dist., 274 So. 2d 522, 525 (Fla. 1973) (law should be construed with any other statute on same subject matter or having same purpose if compatible); Goldstein v. Acme Concrete Corp., 103 So. 2d 202, 204 (Fla. 1958) (statutes dealing with similar topics using the same phrasing should be read and considered together).
by providing dependent stepchildren with a remedy. In the absence of a clear legislative intent to the contrary, courts can and should interpret wrongful death provisions to provide for recovery by dependent stepchildren.

IV. CONCLUSION

Courts should not be bound to the narrow interpretation of wrongful death acts that has governed their past decisions barring wrongful death recovery by stepchildren. When addressing the issue of who should recover in wrongful death actions, courts should be guided not by a blind adherence to outdated views of families and the law, but by the remedial purposes of and the goals sought to be achieved by wrongful death statutes. Courts can achieve these goals and effectuate legislative intent by permitting dependent stepchildren to recover for the wrongful death of their stepparent. Yet, unless one is shrouded in naivete, one cannot expect all courts to re-examine soon their precedents and to question the bases for their past decisions. Accordingly, so long as courts refuse to challenge the premises upon which they chose to narrowly interpret wrongful death statutes to exclude qualified claimants such as stepchildren, it will remain primarily with the legislature to correct the inequities wrought by judicial decisions.