June 26, 2011

REFORMING INTESTATE INHERITANCE FOR STEPHCHILDREN AND STEPPARENTS

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Available at: https://works.bepress.com/terin_cremer/1/
The current Uniform Probate Code (UPC) and state statutes relating to stepfamilies fail to achieve the purpose of intestacy statutes: to satisfy the likely intent of the decedent of a blended family and care for his or her family. More than one-half of all Americans have lived in, are currently living in, or will live in, a stepfamily, yet stepchildren and stepparents are excluded from intestate succession. The UPC drafters developed the language at a time when blended families were the exception rather than the norm.

This Article proposes statutory language consisting of a series of factors courts can use to determine whether a parent-child relationship existed between the stepparent and stepchild for intestacy purposes. Some state and federal statutes and courts evaluate the parent-child relationship in other blended family contexts; but this Article proposes the first legislative solution that naturally extends a body of law the court system and legislatures already embrace. The proposed factors statute allows states and the UPC to progress with the American culture of blended families while better effectuating intent and relieving the financial burden a state receives when it must care for the family of a decedent.
I. INTRODUCTION

Just as *The Brady Bunch*\(^1\) replaced *Leave It to Beaver*,\(^2\) blended families are replacing the traditional family in America.\(^3\) Transformation from the traditional family to blended families places new tension on traditional intestacy laws. Almost two-thirds of all remarriages involve children.\(^4\) Studies estimate that more than one-half of all Americans have lived in, are currently living in, or will live in, a stepfamily.\(^5\) Blended families now make up half the neighborhood.\(^6\)

Unfortunately, as American families change, the law is slow to follow. Currently, stepchildren and stepparents are “virtually excluded from intestate succession.”\(^7\) Intestacy statutes provide for the disposition of a decedent’s probate property when a decedent dies without a will or the will does not dispose of all the decedent’s property.\(^8\)

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\(^3\) For purposes of this Article, a traditional family refers to a man and woman who are married and living with their biological children as a family.


\(^5\) Id.


\(^8\) UNIF. PROB. CODE § 2-101 (2009).
Uniform Probate Code (UPC) developed the language over thirty years ago at a time when blended families were the exception rather than the norm. Article II of the UPC, addressing intestacy statutes and parent-child relationships, has not progressed with the changing demographics as society necessitates.\(^9\)

Few states acknowledge stepchildren in their intestacy statutes.\(^{10}\) California was the first and remains the most progressive, but even the California statute places limitations on stepchild inheritance and does not allow other family members or the stepparent to inherit from the stepchild.\(^{11}\) Thus, while a few states have tried, all have fallen short of adequately providing for a stepfamily in the case of intestacy.

The current stepfamily state statutes and UPC fall short of achieving the purpose of intestacy statutes: to satisfy the likely intent of the decedent of a blended family and care for his or her family. Given the high rate of divorce and the increasing frequency of parent-child relationships between stepparents and stepchildren, the UPC and state statutes should be revised to better meet the intent of blended family citizens, and avoid the problems inherent in the current intestacy statutes that only allow stepchildren to inherit from stepparents in limited circumstances.

This Article proposes a statute consisting of a series of factors that courts can use to determine whether a parent-child relationship existed between the stepparent and stepchild for

\(\text{9 Id.}\)
\(\text{10 See e.g., } \text{CONN. GEN. STAT. ANN. } \S 45a-439(a)(4) \text{ (West 2009) (allowing a stepchild to inherit when there are no issue, parents, or issue of parents); MD. CODE ANN., Est. & Trusts } \S 3-104(e) \text{ (West 2009) (same); OHIO REV. CODE ANN. } \S 2105.06(J) \text{ (West Supp. 2009) (same); S.C. CODE ANN. } \S 62-2-103(6) \text{ (2009) (allowing a stepchild to inherit when there are no issue, parents, or issue of parents, grandparent, issue of grandparent, great grandparent, or issue of great grandparent). Other states allow issue of a predeceased spouse to inherit to permit escheat. See e.g., ARK. CODE ANN. } \S 28-9-215(2) \text{ (2009); IOWA CODE ANN. } \S 633.219(6) \text{ (West 2009); KY. REV. STAT. ANN. } \S 391.010(6) \text{ (West 2009); MO. REV. STAT. } \S 474.010(3) \text{ (2009).}\)
\(\text{11 See CAL. PROB. CODE } \S 6454 \text{ (West 2009).}\)
intestacy purposes. The proposed factors statute (“factors test”) allows states and the UPC to progress with the American culture of blended families while better effectuating intent and relieving some of the burden a state receives when it must care for the family of a decedent. While the factors test creates some administrative costs, the benefit of effectuating intent is better served by requiring intervention by the courts to determine whether a parent-child relationship existed between the stepparent and stepchild for intestacy purposes. Some state and federal statutes and courts already evaluate the parent-child relationship in other blended family contexts; therefore, applying the factors test for intestacy purposes is a natural extension of a body of law that already exists.

II. INTESTACY LAW

What a decedent does not dispose of by will passes by intestacy.12 Each state passes intestacy statutes. Some states choose to enact the UPC as their intestacy statute.13 In 1969, the UPC drafters created the UPC in an effort to “make uniform the law among the various jurisdictions.”14 Approximately eighteen states adopted the UPC in its entirety, while the remaining states adopted portions of it.15

The primary goal of intestacy statutes is to carry out a decedent’s presumed intent by reference to the average person’s intent concerning the disposition of his or her property at death.16 Many consider intestacy statutes a back-up will that should provide a distributive

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scheme to carry out the wishes of most decedents.\textsuperscript{17} However, intestacy statutes do not attempt to
determine a decedent's actual intent.\textsuperscript{18}

In addition to carrying out presumed intent, intestacy statutes are used to assist the state by
supporting the decedent’s family.\textsuperscript{19} Most probate systems have some provision for a spouse and
dependent children.\textsuperscript{20} Under the UPC, any portion of the intestate estate that does not pass to the
surviving spouse passes in the following order: (1) descendants of the decedent; (2) if no
surviving descendant, to the decedent's parents; (3) if no surviving descendant or parent, to the
decedent's siblings; or (4) if there is no surviving descendant, parent or sibling, to the decedent's
grandparents.\textsuperscript{21} Finally, if none of the individuals identified above survive the decedent, the
estate passes to the state.\textsuperscript{22}

The support provided to a decedent’s family through intestacy statutes also extends beyond
financial support as the statute may act as emotional support by identifying the heirs as persons
entitled to a distribution from the decedent’s estate. Thus, the state validates that person’s
relationship with their loved one.\textsuperscript{23}

Intestacy statutes typically distribute a decedent’s property to the decedent’s family as
defined by statutes;\textsuperscript{24} consequently, when a statute does not address a person whom the decedent
considers a family member, such as a stepchild, intent effectuation vanishes. Formal legal
relationships, such as marriage, adoption or biological relations, rather than emotional

\textsuperscript{17}Gary, supra note 16 at 651.
\textsuperscript{18}Id.
\textsuperscript{19}
\textsuperscript{20}See e.g., UNIF. PROB. CODE § 2-402 (amended 2008).
\textsuperscript{21}UNIF. PROB. CODE § 2-103 (2009).
\textsuperscript{22}UNIF. PROB. CODE § 2-105 (2009).
\textsuperscript{23}Gary, supra note 16, at 652.
\textsuperscript{24}Susan N. Gary, \textit{We are Family: The Definition of Parent and Child for Succession Purposes},
relationships, typically define a family member.\textsuperscript{25} As a result, intestacy statutes may exclude persons who consider themselves family members and whom the decedent may have preferred as recipients of the decedent’s property. Therefore, intestacy statutes do not serve their purpose of carrying out the intent of many decedents, or necessarily providing for the familial obligations of the decedent, as is often the case with blended families.\textsuperscript{26}

**III. The UPC and State Statutes Regarding Stepchildren’s Intestacy Rights**

**A. The Absence of Stepchildren in the UPC Intestacy Provisions**

Since its inception, the UPC has not addressed the prospect of stepchildren inheritance in any context other than that of a stepchild who a stepparent adopts thereby entering into a legal parent-child relationship.\textsuperscript{27} The UPC defines a child as “an individual entitled to take as a child under this Code by intestate succession from the parent whose relationship is involved and excludes a person who is only a stepchild . . . .”\textsuperscript{28} The UPC uses the term “parent-child relationship” to indicate the existence of intestacy rights.\textsuperscript{29} Several revisions to Article II of the UPC have been adopted to deal with changing family situations. Nevertheless, the most recent revisions still fail to include the intestacy rights of stepchildren within a possible parent-child relationship. Conversely, the UPC revisions detail intestacy rights in other parent-child relationships including adoption and, most recently, the intestacy rights of children of assisted reproduction technologies.\textsuperscript{30}

\textsuperscript{25} See, e.g., UNIF. PROB. CODE §§ 2-102 (Share of Surviving Spouse), 2-103 (Share of Heirs Other Than Surviving Spouse), 2-115 (Parent and Child Relationship) (2008).

\textsuperscript{26} Gary, supra note 16, at 651.

\textsuperscript{27} See e.g., UNIF. PROB. CODE § 2-119(b) (amended 2008) (“A parent-child relationship exists between an individual who is adopted by the spouse of either genetic parent and: (1) the genetic parent whose spouse adopted the individual; and (2) the other genetic parent, but only for purposes of the right of the adoptee or a descendant of the adoptee to inherit from or through the other genetic parent.”)

\textsuperscript{28} UNIF. PROB. CODE § 1-201(5) (amended 2006).

reproduction technologies. Unlike the stepchildren provisions, the UPC assisted reproduction sections do not require the parent to adopt the child in order for a parent-child relationship to be recognized. Therefore, the UPC is open to the possibility of a child who is neither the parent’s biological child, nor the parent’s legally adopted child, to inherit. The UPC should provide for a situation beyond adoption in which a stepchild can inherit from an intestate stepparent.

The absence of intestacy statutes that would allow stepchildren and stepparents to inherit from one another raises the question: Why can stepchildren and stepparents not inherit through intestacy based on relationship alone? One reason may be because individuals can opt out of the intestacy system through wills and other devises should they choose to. Another reason may be that because there are more avenues to dispose of one’s property besides intestacy the legislature has been slow to amend the laws. Some may claim that the UPC does not intend to create a statute that requires a court to intercede and evaluate a relationship which involves added administrative costs, as compared to a mechanical test.

However, these rationales do not hold when evaluated further. As discussed infra, the unique dynamics of a blended family could make stepparents less likely to draft a will. Furthermore, despite concern over the administrability of a relationship based UPC test, the UPC already provides for reciprocation in a relationship in § 2-114, which precludes inheritance from or through a child if a parent under the statute has not treated the child as a child or has refused to support the child. This article proposes the opposite test: to determine whether a stepparent has treated the stepchild as a child and vice versa. The UPC has already opened itself to judicial

\[\text{UNIF. PROB. CODE §§ 2-120, 2-121 (amended 2008).}\]
\[\text{Kurtz & Waggner, supra note 29, at 32.}\]
\[\text{UNIF. PROB. CODE § 2-144 (2008).}\]
scrutiny in terms of a parent-child relationship.\textsuperscript{33} Therefore, it could easily open the stepparent-stepchild relationship to a similar judicial scrutiny to determine whether a relationship that would create an intent of inheritance for either party exists.

Regardless of the reason for the UPC’s silence on stepchildren heirs, the UPC and the individual states must bring their statutes in line with the social changes of American families by including blended families in their provisions. As divorce, remarriage, and blended families become more prevalent in society, these American families have or will have a need for intestacy statutes that specifically address their precise circumstances.

B. California – Limited Stepchildren Inheritance

In 1983, California enacted Cal. Prob. Code § 6408(e)\textsuperscript{34} which provides that the stepparent-stepchild relationship shall be treated as a parent-child relationship for purposes of intestate succession if: 1) the relationship began during the child's minority and continued throughout the joint lifetimes of both the stepchild and stepparent, and 2) the stepchild establishes by clear and convincing evidence that the stepparent would have adopted the stepchild but for a legal barrier.\textsuperscript{35}

The California Fourth District Court of Appeals first interpreted the meaning of a “relationship” as required in the first prong of the stepchild inheritance statute in \textit{In re Estate of Claffey}.\textsuperscript{36} The court reasoned that the legislative intent for inheritance of stepchildren was to provide for a relationship between a stepchild and stepparent that resembles that “of natural parent and child in [the] sense of family relationship’ rather than just a stepparent-stepchild

\textsuperscript{33} \textit{Id.}
\textsuperscript{34} Current version at CAL. PROB. CODE § 6454 (2009).
\textsuperscript{36} \textit{In re} Estate of Claffey. 257 Cal.Rptr. 197 (Cal.App. 4th 1989).
relationship.\textsuperscript{37} In other words, the relationship must “encompass something more than an exchange of wedding vows between a natural [parent] and a stranger.”\textsuperscript{38}

While a general consensus among the California courts exists regarding the meaning of the first prong of the statute, the second prong of § 6454 (formerly § 6408) fails to specify the timing and duration of the “legal barrier” to meet the statute's requirements which caused a circuit split in the California Courts. The most common legal barrier in this context occurs when the legal parent, who is not married to the stepparent, refuses to allow the stepparent to adopt the child. The imprecise language of § 6454 is one of the statute’s primary weaknesses.

The California appellate Courts developed two positions concerning the interpretation of a legal barrier as required by the second prong of § 6454.\textsuperscript{39} One position is that a legal barrier which exists at the time of the attempted adoption satisfies the requirement.\textsuperscript{40} Conversely, another appellate court held that, to meet the legal barrier requirement under § 6454, a legal barrier must prevent the adoption until the death of the stepparent.\textsuperscript{41} To resolve the appellate court split, the California Supreme Court held that the legal barrier requirement meant that the legal barrier to adoption persisted until the stepparent’s death.\textsuperscript{42} Additionally, even where a legal barrier defeated repeated adoption attempts throughout the child's adulthood, § 6454 would not

\textsuperscript{37} Id.
\textsuperscript{38} Id. at 258.
\textsuperscript{40} See \textit{In re Estate of Stevenson}, 14 Cal. Rptr. 2d 250, 257 (Ct. App. 1992) (holding that legal barrier at time of attempted adoption is sufficient); \textit{In re Estate of Lind}, 257 Cal. Rptr. 853, 859 (Ct. App. 1989) (suggesting that legal barrier existing only at time of attempted adoption is sufficient); \textit{In re Estate of Claffey}, 257 Cal. Rptr. 197, 198-99 (Ct. App. 1989) (restating trial court's finding that, although stepchildren had reached majority, natural parent's refusal to consent was legal barrier).
\textsuperscript{41} See \textit{In re Estate of Cleveland}, 22 Cal. Rptr. 2d 590, 592, 599 (Ct. App. 1993) (holding that when only legal barrier is refusal of stepchild's natural parent to consent to adoption, stepparent's failure to adopt once stepchild becomes adult bars stepchild's claim).
\textsuperscript{42} See Barnum-Smith v. Joseph (Estate of Joseph), 949 P.2d 472 (Cal. 1998).
apply if no legal barrier to adoption existed during the child's minority or if for any reason the
decedent had no intent to adopt during that period. Section 6454 would also not apply if during
any period of time, regardless of how brief, no legal barrier to adoption existed.

Although the California statute is the nation’s most progressive concerning stepchildren
and inheritance rights, it does not reflect the reality of American society because stepparent
adoptions do not occur in most stepfamilies and the statute falls short of providing for
stepparents and stepchildren with a parent-child relationship. The California Supreme Court’s
interpretation of the legal barrier requirement significantly limits the utility of the statutory
provision. After a stepchild reaches the age of majority, the stepchild can give permission for an
adoption and most likely a legal barrier to adoption will no longer exist. However, adoption of an
adult stepchild, regardless of the closeness of the relationship, is unlikely.

Similarly, the California statute fails to recognize that a meaningful parent-child relationship can exist without
the intent or desire to legally recognize the relationship through adoption, as discussed infra.

Unless the stepparent dies before the stepchild reaches the age of majority, the California statute
will have little impact. Furthermore, the California statute only speaks to stepchildren inheritance
and does not create rights in the stepparent to inherit from the stepchild, or rights in the
stepchild’s descendants.

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43 Id. at 488.
44 Id.
45 Cahn, supra note 4, at 60.
46 Susan N. Gary, Outline of the Parent-Child Relationship Under Intestacy Statutes (March 31,
47 Gary, supra note 16, at 671.
Until California’s statute, no state allowed a stepchild to inherit from a stepparent.\textsuperscript{48} Since the California statute’s enactment, a few other states have allowed a stepchild to inherit from an intestate stepparent;\textsuperscript{49} however, stepchild inheritance through intestacy typically only occurs as a last resort in order to avoid the estate passing to the state.\textsuperscript{50} Generally, the instances in which stepchildren inherit from their intestate stepparent are negligible.\textsuperscript{51}

While California was progressive in its recognition of changing family dynamics and inclusion of stepchildren in its intestacy statutes, the current California statute and the few states that have followed still lag behind the reality blended families experience today.

\textbf{C. Equitable Adoption: Inadequate Solution for Inheritance by Stepchildren}

Regardless of whether a state has an applicable statute, as California does, the issue of stepchildren inheriting through intestacy still arises because of the prevalence of blended families in the United States. More than half of the states’ courts have turned to equitable adoption as a solution when a statute does not address stepchild inheritance.\textsuperscript{52} Equitable adoption is a judicially created doctrine which allows the court to treat the child as though he or she was

\begin{footnotes}
\item[50] OHIO REV. CODE ANN. § 2105.06(J) (West 2009) (provides that when a decedent leaves no next of kin and the decedent’s property would otherwise pass to the state, the decedent’s property shall be distributed “to stepchildren or their lineal descendants.”)
\item[51] See e.g., CONN. GEN. STAT. ANN. § 45a-439(a)(4) (West 2009) (allowing a stepchild to inherit when there are no issue, parents, or issue of parents); MD. CODE ANN., Est. & Trusts § 3-104(e) (West 2009) (same); OHIO REV. CODE ANN. § 2105.06(J) (West Supp. 2009) (same); S.C. CODE ANN. § 62-2-103(6) (2009) (allowing a stepchild to inherit when there are no issue, parents, or issue of parents, grandparent, issue of grandparent, great grandparent, or issue of great grandparent). Other states allow issue of a predeceased spouse to inherit to permit escheat. See e.g., ARK. CODE ANN. § 28-9-215(2) (2009); IOWA CODE ANN. § 633.219(6) (West 2009); KY. REV. STAT. ANN. § 391.010(6) (West 2009); MO. REV. STAT. § 474.010(3) (2009).
\item[52] Cahn, supra note 4, at 64; Michael J. Higdon, When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine, 43 WAKE FOREST L. REV. 223, 225 (2008).
\end{footnotes}
equitably adopted if the foster or stepparent contracted to adopt the child but did not complete the adoption.\textsuperscript{53} Some courts have applied the doctrine even though an express contract to adopt did not exist.\textsuperscript{54} However, the argument that a stepparent equitably adopted a stepchild, and therefore the stepchild has a right to inherit through intestacy, has rarely worked in the court system.\textsuperscript{55} In most jurisdictions, a successful equitable adoption claim requires that a foster child show there was a promise to adopt.\textsuperscript{56} A stepchild relationship is not a promise to adopt.\textsuperscript{57} Consequently, the states need a solution, such as the factors test, that courts will use to allow for inheritance in blended family situations.

**IV. GOING BEYOND THE EXISTING STATUTES -- FACTORS TEST**

Because a considerable amount of variability exists in stepparents’ roles, a factors test is the best approach to a statute concerning whether a parent-child relationship exists between a stepparent and stepchild.\textsuperscript{58} The stepparent-stepchild relationship is the most complex and challenging relationship within the stepfamily context.\textsuperscript{59} A mechanical test, although easily administrable, lacks viability, as the complexities involved in a relationship would be oversimplified and likely fail to meet the intent of the stepparent and stepchild. Because of these complexities, the existence of a stepparent and stepchild relationship alone should not guarantee

\textsuperscript{53} Id.
\textsuperscript{55} Higdon, *supra* note 52, at 226, 256.
\textsuperscript{56} Id. at 260.
\textsuperscript{57} See e.g. Pierce v. Pierce, 645 P.2d 1353, 1355 (Mont. 1982) (holding that a step-father could not adopt his step-child by ‘equitable adoption’).
\textsuperscript{59} Id. at 170.
Inheritance rights under intestacy statutes; rather the UPC and states should examine elements of the relationship with the following factors test.

**Determination of whether a parent-child relationship existed for intestacy purposes between stepchildren and stepparents shall be made by evaluating all of the factors affecting the interests of the particular child and the circumstances of that family, including:**

a) The age of the child at the time the stepparent entered the stepchild’s life. Stepparents who enter into a stepchild’s life after the stepchild has reached the age of majority are unlikely to have a parent-child relationship.

b) The length of the marriage between the stepparent and legal parent.

c) Whether the decedent stepparent had any living legal children which survived the decedent, and how the stepchild and stepparent relationship compares to the legal child and stepparent relationship.

d) Whether the stepchild helped care for the stepparent as though he or she was a legal parent as the stepparent aged.

e) The frequency of contact between the stepparent and stepchild throughout their lives.

f) Whether the stepchild referred to the stepparent as “Mom” or “Dad” around the stepchild’s friends.

g) The stepparent would have adopted the stepchild but for a legal barrier during the stepchild’s childhood.

h) Following the death of a legal parent, the stepchild lived with the stepparent.

i) The stepchild lived with the stepparent following the divorce of the stepparent from the stepchild’s legal parent.

j) Whether the stepchild was a minor and primarily financially supported by the stepparent at the time of the stepparents death.

For purposes of this statute, a “legal parent” is defined as a child’s biological or adoptive parent. A “legal child” is defined as a parent’s biological or adopted child.

**A. Rationale for Each of the Proposed Statute’s Factors**

Factor (a), the age of the child at the time the stepparent-stepchild relationship began, is an important element in determining whether a decedent would intend for a stepparent or stepchild to inherit through intestacy. Generally, older stepparents spent little time with their
adult stepchildren and neither person may be motivated to develop a relationship. Thus, stepparents acquired later in life generally are not seen as family members by a stepchild, and norms of family obligations do not apply to them. Research demonstrates that adolescent and young adult stepchildren engage in the most topic avoidance with their stepparents, as opposed to regular parents, friends, etc. A stepparent is unlikely to form a parent-child relationship with a stepchild who does not share information regarding their life and feelings. Therefore, factor (a) would help discern the likelihood of whether the stepparent–stepchild relationship resulted in feelings of a parent-child relationship and kinship obligations that would compel inheritance.

The length of a marriage between a stepparent and legal parent serves as a discernable reference point for the courts that demonstrates the length of time over which a parent-child relationship can form. Longer term step-relationships are often defined as kinship ties. The factors test includes factor (b) because a longer marriage creates a greater opportunity for a stepparent to create a parent-child relationship with a stepchild. Similarly, studies demonstrate that a stepchild is less likely to have a relationship with a newly acquired stepparent. A factors test is particularly appropriate with factor (b) because while the length of a relationship between

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60 Lawrence Ganong and Marilyn Coleman, Obligations to Stepparents Acquired in Later Life: Relationship Quality and Acuity of Needs, 61B, No. 2 J. OF GERONTOLOGY: SOCIAL SCIENCES S80, S86 (2006). The study conducted by Ganong and Coleman used a sample of 487 men and 571 women from across the United States. The mean age was 43.5 years (range ¼ 17–94 years). More than half (n ¼ 716) had children, and 165 were stepparents. Id.
61 Id. at S80.
62 Paul Schrodt, The Stepparent Relationship Index: Development, validation, and associations with stepchildren’s perceptions of stepparent communication competence and closeness, 13 PERSONAL RELATIONSHIPS 167, 169 (2006). Schrodt’s study included 522 young adult stepchildren from four different states who completed an inventory assessing key dimensions of the stepparent–stepchild relationship, as well as stepchildren’s perceptions of stepparents’ communication competence and closeness. The results produced the Stepparent Relationship Index. Id. at 171.
63 Ganong & Coleman, supra note 60 at S81.
64 Id. at S86.
65 Id. at S81.
a stepparent and stepchild is an important element of a parent-child relationship, studies have not definitively determined “how long the relationship between older stepparents and adult stepchildren has to exist … before step relationships are seen as kinship ties.” 66 Naturally, “the invisible bonds of loyalty that connect parents and children across the life course apparently do not apply to relatively recent stepparent–stepchild ties.”67 Factor (b) closely relates to factor (a) as “stepchildren who develop a relationship with their primary stepparents at an earlier age, as well as those who have been members of their stepfamilies for longer periods of time, may be somewhat more likely to grant a primary stepparent parental authority,” a sign that indicates a parent-child relationship exists.68

Factor (c) takes into account whether a decedent stepparent has any legal children who survived him or her in addition to the stepchild. Legal children of a stepparent in question can be helpful in analysis of whether a parent-child relationship existed between a stepparent and stepchild. First, the stepparent and legal child serve as an indicator of how a true parent-child relationship with the stepparent as a parent figure would appear. Through the comparison of a parent-child relationship between the stepparent and his or her legal child and the stepparent and his or her stepchild, a court may be able to discern whether a parent child relationship existed. Furthermore, the existence of a legal child may make a stepparent less likely to want his or her stepchildren to inherit in lieu of or in addition to a legal child. This is a consideration the court should take into account in concert with the other parent-child relationship factors.

Factor (d), whether the stepchild helped care for the stepparent as the stepparent aged, aptly indicates the responsibility and closeness a stepchild feels towards a stepparent. Generally,

66 Id. at S86.
67 Id.
68 Schrodt, supra note 62, at 180.
people perceive themselves as having greater responsibilities to assist family members, particularly parents, through old age. In making judgments about assistance exchanged in step-relationships, emotional closeness or relationship quality is the most salient element. If emotional closeness exists, a stepchild will likely care for a stepparent as the stepparent ages. Study participants demonstrated that emotional closeness can indicate that step-relationships were defined as familial bonds that carried familial obligations. Close bonds between stepparents and stepchildren increase the likelihood that family members and others define the relationship as quasi-biological and thus would like the stepparent or stepchild to inherit through intestacy.

Because stepparents who are genuinely interested in establishing and maintaining a parent-child like relationship with their stepchild are likely to maintain close contact with the stepchild, the factors test incorporated factor (e). Consequently, effort on the part of both the stepparent and stepchild occurs well beyond the formation of the stepfamily. The inclusion of factor (e) allows the possibility that a parent-child relationship can exist between a stepparent and stepchild even if the stepparent divorces the legal parent. In examining the frequency of contact between the stepparent and stepchild throughout their lives, a parent-child relationship may be discerned. Factor (e) also incorporates the element of who had custody over the stepchild during the stepchild’s childhood, because the stepchild will have a greater frequency of contact with his or her custodial parent and stepparent. Therefore, factor (e), continued and frequent contact between the stepparent and stepchild, can be a telling element as to whether a parent-child relationship existed prior to one party’s death.

69 Ganong & Coleman, supra note 60, at $82.
70 Id. at $82.
71 Id.
72 Schrodt, supra note 62, at 169.
73 Id.
Research demonstrates that factor (f), whether the stepchild referred to the stepparent as “Mom” or “Dad” when speaking with their friends, indicates the role the stepparent played in the stepchild’s life. Children who refer to their stepparent as “Mom” or “Dad” likely had a stepparent who guided and enforced household rules, disciplined their stepchildren as children of their own, and gave advice to their stepchildren on how to live their lives. These actions by the stepparent indicate a stepparent fulfilling the parent role in a parent-child relationship with a stepchild.

The factors test modified the second prong of Cal. Prob. Code § 6454 (West 2009) to develop factor (g), the stepparent would have adopted the stepchild but for a legal barrier during the stepchild’s childhood. As discussed supra, § 6454 fails to fulfill the intent of many stepparent or stepchild decedents. The California Supreme Court’s interpretation that a legal barrier must exist until the death of the stepparent is under inclusive. Consequently, the factors test modified § 6454. The inclusion of the proviso that the legal barrier exists through the stepchild’s childhood eliminates the primary cause of the California circuit split in the interpretation of a legal barrier, and avoids the under inclusive interpretation of the California Supreme Court. The factors test defines a legal barrier as having to exist through the stepchild’s legal childhood, rather than through the death of either the stepparent or stepchild, because adult child adoption by stepparents rarely occurs due to a variety of factors, including that the stepparent sees no need to adopt when the emotional relationship already present. Thus, whether a stepparent would have adopted a stepchild but for a legal barrier should be one of the factors of the statute.

74 Id. at 174.
75 Id.
77 Cahn, supra note 4, at 60.
Factors (h) and (i) indicate a parent-child relationship because when a stepchild continues to reside with a stepparent after the death of or divorce from the legal parent, the relationship between the stepparent and stepchild becomes the same as that of a legal parent and a child.\textsuperscript{78} The relationship particularly replicates a parent-child relationship when the other legal parent is alive, yet the child chooses to remain with the stepparent. This relationship leads to the conclusion that the stepparent would likely want and intend for the stepchild to inherit as if the stepchild were a legal child.\textsuperscript{79}

The final factor, whether the stepchild was a minor and primarily financially supported by the stepparent at the time of the stepparent’s death, is a discernible element by the court and already implemented in part under the federal Social Security Act.\textsuperscript{80} When a stepparent primarily supports a stepchild financially, the stepparent demonstrates a parental responsibility towards that child, that the stepparent is not obligated to perform.\textsuperscript{81} In shouldering the financial burden of a stepchild, the stepparent assumes the role and duty of a mother or father.\textsuperscript{82} As such, in following the federal statute’s lead, a stepparent who financially supports a stepchild under factor (j), meets an element of a parent-child relationship with that stepchild.

The factors test surpasses other intestacy statutes by addressing the blended family social culture in America. The factors test encompasses more than existing statutes, as it allows for

\textsuperscript{78} Noble, \textit{supra} note 15, at 848.
\textsuperscript{79} \textit{Id.} Furthermore, in contemplating the value of factor (h) consider a situation in which a father is widowed leaving children. He remarries and dies intestate. His wife (the children’s stepparent) would take. Consequently, if the stepmother died intestate, unless she had formally adopted these children, the children could not inherit from their stepmother what she received from their father under current intestacy statutes. Note that had the father not remarried the children would have been the first to inherit. Factor (h) addresses this problem.
\textsuperscript{81} Laura Wish Morgan, \textit{The Duty of Stepparents to Support their Children}, DIVORCE LITIGATION (May 19, 2002), http://childsupportguidelines.com/articles/art199908.html.
\textsuperscript{82} \textit{Id.}
stepchildren to inherit from stepparents, and stepparents to inherit from stepchildren after closely examining the relationships. Furthermore, each factor within the factors test is an element that research suggests demonstrates whether a valid parent-child relationship exists.

B. Stepparents’ Assumptions

Frequently, a stepparent may not adopt a child because the child’s other legal parent (the parent not married to the stepparent) does not want to relinquish his or her parental rights. While this legal barrier disappears once the child reaches the age of majority, the stepparent remains unlikely to adopt the stepchild because the rights and responsibilities between a parent and child change substantially once that child becomes a legal adult.\(^83\) In other words, the relationship can continue without concerns regarding visitation and custody because the child is of the age to choose. That a stepchild continues to spend time with a stepparent once he or she can legally choose whom to spend time with evidences that a parent-child relationship exists which should allow for inheritance, as recognized under factor (e) of the factors test. Yet, none of the current statutory provisions consider these factors.

Even if a legal barrier does not exist which bars adoption, a stepparent with a close relationship to the child still may not adopt the child because the stepparent does not feel the need to change an already good relationship, particularly once the child has reached the age of majority. Stepparent reluctance may be caused by the requirements of existing adoption law, which often do not recognize the possibility of continuing emotional (or inheritance) relationships between the child and the parent whose rights must be terminated so that the

\(^{83}\) See Barnum-Smith v. Joseph (Estate of Joseph), 949 P.2d 472, 488 (Cal. 1998) (George, C.J., dissenting) (arguing that requiring that the barrier exist only during the child's minority makes sense because the majority’s interpretation precludes most stepchildren from meeting the requirements of the statute).
adoption can occur. Stepparents may also simply procrastinate or want to avoid the added cost when their family has been functioning well without the legal title. Finally, a stepparent may not want to adopt a stepchild because he or she respects the child's legal parents, or has a good relationship with the child’s other legal parent but still considers the child one of his or her own. In cases of remarriage in which the new spouse (stepparent) has no children of his or her own, the stepparent likely considers the child a family member and an heir regardless of adoption status. Consequently, this child has three meaningful child-parent relationships (i.e., relationships with the legal father, legal mother, and stepparent).

Stepparents face complex emotional issues as they sort out and create family relationships. Stating inheritance rights in a will may raise issues that stepparents and their spouses would rather avoid. Although their avoidance causes adverse affects under the existing intestacy statutes, people often operate under the false assumption that their “family” will inherit under the intestacy statutes. Consequently, the decedent fails to draft a will because he or she inaccurately assumes that their concept of family, which includes stepchildren, will fall within the intestacy statutes’ definition of a family.

In each of the above situations, stepparents are raising children even though they are not legal parents. Thus, the fact that these family members have functioned as a family suggests that each would prefer that the other inherit as if they were legally related, rather than merely looking at

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84 Cahn, supra note 4, at 60.  
85 Gary, supra note 16, at 650.  
86 Id.  
87 Monica K. Johnson & Jennifer K. Robbennolt, Using Social Science to Inform the Law of Intestacy: The Case of Unmarried Committed Partners, 22 LAW & HUM. BEHAV. 479, 489 (1998) (analyzing results of the survey reported in Fellows et al, Public Attitudes. Johnson and Robbennolt report that more than 30% of persons with opposite-sex partners and more than 40% of persons with same-sex partners incorrectly assumed that their unmarried partners would inherit a share of their estate under the intestacy laws that applied to them).
the step-family as serving a functional purpose. Yet current intestacy statutes make no provision for these family members. The statutory definitions of heirs continue to be based on adoption or biological relationships. None of the intestacy systems look to whether the parent and child functioned as a family, which would likely more closely align itself to the decedent’s testamentary intent.

C. Parent-Child Relationships are Already Examined

1. Existing Judicial Parent-Like Relationship Tests

The factors test combats the under-inclusive intestacy laws by expanding the definition of parent and child to include stepparents who functioned in a parent-child relationship. Although this proposal is unique for intestacy purposes, various courts have incorporated similar parent-like tests for purposes such as custody and visitation issues. Therefore, the factors test, although unique in applicability, is not unique to the court system which frequently examines relationships

88 Gary, supra note 176, at 665.
89 It is only a matter of time before the absence of stepchildren inheritance through intestacy surfaces in the context of gay and lesbian blended families. Up to nine million American children under the age of eighteen have at least one gay or lesbian parent. That figure includes children who were born through reproductive technologies and as a result only have a legal relationship with their biological mother, but were raised since birth with their mother’s homosexual partner. These children can only inherit by intestacy from their biological parent, even though the couple was together beginning with the child’s pregnancy through the rest of its life. Sarah Kaye & Katherine A. Kuvalanka, State Gay Adoption Laws and Permanency for Foster Youth, Maryland Family Policy Impact Seminar (May 2006), available at http://www.sph.umd.edu/fmsc_docsContribute/GayadoptionbriefFINAL0806.pdf. As more states recognize marriage or civil unions between same sex partners, the issue of same sex stepparents and intestacy rights will be of great importance. Particularly because the acknowledgement or allowance of same sex marriage, does not necessarily mean that the same sex couple will be permitted to adopt, creating a legal barrier to adoption. See e.g., In re Angel Lace M., 516 N.W.2d 678 (Wis. 1994).
to discern whether a parent-like relationship exists. Consequently, the implementation of the factors test would not face numerous barriers, because it furthers an analysis courts have grown accustomed to.

Courts currently use relationship tests similar to the factors test to examine other elements dealing with blended families. Although courts have not specifically evaluated a parent-like relationship in the context of intestacy for stepchildren, several cases have focused on the functional parent-child relationship and the importance to the child of maintaining a relationship with someone who has acted as a parent when considering visitation rights. The Supreme Court of Massachusetts defines a “de facto parent” as “one who has no biological relation to the child, but has participated in the child's life as a member of the child's family.” The Supreme Court of Wisconsin created a four-part test to determine whether a “parent-like relationship” exists with a child. To constitute a parent-like relationship, the petitioner must show that the legal parent consented to and fostered the relationship, that the petitioner and the child resided in the same household, that the petitioner assumed responsibilities of parenthood and helped care for the child, and that the petitioner's parental role had existed for a length of time sufficient to have developed a parental relationship with the child. The New Jersey Supreme Court adopted this four-part test in 2000 and interpreted the statutory definition of

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91 See, e.g., J.A.L. v. E.P.H, 682 A.2d 1314, 1320 (Pa. Super. 1996) (stating that where a strong psychological relationship exists between the child and a third party who has “in the child's eye a stature like that of a parent” then “the child's best interest requires that the third party be granted standing”).
92 E.N.O. v. L.M.M., 711 N.E.2d 886, 891, 893 (Mass. 1999) (explaining that the legal parent's interests must be balanced with the child's interest in maintaining a relationship with the de facto parent).
94 Id.
“parent” to include a psychological parent for visitation purposes. Florida has also incorporated in its statutes a list of twenty relationship factors to determine the custodial parent following a divorce. A test for a parent-like relationship between the stepchild and parent is the best solution for allowing stepchildren to inherit through the intestacy statutes.

2. Inheritance Rights of Stepchildren Already Recognized in Other Arenas

Other areas of law already consider stepchildren natural inheritors of their stepparents. The Social Security Act (“the Act”) provides benefits to dependent children of deceased parents who at death were fully insured under the Act. Under the Act, a child includes “a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died…” The Act looks to the length of the relationship and recognizes that a stepparent likely had some financial responsibility to the stepchild, as factors (b) and (j) do in the factors test. The Act, and similarly, the factors test could easily be likened to one of the purposes behind intestacy statutes: supporting the family.

Individual state laws also contain provisions for stepchildren upon the death of a stepparent. The Pennsylvania Worker’s Compensation Act, § 1407, defines children to include stepchildren who are members of decedent's household at the time of death. In the case of death due to an occupational disease, § 1407 provides for computation of compensation based on whether a spouse survives the decedent and the number of children who survive decedent. For

96 FLA. STAT. § 61.13(3) (2009).
99 77 PA. CONS. STAT. ANN. § 1407 (West 2009).
purposes of this statute, the term children includes stepchildren. Thus, while legislatures found it appropriate to provide for stepchildren who reside with the decedent when the decedent's death results from an occupational disease, a logical extension of the law would also provide for stepchildren who reside with decedent when the decedent dies intestate.100

Because the federal legislature and some state legislatures have developed tests for stepchildren inheritance in specific areas of the law, there should be no issue in incorporating the factors test to provide for stepfamilies in dealing with intestacy.

D. Long-Term Positive Effects of the Statute

Statutory provisions, such as the factors test, which provide for blended American families through intestacy statutes, create long-term positive effects by increasing the accuracy of intent effectuation in intestacy statutes, and providing support for a greater number of members within a blended family. By including a provision that specifically addresses stepparents and stepchildren in the statutes, the factors test would address the reality that more than half of all Americans have been or are currently a stepchild or stepparent.101 This would result in more accurate intestacy distribution by providing for a situation that while not new (step families have existed for decades), remains sparsely and inadequately addressed by the UPC and states. In allowing the possibility of inheritance from a stepparent or stepchild, the factors test better meets the two primary goals of intestacy provisions, to carry out the intent effectuation of the decedent102 and to assist the state by supporting the decedent’s family.103 The factors test would

100 Noble, supra note 15, at 848-49.
102 Gary, supra note 17, at 651.
103 Id. at 652.
better satisfy the intent of the decedent by allowing deserving stepchildren to inherit from their
stepparent and vice versa, an option which is not available to stepparents unless the stepchild is
legally adopted by the stepparent. Families will receive greater financial support because the
stepchild or stepparent will be able to better provide for the family, by keeping the inheritance
within the immediate family, rather than allowing inheritance to fall to more distant relatives.

E. Potential Criticisms of the Factors test

The hesitancy of dealing with the inheritance rights in blended family situations stems
from the large variance in the strength of stepparent-stepchild relationships, and the burden on
judicial resources. However, with “the large majority of people dying intestate,” and more than
half the population constituting a member of a blended family, the issue of stepchild and
stepparent inheritance can no longer be overlooked.104

1. Variance in Strength of Stepparent-Stepchild Relationships

Critics correctly shy from granting broad inheritance rights to blended family members
when one considers that 1) sixty to seventy-four percent of remarriages end in divorce, and 2)
time is needed for stepfamilies to develop family closeness.105 However, the factors test
alleviates these concerns by withholding broad rights, and instead allowing inheritance based on
the individual relationship. While not all remarriages are life lasting, some of the bonds created
between stepparents and stepchildren in a remarriage do indeed last a lifetime. The factors test
takes into consideration the amount of time and frequency of visits between the stepparent and
stepchild. The factors test does not grant broad inheritance rights, but rather looks to the

105 AboutDivorce.org, Divorce Rate – USA, http://www.aboutdivorce.org/us_divorce_rates.html
(last visited on Oct. 14, 2009); E.M. Hetherington, The Role of Individual Differences and
Family Relationships in Children’s Coping with Divorce & Remarriage, FAMILY TRANSITIONS
165-94 (P. Cowan & E. M. Hetherington eds., 1991)).
variance in the strength of the stepparent-stepchild relationship that critics are concerned with and discerns whether a decedent would intend for the stepfamily member to inherit through intestacy. By looking at the totality of the circumstances of the stepparent-stepchild relationship, the factors test helps determine whether the strength of the relationship reached that of a parent-child relationship.

2. More Opportunities for Stepchildren to Inherit

One may argue that allowing a stepchild to inherit through intestacy unfairly favors stepchildren by allowing them more opportunities to inherit than biological children without stepparents and adopted children. Adoption of a child severs the ties to his natural parents, thereby according adoptees the same inheritance rights as biological children. However, this argument overlooks that an adopted child does not sever all ties with his or her biological parents after adoption in situations involving post-adoption contact. Thus, some adoptive children have the opportunity to inherit from more than just their two biological parents. Moreover, oftentimes a child is in the position to inherit from a stepparent because a biological parent was absent throughout the child’s life. This would make it less likely that the child would inherit from three parental figures, which would alleviate the discrepancies between the number of potential benefactors for the child. Finally, the purpose of an intestacy statute is to focus on the decedent’s intent, not equality among the number of potential benefactors. Stepfamilies in which a child maintains emotional ties to the noncustodial parent or to the noncustodial parent’s family acknowledge a familial connection and should be provided the opportunity for inheritance from the noncustodial relative and stepparent if a relationship exists that would establish that intent.

106 Cahn, supra note 4, at 65.
107 Id.
108 Id.
The argument that a stepchild has more opportunities to inherit than a person with only two biological parents and, therefore, should be forbidden from inheriting through a stepparent is unreasonable. Every person has different opportunities for inheritance that result from their family. Even if one set aside the obvious discrepancies in wealth that allow for some to inherit versus others, each family dynamic creates its own circumstances to inherit. A person with two biological parents may be an only child, and thus not have the “opportunity” to inherit from a sibling when compared to another. To use fairness in terms of opportunities for inheritance as an argument ignores the obvious fact that no two people are alike for inheritance purposes.

3. Factors Test Statute Creates a Judicial Burden on the Court Systems

It could be argued that including a provision which requires the evaluation of a relationship between a stepparent and stepchild would create a judicial burden on the court system. However, the UPC already evaluates parent-child relationships in section 2-114, which precludes inheritance from or through a child if a parent under the statute has not treated the child as a child or has refused to support the child.\(^\text{109}\) Thus, the UPC has already opened itself to judicial scrutiny in terms of a parent-child relationship. Similarly, several state statutes and the federal Social Security Act evaluate the relationship or relationship factors between parents, stepparents and children to discern appropriate courses of action for distribution following a stepparent’s death. Consequently, to expand intestacy to include inheritance by stepchildren and stepparents would promulgate the primary purposes of intestacy, intent effectuation and family care, while not generating any greater judicial responsibility than that which already exists through the relationship tests currently in statutes. Furthermore, the United States Supreme Court has repeatedly acknowledged that states have a legitimate interest in developing statutory

classifications that promote an “accurate and efficient method of disposing of property at death” despite additional judicial responsibility.\footnote{Trimble v. Gordon, 430 U.S. 762, 766 (1977); Lalli v. Lalli, 439 U.S. 259, 265 (1978).}

**VI. CONCLUSION**

In conclusion, the UPC and state statutes are inadequate to deal with the realities of the modern blended family; thus, the UPC and state statutes should include a factors test that would determine whether a parent-child relationship existed between a stepparent and stepchild thereby allowing them to inherit from one another through intestacy. By determining whether a parent-child relationship exists and allowing blended family members to inherit from one another, the primary purposes of intestacy--intent effectuation and support of the family that alleviates the burden on the state--would be better met. Finally, the federal government and state legislation already include a stepchild as a child for inheritance purposes and apply relationship tests in specific contexts. Consequently, the inclusion of a factors test for inheritance purposes regarding stepparents and stepchildren naturally extends a body of law the court system and legislatures already embrace.