

SOLVING INJUSTICE IN INHERITANCE LAWS THROUGH JUDICIAL DISCRETION: COMMON SENSE SOLUTIONS FROM COMMON LAW TRADITION

I. INTRODUCTION

For many years, American legal scholars have argued that U.S. laws providing for distributing the property of those who die without a will is unjust and should be changed.¹ In most states, when a person dies without a will, her property is distributed according to a strict statutory system to her spouse, children, descendants, or other relatives.² While this seems reasonable on its face, intestate succession laws do not allow for the rapidly-changing American family.³ For example, suppose a single woman is raising her grandchildren because her daughter is an active drug addict and therefore not fit to raise the children. If the grandmother who is raising the children dies without a will, her property is given to her drug-addicted daughter. Her grandchildren, who are in all ways dependent upon her for support, do not take any part of the estate and have no way to obtain any part of it.

In the United States, the rules of intestate succession do not allow grandchildren to take if one of their parents is living.⁴ In addition, intestate succession laws do not allow stepchildren, in-laws, nor unmarried partners to take.⁵ Recognizing the injustice of the current system, a number of models for changing inheritance law in America have been suggested, examined,

1. For example, John Gaubatz argued in 1977 that judges should have discretion in distributing estates. John T. Gaubatz, *Notes Toward A Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497 (1977). Susan Gary proposes that states adopt a “function” approach to determining “family” for the purposes of intestacy. Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1 (2000). Frances Foster believes that the current system is unjust, but has struggled to find a fair alternative. Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199 (2001).

2. See Part II, *infra*.

3. See Part III, *infra*.

4. Dukeminier, *infra* note 10, at 80-84.

5. For example, same-sex partners, who are prohibited from marrying in most U.S. states, are excluded from being able to take part of the estate if a partner dies intestate. This has resulted in a particularly harsh result for Frank Vasquez, whose partner Robert Schwerzler died intestate in 1995. Daniel B. Kennedy, *Til Death Do Us Part*, ABA J., Jan. 2001, at 10. Vasquez and Schwerzler lived together and ran a business together, in which Vasquez, who is illiterate, performed most of the labor while his partner managed the business and maintained all the client contacts. *Id.* Schwerzler had sole title to the home he shared with Vasquez, as well as other property worth over \$200,000. *Id.* Vasquez was left without a home nor a way to make a living after California intestate succession laws resulted in all of his partner’s property being given to the partner’s siblings. *Id.*

criticized, and re-examined, but so far none have been adopted.⁶

In light of new data from Census 2000, it is time to re-examine U.S. intestate succession law. Census 2000 revealed that the American family is changing tremendously, making rules of intestate succession more unjust and out of tune with the goals of American inheritance law. Although other methods of property dispersal at death always reflect the desires of the one who leaves it behind.⁷ On the other hand, the rules of intestate succession remain stagnant⁸ while the American family and society changes, leaving an alarming disconnect.⁹ Contemporary social phenomena no longer comport with the goals of the U.S. inheritance system. Unfortunately, there are very few alternatives available to U.S. courts to circumvent these rules when justice would require it.¹⁰

The purpose of this Note is to examine the goals of U.S. intestate succession law,¹¹ the adequacy of the current schemes to meet those goals,

6. Frances Foster provides a thorough discussion and analysis of these proposals, which “include expanded intestacy rules to cover ‘nontraditional’ family members, updated elective share provisions to implement a partnership theory of marriage, statutory and judicial remedies for disinherited children, and alternative dispute resolution techniques for ensure a fair hearing for ‘nonconforming’ wills that leave property outside the family.” Foster, *Family Paradigm*, *supra* note 1, at 203-04.

7. Wills, trust instruments, and documents providing for inter vivos transfers of property, such as insurance policies, are all created by the decedent and thus reflect the desires of the decedent. In addition, all of these methods of property dispersal and transfer can be changed at any time by the decedent before death to reflect changes in the decedent’s family or relationships.

8. Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199 (1999).

9. It should be noted that several states have revised intestate succession statutes in recent years. However, these changes are relatively minor, such as distributing a greater share of the estate to a surviving spouse or to adjusting distribution of shares from a strict *per stirpes* scheme to a representative system. See Foster, *Family Paradigm*, *supra* note 1, at 125; Gary, *supra* note 1, at 27 n.8. See also Part II for a discussion of *per stirpes* and representation systems of distribution. However, these changes do not address the larger problems with intestate succession in the United States.

10. Courts have invented several equitable remedies to help relieve some of the harsh results of strict application of intestacy rules. For example, some states, by statute, recognize “common law” or meretricious marriages, in which partners lived together as husband and wife for a certain number of years although they never obtained a marriage license. See, e.g., N.H. REV. STAT. ANN. § 457:39 (2001); OR. REV. STAT. § 112.107 (1995) (repealed in 1999). This concept allows courts to give a spousal share to one who was not legally married to the decedent.

In order to protect children of intestates from harsh results, courts created equitable adoption. In states which recognize the concept, children are considered legal heirs of the decedent if they lived as and were treated as a child of the decedent, and there was an agreement between the natural and adoptive parents. See, e.g., O’Neal v. Wilkes, 263 Ga. 350 (Ga., 1994). The requirements for proving “equitable adoption” vary by jurisdiction. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES, 105-06 (5th ed., 1995).

11. The reader should be mindful throughout that this note discusses and proposes changes to the intestate succession law alone, and does not propose change for other areas of inheritance law. Changes in other areas of inheritance law, such as forced shares for spouses or children to allow for

and the alternative discretionary schemes foreign countries use, which may help solve current U.S. problems. Virtually every other English-speaking country in the world has adopted a scheme for intestate succession that grants judicial discretion in distribution of a decedent's estate, when justice requires, to those who were financially dependent on the decedent. The United States should adopt such a scheme to correct injustices that will occur more frequently as current family dynamics accelerate past rules of intestate succession that remain trapped in the eighteenth century.

II. INTESTATE SUCCESSION IN THE UNITED STATES

When a person dies without leaving a will that expresses his¹² intent in distributing the property he has left behind, the law steps in to distribute the estate, in effect imposing a statutory will.¹³ Because almost half of the U.S. population dies without a will, the rules of intestacy affect a large part of the population.¹⁴ Unfortunately, many people are not aware of how the rules of intestate succession will distribute their estates, and, presumably, many intestate estates are not distributed according to the desires of the decedent.¹⁵ Most people who die without a will are, predictably, middle-aged people whose death was unexpected, or those who had moderate estates and could either not afford or did not want to hire a lawyer to draft a will.¹⁶

When one dies without a will, one's property is dispersed in accordance with a strictly applied¹⁷ state statutory scheme.¹⁸ While each state's laws regulating intestate succession vary, they are substantially similar. In every state, the decedent's surviving spouse first takes a share of the estate,¹⁹ then

disinheritance, require a change in U.S. inheritance principles because they may require courts to oppose the expressed intent of the decedent.

While some scholars have insisted that a change in the paradigm of American inheritance law is needed, such an undertaking is beyond the scope of this note. Frances Foster and Susan Gary have articulated such proposals. See Foster, *Family Paradigm*, *supra* note 1.

12. In the interest of gender-neutrality, I have tried to alternate between male and female pronouns.

13. See Gary, *supra* note 1, at 1.

14. See DUKEMINIER & JOHANSON, *supra* note 10, at 67; Gary, *supra* note 1, at n.12.

15. Gary, *supra* note 1, at 7.

16. *Id.* at 13-14; see also Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 356.

17. See Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*. 1966 WIS. LAW REV. 340, 346.

18. The law of the state in which the decedent lived at the time of his death governs the distribution of personal property; the distribution of real property is governed by the law in which the property is located. DUKEMINIER & JOHANSON, *supra* note 10, at 68.

19. Traditionally, spouses were entitled only to a one-third share of the estate, under the old

the decedent's surviving children by blood or adoption.²⁰ Stepchildren and unmarried partners are excluded from taking any part of the estate, as are sons- and daughters-in-law.²¹ If the intestate died without a surviving spouse or child, other lineal descendants, such as grandchildren and great-grandchildren, take the estate.²² Again, only descendants who are blood relatives (and sometimes adopted relatives) are eligible to receive any part of the decedent's property.²³ If there are no surviving lineal descendants, the decedent's parents, if living, take the estate.²⁴ If the decedent's parents are not living, his siblings share the estate.²⁵ If none of these survive, more

notion of dower rights. Some states allow spouses to take half the estate when there are descendants. § 735 Ill. Comp. Stat. Ann. § 5/2-1 (2001). Most states have changed this rule, many of them allowing the spouse to take a set dollar amount plus one half of the remaining property. *See* FLA. STAT. ANN. § 732.102 (2001), MO. ANN. STAT. § 474.010 (2003), N.J. STAT. § 3B:5-3 (2003). Other states, such as Alaska, allow the surviving spouse to take the entire estate when all the decedent's living descendants are also descendants of the spouse. ALASKA STAT. ANN. § 13.12.102 (2001).

20. *See* DUKEMINIER & JOHANSON, *supra* note 10, at 70-83.

21. *Id.* at 81. There is an exception to the rule that only blood relatives and spouses may take. In Hawaii and Vermont, same-sex partners may register with the state and become entitled to marital rights, including a surviving spouse's share of the estate if one's partner dies intestate. *See, e.g.*, HAW. REV. STAT. § 572C-2 (2001); VT. STAT. ANN. tit. 15, §§ 1202-05 (2001).

22. There are three main schemes for determining how much of the estate is distributed to which descendants. In all schemes, the closer one's relation to the decedent, the larger the share. In a strict per stirpes (by stocks) scheme, which is in place in only a few states, the estate is divided into the number of shares as there are living children and deceased children with living descendants. If a child predeceased the decedent, that child's share is distributed to his children in equal shares. For example, say Bob had four children, one of whom predeceased him but had two children. Under a per stirpes scheme, when Bob dies, his estate will be divided into four equal parts. His grandchildren will divide their parent's share equally. Thus, each of Bob's living children will take one fourth of his estate, and his grandchildren will each take one eighth. *See* DUKEMINIER & JOHANSON, *supra* note 10, at 82; FLA. STAT. ANN. § 732.103 (2001); 755 ILL. COMP. STAT. ANN. § 5/2-1 (2001).

In a per capita with representation scheme, the estate is divided into shares at the generation nearest the decedent where there are living descendants. The shares are then distributed among the descendants per stirpes. For example, say Bob had two children, one of whom had three children and one of whom had one child. The estate is divided into four parts and divided equally among the grandchildren. *See* DUKEMINIER & JOHANSON, *supra* note 10, at 82; MO. ANN. STAT. § 474.010, 474.020 (2001); N.J. STAT. § 3B:5-4, 3B:5-6 (2001).

In a per capita at each generation scheme, the estate is again divided into shares at the generation nearest the decedent in which there are surviving descendants. However, at each generation, the estate is split so that all the descendants in that generation have an equal share. This is the approach taken by the Uniform Probate Code 1990. *See* DUKEMINIER & JOHANSON, *supra* note 10, at 83; ALASKA STAT. ANN. § 13.12.103, 13.12.106 (2003); N.C. GEN. STAT. § 29-15, 29-16, 29-6, 29-7 (2000).

23. Only one's children by blood or adoption, and their issue (which may or may not include those by adoption, depending on the jurisdiction) may take. *See* DUKEMINIER & JOHANSON, *supra* note 10, at 96.

Children born outside of marriage are now allowed to take in all states, although such children were formerly either ineligible to take altogether, or received a smaller share in the past. *Id.* at 106; *See also* Trimble v. Gordon, 430 U.S. 762 (1977).

24. DUKEMINIER & JOHANSON, *supra* note 10, at 85.

25. *Id.*

distant relatives take the estate, such as nieces, nephews, and cousins.²⁶ This sometimes results in “laughing heirs,” who may have never come into contact with the decedent, taking the estate.²⁷ Finally, if there are no living blood relatives, the estate escheats, or returns to the state.²⁸

The rules of intestate succession were created to further several goals of the American inheritance system. According to John Gaubatz, inheritance laws ideally serve to effectuate the desires of most citizens regarding the distribution of their property and to support the concept of the American family, as well as other important aspects of American society.²⁹

The most important guiding principle of U.S. inheritance law is its emphasis on the wishes and intent of the individual who has died.³⁰ While the strict scheme of intestate succession cannot possibly allow for every situation and every individual’s wishes, the rules were originally designed to express each state legislature’s judgment of the probable intent of most people.³¹

26. *Id.* There are several methods for determining the amount of the share to ancestors and collateral relatives, when there is no spouse, parent, or lineal descendant. If there are “first-line collaterals,” descendants of the decedent’s parents (aunts, uncles, nieces, nephews), the estate is distributed to them according to a per stirpes or per capita with representation scheme. *Id.* at 87; see also UNIFORM PROBATE CODE § 2-106(c).

If there are no first-line collaterals, the estate is distributed either by degree-of-relationship or by a parentelic system. Under the parentelic system, the estate passes to grandparents and their descendants, then great-grandparents and their descendants, and so on. See DUKEMINIER & JOHANSON, *supra* note 10, at 87. Under the degree-of-relationship system, the estate passes to the closest of kin, determined by counting the steps up from the decedent to the nearest common ancestor, and then the steps back down to the claimant. The relative who has the lowest number of total steps take the estate. If there are several relatives with the same number, they take the estate equally. *Id.* at 86-87.

27. They are called “laughing heirs” because they laugh all the way to the bank and do not grieve for the deceased. See *id.* at 88. A good example of this is the case of Henrietta Garrett, who died intestate in 1930 with an estate of over \$17 million. Estate of Garrett, 372 Pa. 438 (Pa., 1953). Thousands of claims were filed by people claiming to be her heirs. *Id.* After twenty-three years of litigation the court finally identified three first cousins. *Id.*

28. DUKEMINIER & JOHANSON, *supra* note 10, at 70; In re Estate of John O’Connor, 126 Neb. 183 (Neb. App. Ct. 1934).

29. See Gaubatz, *supra* note 1, at 501. He goes on to identify the four goals of succession law in the U.S. as:

(1) continuation of the regime of private property as dominant in the social order, (2) affectuation of the wishes of the individual, (3) provision for the well-being of the family, and (4) provision for the well-being of society.

Id. (citing 1 R. ELY, PROPERTY AND CONTRACT IN THEIR RELATION TO THE DISTRIBUTION OF WEALTH 425 (1914)); Gary, *supra* note 1, at 6-13.

30. See Gaubatz, *supra* note 1, at 503-06.

31. State intestate succession laws have changed somewhat in response to changes in American attitudes; several states have increased the surviving spouses’ share in response to recent articles and surveys. See Gary, *supra* note 1, at 2, 2 n.8. See also DUKEMINIER & JOHANSON, *supra* note 10, at 70-71; Gary, *supra* note 1, at 7, 7 n.27.

Another goal of American inheritance law is to recognize and support the importance of the family.³² In every scheme for distributing property in intestacy, the decedent's family takes her property. Only those who are related to the decedent, either through blood, adoption, or sometimes marriage,³³ are entitled to take any part of the estate. Thus, the rules of intestate succession support the family by keeping the property of the decedent with her family.

In addition, inheritance laws ideally benefit society by providing for the needy and recognizing those who are most deserving.³⁴ Current schemes of intestacy address these concerns by providing that the potentially needy family of the one who has died will take whatever is left.³⁵ Intestate succession laws were also designed to take into account those who deserve to inherit, assuming that those who provided support to the decedent would be his family.³⁶

Finally, U.S. intestate succession laws benefit society in that they are predictable, and easy to apply and administrate, thus reducing the strain on the legal system.³⁷ While inheritance law should serve to further all of these goals, the reality is that the current law of intestate succession no longer effectuates many of these goals.

III. CENSUS 2000 REVEALS THAT CURRENT U.S. LAW IS OUTDATED

The American population, particularly the composition of the family, has changed dramatically in recent years. Census 2000 results support the widely-held belief that the American family is changing rapidly and significantly.³⁸ For example, Census 2000 revealed that the number of

32. See Gaubatz, *supra* note 1, at 507-509.

33. The only relative by marriage who is entitled to take is one's spouse. Sons- and daughters-in-law cannot inherit under the rules of intestacy. See DUKEMINIER & JOHANSON, *supra* note 10, at 81.

34. See Gaubatz, *supra* note 1, at 509-16. There are several ways in which inheritance law provides for society: providing for the needy, the meritorious, the decedent, the stability of society, the economical use of property, ease of administration, constancy and stability of the legal system, and maintaining respect for the system. *Id.*

35. *Id.* at 510-11.

36. *Id.* at 511-12.

37. *Id.* at 513-17.

38. Some have argued that the American family itself is an outdated concept. Susan Gary has argued that inheritance law should reject the traditional notion of family in favor of a "system" or "functional" approach. Under this approach, the definition of family would be determined by the functional nature of the relationship, determined by a number of factors, rather than by blood relation, marriage, or adoption. See generally Gary, *supra* note 1.

Frances Foster has argued that the family paradigm in inheritance law is outdated and no longer useful, but has struggled to find an alternative. She suggests that alternative paradigms may be looking to the decedent's intent or to the decedent's actual relationships, rather than assuming that familial

households in which the head of the household is related to one or more others in the home is rapidly declining.³⁹ Over the last sixty years, the percentage of householders⁴⁰ who live with relatives declined from ninety percent to sixty-eight percent.⁴¹ If that trend continues, less than half of the population will live in “family households”⁴² by 2030.

Conversely, an increasing number of households are “nonfamily” households, in which the inhabitants are not related by a legally-recognized relationship such as marriage, adoption, or blood.⁴³ The increased number of nonfamily households is a result of several factors: more adults cohabit without being married,⁴⁴ more people live alone,⁴⁵ and fewer households are headed by a married couple.⁴⁶

Not only are fewer people living with relatives, but the composition of the families who do live together has changed. Blended families⁴⁷ and multi-generational households are an increasing segment of the population.⁴⁸

relationships should be the norm. *See generally* Foster, *supra* note 1.

39. In 1970, eighty-one percent of all households were family households, but by 2000, only sixty-nine percent of households were family households. JASON FIELDS & LYNNE M. CASPER, U.S. CENSUS BUREAU, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: POPULATION CHARACTERISTICS 3 (2001).

40. A “householder” is the person in whose name a housing unit is rented, leased, or owned; a “household” is a single person or group of people who occupy a housing unit. TAVIA SIMMONS & GRACE O’NEILL, U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2000 2 (2001) [hereinafter HOUSEHOLDS AND FAMILIES].

41. U.S. Census Bureau, *Households by Type: 1940 to Present*, at <http://www.census.gov/population/socdemo/hh-fam/tabHH-1.txt> (2001) [hereinafter *Households by Type*].

42. According to the Census, “a ‘family household’ consists of a householder and one or more people living together in the same household who are related to the householder by birth, marriage, or adoption.” HOUSEHOLDS AND FAMILIES, *supra* note 40, at 2.

43. The number of nonfamily households increased twenty-three percent between 1990 and 2000. A nonfamily household is one in which one person lives alone or the householder shares the home with people who are not related (either to the householder or each other). *Id.* The percentage of nonfamily households increased from 29.8 percent of the total number of households in 1990 to 31.9 percent in 2000. *Id.*

44. The number of unmarried-partner households increased from 3.2 million to 5.5 million between 1990 and 2000; in 1990 they accounted for 3.5 percent of all households, and in 2000 5.2 percent of all households. *Id.* at 7. Of the 5.5 million households headed by unmarried partners, 4.9 million of them consisted of partners of the opposite sex. *Id.*

45. The percentage of households consisting of only one person increased one percent between 1990 and 2000. *Id.* at 6. Between 1970 and 2000, however, the number of these single-person households increased nine percent. *See* FIELDS & CASPER, *supra* note 39, at 3.

46. Between 1990 and 2000, the percentage of households headed by a married couple decreased significantly, from 55.2 percent to 51.7 percent. *See* HOUSEHOLDS AND FAMILIES, *supra* note 40, at 3.

47. This is evidenced by the dramatic decline in the proportion of married-couple households with their own children, which decreased from forty percent of all households in 1970 to twenty-four percent in 2000. *See* FIELDS & CASPER, *supra* note 39, at 3. Households with children under eighteen who have never married dropped from forty-five percent in 1970 to thirty-three percent in 2000. *Id.* at 4.

48. From 1970 to 2000, the number of grandchildren living in the home of their grandparents

Additionally, the proportion of single-parent households continues to increase.⁴⁹ Census 2000 also revealed that there are now more unmarried couples living together with children than there are married couples living with their children.⁵⁰ American households are smaller, due in large part to an increased number of divorces, which results in division of households, a larger number of people living alone,⁵¹ and fewer children being born.⁵²

In addition to these changes in American households and families, other changes in the population indicate the need for a revision of intestacy law. The fastest-growing segment of the population is the middle-aged; the most likely demographic to die intestate.⁵³ Thus, the injustice of current intestate succession law will become more pronounced as more people die intestate. Additionally, such inequity is compounded because those who die will come from a “nontraditional” family or household.

It is clear from the results of Census 2000 that the traditional American family—in which a husband and wife live together with their children, stay married, and have grandchildren before they die—is disappearing. Moreover, if one assumes that the people with whom one lives are those who ought to inherit one’s property, the current system of intestate succession is

increased from 2.2 million to 3.8 million; in 1970, this was 3.1 percent of the children under 18, and in 2000 this was 5.5 percent. U.S. Census Bureau, *Grandchildren Living in the Home of Their Grandparents: 1970 to Present*, at <http://www.census.gov/population/socdemo/hh-fam/tabch-7.txt>; U.S. Census Bureau, *Children Under 18 Living in Their Grandparents’ Household, by State*, at <http://www.census.gov/population/socdemo/grandparents/gp-1.txt>.

In 2000, 3.7 percent of all households were multigenerational households. See HOUSEHOLDS & FAMILIES, *supra* note 40, at 7-8. Sixty-five percent of these households consist of a householder along with his or her children and grandchildren. *Id.* About one-third of all multigenerational households consist of a householder with his or her parent or parent-in-law and children. *Id.* A few (two percent) households include four generations.

49. Family households headed by a single woman consisted of 12.2 percent of all households in 2000; those headed by a single man consisted of 4.2 percent. *Id.* at 2. Households consisting of a single woman and her own children under eighteen have increased in proportion from 6.6 percent of all households in 1990 to 7.2 percent in 2000. *Id.* at 7. The proportion of single-mother families (as opposed to households) grew from twelve percent in 1970 to twenty-six percent in 2000; single-father families grew from one percent in 1970 to five percent in 2000. *Id.* A family or family group consists of the number of family households plus all related and unrelated subfamilies. See FIELDS & CASPER, *supra* note 39, at 7.

50. In 2000, forty-six percent of married couple family groups had children, compared with sixty-one percent of unmarried couple families. *Id.* at 6.

51. The second most common type of household (after married households) is people living alone, which comprises 26 percent of all households. See HOUSEHOLDS AND FAMILIES, *supra* note 40, at 1-2.

52. Between 1990 and 2000, the average household size decreased from 2.63 to 2.59. *Id.* at 2. According to the Census Bureau, “changes in fertility, marriage, divorce, and mortality have all contributed to declines in the size of American households.” FIELDS & CASPER, *supra* note 39, at 4.

53. The group of persons between the ages of fifty and fifty-four grew 55 percent; the second-fastest growing group is those aged forty-five to forty-nine, which grew forty-five percent between 1990 and 2000. JULIE MEYER, U.S. CENSUS BUREAU, AGE: 2000, 2 (2001).

inadequate. For example, in a multi-generational household, where the householder may be caring for both her parents and her children, the householder's dependent parents would not receive any of their children's property if the householder dies intestate. Single people who live alone may not have any close relatives, but may be giving financial support to a godchild. However, if the godparent dies without a will, the godchild would not be eligible to continue receiving support from the godparent's estate. Perhaps the most common, as well as the harshest result of the operation of intestacy laws is in the case of blended families, where stepchildren cannot inherit anything from stepparents, even if the children were treated as the natural children of that stepparent. Couples who live together, but are not married, are not protected when one partner dies. If the decedent had no children, his parents and siblings are entitled to inherit her property, but her partner, who may have been financially dependent on her, cannot take any part of the estate.⁵⁴

These examples illustrate, and the results of Census 2000 confirm, that the U.S. scheme of strictly-applied rules of intestate succession no longer furthers the goals of the American inheritance system.⁵⁵ As more and more people live outside of traditional family situations, intestate succession schemes that focus on traditional blood and adoptive relationships no longer comport with the ideal of effectuating the decedent's intent or desires.⁵⁶ In addition, strict application of intestacy laws does not adequately address the goals of support and entitlement in inheritance.⁵⁷ Those who are dependent upon the support of a person dying without a will are less likely to be provided for, because dependents are less frequently blood relatives. Inheritance law also assumes that those who cared for and supported the deceased during her lifetime are entitled to part of her estate. As the household and family changes, it is less likely that those who gave support to

54. *See supra*, note 5 and accompanying text. A few states have softened this approach by allowing civil union partnerships or meretricious marriages. *See supra* note 10 and accompanying text.

55. In 1977, John Gaubatz pointed out that, "[g]iven the state of recognition of less common family arrangements in society today, the efficacy of the law to provide for family protection must be questioned." Gaubatz, *supra* note 1, at 534-45. This is even more true now, since families have changed dramatically since 1977.

56. Gaubatz notes that there are frequent variations between wills and intestate succession rules. Wills typically give everything to a surviving spouse, while intestate succession rules do not. In addition, wills allow for children or dependents of unequal capacity, while rules of intestate succession distribute property evenly among children. "The societal interests of fostering respect for the law, of providing for the welfare of the individual, and of fostering strong social units within society would seem to be violated." *Id.* at 533-34.

57. Societal interests of fostering respect for the law, providing for the welfare of the individual, and fostering strong social units are violated by rules of intestate succession. *Id.* at 535.

the deceased during her lifetime are her blood relatives. Thus, those who take an intestate's estate are less likely to either need the support or be entitled to it.

IV. JUDICIAL DISCRETION IN INTESTATE SUCCESSION: NEW ZEALAND, CANADA, ENGLAND, AND AUSTRALIA

U.S. legal scholars have frequently looked to foreign jurisdictions for guidance in proposing changes to inheritance law.⁵⁸ It is especially appropriate to look to countries that share common values, legal history, and societal structures with the United States,⁵⁹ England, New Zealand, Australia, and Canada fit this mold, in addition to sharing a common language with the United States.⁶⁰ Thus, it is particularly appropriate to look to these countries for guidance in inheritance law.

All of these countries grant judges discretion in distributing an estate. Sometimes called "family maintenance" provisions, these laws allow certain persons to apply for and receive a part of the decedent's estate if either the will or the intestate succession laws result in an unfair distribution of the estate.⁶¹ In 1900, New Zealand was the first to create such a provision, which

58. See Foster, *The Family Paradigm of Inheritance Law*, *supra* note 1, at 123-29; Foster, *Linking Support and Inheritance*, *supra* note 8, at 1207-09 (explaining the brief history of such scholarship). Gaubatz, *supra* note 1, at 558 (New Zealand, England, and Canada); Laufer, *infra* note 60 (New Zealand; Chester, *infra* note 60 (British Columbia)).

59. Unfortunately, European countries do not offer a solution to the U.S. problems with intestate succession. With the exception of England, all European countries have strictly-applied rules of intestate succession like the U.S. Rules of intestate succession in Europe operate similarly to those in the United States: spouses and children take first, then other descendants, and if no descendants, then parents and/or siblings and their issue take the estate. For a thorough review of inheritance laws throughout Europe, see *EUROPEAN SUCCESSION LAWS* (David Hayton, ed. 1998).

60. Legal scholars in the United States have in fact looked to England, New Zealand, Australia, and Canada for guidance in inheritance law. See Joseph Laufer, *Flexible Restraints on Testamentary Freedom: A Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277 (1955); Helene S. Shapo, *A Tale of Two Systems: Anglo-American Problems in the Modernization of Inheritance Legislation*, 60 TENN. L. REV. 707 (1993); Gary, *supra* note 1; Ronald Chester, *Disinheritance and the American Child: An Alternative From British Columbia*, 1998 UTAH L. REV. 1 (1998).

61. Inheritance (Family and Dependents Maintenance) Act, 1975, c. 63, pt.1, § 2 (Eng.). See also Family Protection Act, 1955 § 4, as amended 1991, 2001 (N. Z.), at <http://rangi.knowledge-basket.co.nz/gpacts/reprint/text/1955/an/088.html>; Family Provision Act, 1982, § 7, N.S.W. Acts (Austl.), at http://www.austlii.edu.au/au/legis/nsw/consol_act/fpa1982209; Family Provision Act, § 8, N. Terr. Consol. Legis. (Austl.), at http://www.austlii.edu.au/au/legis/nt/consol_act/fpa209; Succession Act, 1981, pt. 4, § 41(1), Queensl. Consol. Acts (Austl.), at http://www.austlii.edu.au/au/legis/qld/consol_act/sa/981138; Testator's Family Maintenance Act, 1912 § 3(1), Tas. Consol. Legis. (Austl.), at http://www.austlii.edu.au/au/legis/tas/consol_act/tfma1912; Administration and Probate Act, 1958, Pt. 4, § 91(3)(b) Vict. Consol. Legis. (Austl.), at http://www.austlii.edu.au/au/legis/vic/consol_act/aapa1958; Inheritance (Family and Dependents Provision) Act, 1972, § 6 W. Austl. Consol. Acts (Austl.), at http://www.austlii.edu.au/au/legis/wa/consol_act/; Family Relief Act, 1980, R.S.A., c. F-

allowed a decedent's spouse or child to petition the court for relief if disinherited by the decedent.⁶² Since then, all the provinces in Australia have passed similar statutes, as has England, and most of the provinces in Canada.⁶³ Although originally these laws were intended to correct the injustice of a disinherited child or spouse, they have expanded to include cases of intestacy, and have broadened the class of persons eligible to apply for support.⁶⁴

All family maintenance statutes have several features in common, even though each jurisdiction has adopted unique features to suit local needs. The most important feature that all statutes have in common is that they give courts the discretion to make a provision when the will or rules of intestacy do not provide adequately for the applicant.⁶⁵ These statutes also operate similarly in that when a person dies without a will, the rules of intestacy apply by default. In order to get around these rules, an eligible person (or his representative) must apply to the court for a provision from the estate.⁶⁶ In

2, § 3(1)(6) (Can.), at <http://www.gov.ab.ca/qp/ascii/Acts/WPD/F02.txt>; Dependants Relief Act, 1990, R.S.M., c. 42, Ch. D37, § 2(2) (Can.); Consolidation of Dependants Relief Act, 1988, R.S.N.W.T., c. D-4, § 2, as amended by S.N.W.T. 1998, c.17, S.N.W.T. 2000, c.16 (Can.); Succession Law Reform Act, 1990, R.S.O., c.S-26, pt.V, § 58(1), as amended by 1994, c.27, s.63; 1997, c.25, Sched.E, s.12; 1999, c.6,s.61; 1999, c.12, Sched.B, s.17; 2001 c.13, s.31 (Can.), at http://192.75.156.68/DBLaws/statutes/English/90s26_e.html; Dependants' Relief Act, 1996, S.S. c. D-25.01, § 2(3), as amended by S.S. 2001, c.51 (Can.); Dependants Relief Act, S.Y.T., c.44, § 2 (Can.), at <http://www.lex-yk.ca>.

62. See Laufer, *supra* note 60, at 282-83.

63. See Inheritance (Family and Dependants Maintenance) Act, 1975, c. 63, Pt. 1 (Eng.); Family Provision Act 1982, N.S.W. Acts (Austl.); Family Provision Act, N. Terr. Austl. Consol. Legis. (Austl.); Succession Act, 1981, pt 4, Queensl. Consol. Legis. (Austl.); Inheritance (Family Provision) Act, 1972, S. Austl. Consol. Acts, at http://www.austlii.edu.au/au/legis/sa/consol_act; Testator's Family Maintenance Act, 1912, Tas. Consol. Legis. (Austl.); Administration and Probate Act, 1958, Pt. 4, Vict. Consol. Legis.(Austl.); Inheritance (Family and Dependants Provision) Act, 1972, W. Austl. Consol. Acts; R.S.A. 1980, Ch. F-2 (Can.); Wills Variation Act, R.S.B.C., 1996, c. 490 (Can.), at http://www.qp.gov.bc.ca/statreg/stat/W/96490_01.htm (Can.); S.M., 1990, c. 42, ch. D37 (Can.); R.S.N.W.T., 1988, c.D-4 (Can.); R.S.O., 1990, c.S-26, pt.V (Can.); S.S., 1996 c. D-25.01 (Can.); S.Y.T., c.44 (Can.).

64. See Laufer, *supra* note 60, at 284-87.

65. All of these jurisdictions, with the exception of British Columbia and South Australia, apply to the rules of intestacy. Inheritance (Family Provision) Act, 1972, § 7, S. Austl. Consol. Acts; Wills Variation Act, R.S.B.C., 1996, c. 490 (Can.).

66. For example, in England, a reasonable financial provision for a spouse is "such financial provision as it would be reasonable in all the circumstances of the case for the Husband or Wife to receive, whether or not that provision is required for his or her maintenance. Inheritance (Family and Dependants Maintenance) Act, 1975, c. 63, Pt. 1 § 1(2)(a). For all others, it is "such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance." *Id.* at § 1(2)(b). See also Family Protection Act, 1955, § 4(1) (N.Z.); Family Provision Act 1982, § 7 N.S.W. Acts (Austl.) (stating that provision may be made "for the maintenance, education, or advancement in life"); Family Provision Act, § 8 N. Terr. Austl. Consol. Legis. (Austl.); Succession Act, 1981, pt 4, § 41, Queensl. Consol. Legis. (Austl.); Testator's Family Maintenance Act, 1912, § 3 Tas. Consol. Legis. (Austl.); Administration and Probate Act, 1958, Pt. 4, § 91, Vict. Consol. Legis. (Austl.); Inheritance (Family and Dependants Provision) Act, 1972, § 6, W.

most jurisdictions, the party may apply for either periodic maintenance payments, a lump-sum payment, or for an interest in specific property.⁶⁷ The court may later change the award if circumstances change.⁶⁸

Where these laws differ significantly, however, is in the degree of discretion granted to the court, the factors courts consider in determining whether to grant an award, and which persons are eligible to apply for such a distribution. Generally, New Zealand and several Australian statutes grant courts broad discretion and identify only a few specific factors the courts must or may consider in determining an award.⁶⁹ In both countries, however, the court may take the decedent's intent into account.⁷⁰ In contrast, England and most of the Canadian provinces list specific factors courts must consider when granting a distribution.⁷¹ For example, in Manitoba, the court must

Austl. Consol. Acts; R.S.A. 1980, Ch. F-2, § 3 (Can.); S.M., 1990, c. 42, ch. D37, § 2(1) (Can.); R.S.N.W.T., 1988, c.D-4, § 2(1) (Can.); R.S.O., 1990, c.S-26, pt.V, § 58 (Can.); S.S., 1996 c. D-25.01, § 6 (Can.); S.Y.T., c.44, § 2 (Can.).

67. Inheritance (Family and Dependents Maintenance) Act, 1975, c. 63, pt. 1 § 2(1); Family Protection Act, 1955, § 5(2) (N.Z.); Family Provision Act 1982, § 7 N.S.W. Acts (Austl.); Family Provision Act, § 15, N. Terr. Austl. Consol. Legis. (Austl.); Succession Act, 1981, pt 4, § 41(5), Queensl. Consol. Legis. (Austl.); Testator's Family Maintenance Act, 1912, § 3(2) Tas. Consol. Legis. (Austl.); Administration and Probate Act, 1958, Pt. 4, § 96(3), Vict. Consol. Legis.(Austl.); Inheritance (Family and Dependents Provision) Act, 1972, § 6(4), W. Austl. Consol. Acts; R.S.A. 1980, Ch. F-2, § 5(3) (Can.); S.M., 1990, c. 42, ch. D37, § 9(2) (Can.); R.S.N.W.T., 1988, c.D-4, § 3 (Can.); R.S.O., 1990, c.S-26, pt.V, § 63(2) (Can.); S.S., 1996 c. D-25.01, § 7(1) (Can.); S.Y.T., c.44, § 6(2) (Can.).

68. Inheritance (Family and Dependents Maintenance) Act, 1975, c. 63, pt. 1 § 6; Family Protection Act, 1955, § 12 (N.Z.); Family Provision Act 1982, § 8 N.S.W. Acts (Austl.); Family Provision Act, § 8, N. Terr. Austl. Consol. Legis. (Austl.); Succession Act, 1981, pt 4, § 41(5), Queensl. Consol. Legis. (Austl.); Testator's Family Maintenance Act, 1912, § 9(5) Tas. Consol. Legis. (Austl.); R.S.A. 1980, Ch. F-2, § 6 (Can.); S.M., 1990, c. 42, ch. D37, § 14 (Can.); R.S.N.W.T., 1988, c.D-4, § 6 (Can.); R.S.O., 1990, c.S-26, pt.V, § 66 (Can.); S.S., 1996 c. D-25.01, § 20 (Can.); S.Y.T., c.44, § 7(c) (Can.).

69. In New Zealand, the only factor listed in the statute that courts may take into account is the decedent's intent, and the conduct of the applicant may disqualify him from receiving part of the estate. Family Protection Act, 1955, § 11.

70. *Id.*; Family Provision Act, N Terr. Consol. Legis., § 22; Inheritance (Family and Dependents Provision) Act, 1972 § 6(3) (W. Austl.).

71. In England, the Court must take into account: the financial resources of the applicant, now and into the foreseeable future; the obligations and responsibilities of the decedent toward the applicant; the size and nature of the estate; physical or mental disability on the part of the applicant; and any other relevant matter; as well as specific factors depending on the relationship the applicant had with the decedent. Inheritance (Family and Dependents Maintenance) Act, 1975, c. 63, Pt. 1 § 3.

In Ontario, the courts must consider: the dependant's current and future assets; the applicant's capacity, age, and mental health; the needs and accustomed standard of living of the applicant; the proximity and duration of the relationship between the applicant and the deceased; the decedent's contributions to the applicant; the dependant's legal obligations; the circumstances of the deceased; any agreement between the deceased and the applicant; previous distribution of property; the claims of other dependants; and other specific factors based on the status of the dependant. R.S.O., 1990, c.S-26, pt.V, § 62 (Can.).

In Saskatchewan, the Court must consider: the nature of the estate; the dependant's past, present, and future income; the dependant's conduct; other claims the applicant has to the estate; any other

consider primarily the financial needs of the dependant, as well as the size and nature of deceased estate the applicant's present and future resources, the applicant's opportunities and capacity to become financially independent, the age and health of the applicant, and any other distributions from the estate to which the applicant is entitled.⁷²

In many of these jurisdictions, courts are *required* to consider the decedent's desires or intent.⁷³ The kinds of evidence that the courts may consider varies, from solely considering the writings of the decedent to looking at all relevant evidence that goes to show intent.⁷⁴

Jurisdictions also differ in their determinations of the persons who are entitled to apply for a portion of the estate. Here, England is one of the most liberal. Anyone who was financially dependent upon the decedent at the time of death, and who was so for at least two years prior, is eligible to apply for a

appropriate matter. S.S., 1996 c. D-25.01, § 8 (Can.)

72. S.M., 1990, c.42-chap. D37, § 8(1). Manitoba has the longest list of factors that courts are required to consider. While this is thorough, it could be cumbersome.

Courts in parts of Australia are also required to take into account specific factors. For example, in Victoria, the Court must take into account: any family relationship; any obligations or responsibilities of the decedent; the size and nature of the estate; financial resources and capacity of the applicant; the applicant's age and disability; any contribution the applicant made to the estate; benefits previously given to the applicant; whether the applicant was being maintained; the liability of any other person to maintain the applicant; and the character or conduct of the applicant; and any other relevant factor. Administration and Probate Act 1958, Part 4, § 91(4), Vict. Consol. Legis. (Aust.).

73. Interestingly, England has no requirement that the court inquire into the decedent's intent. Most jurisdictions, however, either require or suggest that the court look at the decedent's intent. In New Zealand and Northern Territory of Australia, the court may take the decedent's intent into account, but is not required to. Family Protection Act, 1955, § 11 (N. Z.); Family Provision Act § 22, N.T. Austl. Consol. Legis. In most provinces of Canada, courts are generally required to take the decedent's intent into account. R.S.B.C. 1997 Ch. 490 § 5; R.S.S. 1996 c.D-25.01 § 8(3); RSO 1990, c.S.26, pt. V § 62(3). Usually, this seems to be relevant to cases in which one has been disinherited. For example, in Tasmania, "the Court or judge may have regard to the deceased person's reasons, so far as they are ascertainable, for making the dispositions made by his will, or for not making any provision or further provision [to the applicant]." Testator's Family Maintenance Act, 1912, § 8A Tas. Consol. Legis.

74. Usually, courts are given broad discretion to consider all relevant evidence, including writings signed by the deceased. In Manitoba, for example, "the court (a) may inquire into and consider all matters that it considers should fairly be taken into account in deciding the application; (b) may in addition to the evidence presented by the parties direct any other evidence be given that it considers necessary or proper." S.M. 1990, c.42-Chap. D37 § 8(2). *See also* Testator's Family Maintenance Act 1912 § 6 (Tasmania); R.S.A. 1980 ch.F-2 § 3(2); R.S.N.W.T. 1988, c.D-4 § 4; R.S.O. 1990, c.S-26, pt. V § 62(2); and S.Y. c.44 § 5.

Provisions that encourage or require the courts to take into account signed writings of the decedent may help in situations where a will was not executed properly, but it is clear that the decedent believed he had written a will and that his property would be dispersed according to a specific plan. It is important to note, however, that property could only be distributed according to the writing if those who were beneficiaries in the writing had both applied to the court for payment and were in the class of persons eligible to apply for such payments.

portion of the estate.⁷⁵ Ontario specifically allows same-sex partners to apply,⁷⁶ while many jurisdictions specifically disallow same-sex partners.⁷⁷ Many Australian statutes allow “de facto” spouses to apply.⁷⁸ On the other hand, in a few jurisdictions, only spouses, children, grandchildren, and parents may apply for a portion of the estate.⁷⁹

England, Manitoba, and Ontario have statutes that would best solve the problems of U.S. intestate succession law and effectuate the goals of U.S. inheritance law. In these three jurisdictions, the class of persons entitled to apply is broad, allowing for a variety of family, support, and entitlement circumstances. In addition, the statutes in these jurisdictions require courts to consider specific factors in determining whether and how much to give an applicant. This limits the court’s discretion, and provides courts guidance so that results are fair and consistent.

In general, English courts have interpreted the family maintenance statute

75. Additionally, the following persons may apply: a spouse, a former spouse who has not remarried, a child, one who was treated as a child, and one who lived as the spouse of deceased for two years prior to death (excluding same-sex partners) U.K. St. 1975 c. 63, Pt. 1, § 1.

Victoria, Australia is the most liberal: “The court may order that provision be made . . . for the proper maintenance and support of a person for whom the deceased had responsibility to make provision.” Administration and Probate Act 1958, Part IV, Family Provision, § 91(1). The court determines such persons who are eligible, taking into account family relationship and other factors. *Id.* at § 91(4).

76. R.S.O. 1990, c.S-26, pt. V, s 57(a): “Dependant” means, “the spouse or same-sex partner of the deceased” *See also* Family Provision Act § 6(a)(ii) (N.S.W. Aust.): a person “with whom the deceased person was living in a domestic relationship.” R.S.O. 1990 c.S-26, pt. V § 57: Dependant means “(a) spouse or same-sex partner.”

77. In England, same sex partners may apply only if they meet the definition of “dependant.” UK ST 1975 c 63, pt. 1 § 1 (England). In Manitoba, a cohabitor of the opposite sex only is allowed to apply; the applicant must also meet many conditions. The Dependents Relief Act, C.C.S.M. 1989-1990, c. 42–Chap. D37, § 1(c) (Manitoba, Can.). Similarly, in the Yukon, an eligible cohabitor must be of the opposite sex, and must be financially dependant on the deceased. Dependents Relief Act, S.Y., c.44, § 1 (Yukon, Can.).

78. A “de facto” spouse is one who, immediately before the partner’s death, was living with him/her as a spouse on a “bona fide domestic basis” although not married. Family Provision Act, § 4(1)(a)-(b), (N. Terr. Aust.) *See also* Family Protection Act (1955) § 3(aa) (N.Z.); Queensland Succession Act 1981, pt. 4 § 41(1); Testator’s Family Maintenance Act 1912 § 3A(e) (Tasmania); Inheritance (Family and Dependents Provision) Act 1972 § 7(1)(f) (W. Aust.) In the Northern Territory of Australia, spouses recognized by Aboriginal law are also eligible. Family Provision Act § 7(1A) (N.T. Aust.)

79. R.S.A. 1980 Ch. F-2, § 3(1) (Can.); R.S.B.C. 1996 Ch. 490, § 2 (Can.).

In several jurisdictions, a grandchild, parent, de facto partner, or other relative may also have to show that he/she was financially dependent on the decedent. Family Protection Act 1982, § 6(1) (N.S.W., Aust.); Inheritance (Family Provision) Act 1972 § 7 (S. Aust.); Inheritance (Family and Dependents Provision) Act 1972, § 7 (W. Aust.); R.S.O. 1990, c.S-26, pt. V, § 7 (Can.); S.Y., § 1 c.44 (Can.).

In Manitoba, the Northwest Territory, and Saskatchewan, a child must be under 18 or disabled in order to apply. C.C.S.M. 1989-1990, c.42-Chap.D37 § 1(d); RSNWT 1988, c.D-4 § 1; RSS 1996, c.D-25.01 § 2.

broadly in order to best effectuate fair results in cases of intestacy. For example, the statute states that a “dependant” must have been maintained by decedent “otherwise than for valuable consideration” in order to take as a dependant.⁸⁰ To ensure that an applicant is not denied maintenance when she provided exceptional care to the decedent before his death, courts have interpreted this provision broadly.⁸¹ Similarly, English courts have been generous in defining co-habitants who lived as husband and wife, in ruling that a sexual relationship is not a requirement.⁸²

In order for step-children to take under the English statute, they must have been recognized by the decedent as a child, which means the decedent assumed parental responsibility for the applicant.⁸³ This ensures that children who are dependent on the decedent, and who are entitled to inherit, can get their entitlement. “Dependents” may include mistresses being maintained, godchildren, co-habitants, and same-sex partners.⁸⁴ The English model focuses on the concepts of support and entitlement.

In Manitoba, there have been few reported cases interpreting the Dependant’s Relief Act since it was last amended in 1990.⁸⁵ Of these, all are cases in which the applicant was disinherited by the decedent’s will; that is, no case has dealt with a distribution under intestacy provisions. The Manitoba courts rely heavily on statutory language, but have been lenient when the statute calls for interpretation. For example, a “common-law” wife

80. UK 1975 c.63 Pt. 1 § 1(3) When the dependant is a non-relative who was being maintained by the deceased, “a person shall be treated as being maintained by the deceased . . . if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money’s worth towards the reasonable needs of that person.” *Id.*

81. The “exceptional care” which the applicant provided to the man with whom she lived was not “valuable consideration” which kept her from inheriting. *Bishop v. Plumley*, 1991 1 W.L.R. 582, 587. In this case, the parties had lived together as husband and wife. *Id.* The free accommodation that the decedent provided to the applicant was at first considered full consideration, but this was reversed on appeal. *Id.* The court reasoned that Parliament could not have intended someone giving care to the decedent to have been treated less generously than one who had not. *Id.*

82. See Kaye Senior, “*Revolting relations*” and *Other Objectors to a Will*. 149 NEW L.J. 1852 n.6919 (10 Dec. 1999) (citing *In the Estate of John Watson*, THE TIMES, Dec. 31, 1998). In the *Watson* case, Miss Griffiths and Mr. Watson began a relationship in 1964. *Id.* In 1985, Griffiths moved in with Watson and she continued to live there until he died. *Id.* Although they had a sexual relationship earlier, they never had such a relationship while they lived together, and kept separate bedrooms. *Id.* The Court said that the test was what a reasonable person would conclude their relationship to be. *Id.* The judge stated that it was not unusual for older married couples to have separate bedrooms and no sex life. *Id.*

83. *In re Leach*, 1995 2 All E.R. 754. A stepchild must show that he was treated by the decedent as a child of the family; the decedent must have assumed some kind of parental responsibility for the applicant. *Id.*

84. Senior, *supra* note 82.

85. There were twenty-eight cases found in the Westlaw database that included the term “Dependants Relief Act” in all Manitoba cases reported in the Westlaw system.

was granted a lump sum of \$60,000 even though she had her own income.⁸⁶ The court reasoned that she had been substantially dependent on her common-law husband for support.⁸⁷ On the other hand, adult children who were disinherited by their father were denied a provision when the decedent left everything to his second wife.⁸⁸ There, the court reasoned that the children were adults and no longer financially dependent on their father and, thus, the will should not be rewritten.⁸⁹ These cases demonstrate that the courts in Manitoba are most concerned about providing support to those who were financially dependent on the decedent.

Similarly, in Ontario the courts have relied heavily on statutory language.⁹⁰ The courts in Ontario have interpreted the statute broadly to best effectuate fairness. For example, in determining the definition of a “spouse,” one court granted an application for support to a woman when she and the decedent stayed together in her home for more than three years.⁹¹ The court noted that neighbors and her pastor considered them as living together, and she was dropped from church membership for living with the decedent outside of marriage, even though the two kept separate houses and addresses.⁹² The court said that “the legislature asks the court to enter into an exercise of righting certain wrongs,” and that the court should err on the side of generosity, particularly in an application for interim support.⁹³ Ontario courts have also found that proper support, as provided in the statute, means more than just comfortable maintenance—the applicant should be provided a standard of living equal to what she enjoyed while the decedent was supporting her.⁹⁴

So far, the only problem encountered in England with the Family Maintenance Act has been with depletion of the estate.⁹⁵ In Ontario, this

86. *Kawiwk v. Wagenko*, 25 E.T.R. 2d 203 (Man. Ct. of Queen’s Bench 1999).

87. *Id.*

88. *Syrota v. Clark Estate* 74 Man. R. 2d 116 (Man. Ct. of Queen’s Bench 1991).

89. *Id.*

90. Ontario has had many more cases under the Succession Law Reform Act. According to Westlaw, as of November, 2001, there have been 275 cases that mention the Act. However, the Act deals with all aspects of succession, not just family maintenance or support. Of the 275 cases mentioning the Act, 129 have mentioned intestacy. Seventy-six cases reported an application for support under the intestacy provisions.

91. *Barrett v. Kouril Estate*, 2001 Carswell Ont. 3551 (Ont. Sup. Ct. of J. 2001).

92. *Id.* However, just because two people shared a home does not mean they were spouses under the statute. When the decedent rented a room in the applicant’s house, but the two only occasionally shared meals, and did not enjoy a sexual relationship or other aspects of a spousal relationship, the applicant was denied. The court said that “the question of cohabitation is one of intention.” *Horodyski v. Tobin Estate*, 13 E.T.R.2d 305 (Ont. Ct. of J. 1996).

93. *Ieracitano v. Ieracitano*, 1998 Carswell Ont. 1798 (Ont. Ct. of Just., Gen’l Div. 1998).

94. *Boyko v. Boyko Estate*, 1998 Carswell Ont. 1447 (Ont. Ct. of Just., Gen’l Div. 1998).

95. Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and*

problem has been dealt with by granting courts discretion when awarding costs of litigation either out of the estate or to charge them to the applicant.⁹⁶ Despite other criticisms by American scholars, there have been no other problems in applying these statutes that allow judicial discretion in distributing property when rules of intestacy, or the will of the decedent, make for an unfair result.⁹⁷

V. APPLYING DISCRETIONARY STATUTES TO U.S. INTESTACY RULES

Allowing U.S. judges the kind of discretion enjoyed by Canadian and English judges to distribute an intestate's estate otherwise than as provided by rules of intestate succession would solve a number of problems in the U.S. intestacy law. First, allowing judges discretion addresses the recent and ever-increasing changes in the American family.⁹⁸ Judges should have the discretion to distribute an intestate's estate to stepchildren, grandchildren, parents, or one who lived with the deceased as a committed partner. Those who depend on the support of the decedent or who are entitled to such support should receive it. Allowing judges discretion would correct the injustices of the intestate succession system and bring the law back in line with the goals of inheritance law.⁹⁹

Judicial discretion also allows courts to better effectuate a decedent's intent or desires when he dies without a will. The strict application of intestate succession laws can leave the decedent's closest relatives and those dependent on her without any part of the estate. In cases where the decedent cared for a child as her own, but who was not her biological nor adopted child, it is likely that she would want that child to take part of her estate if she died. In these types of cases, the rules of intestate succession do not carry out the decedent's intent, which has been the mainstay of inheritance law in the United States.¹⁰⁰ Discretion would also allow courts to effectuate the decedent's intent in cases where a will was written but was not properly executed. In many of these cases, it is clear from the evidence that a decedent intended his estate to be distributed in a particular way. In these cases, judicial discretion statutes could allow courts to give effect to the will even if it was not properly executed due to a technicality. Thus, allowing judicial

Succession Law, 60 TUL. L. REV. 1165 (1986).

96. See B. (J.D.D., Litigation Guardian of) v. G. (J.E.) 2000 Carswell Ont. 53 (Ont. Sup. Ct. of J. 2000).

97. See Glendon, *supra* note 95.

98. See Part III, *supra*.

99. See Gaubatz, *supra* note 1, at 559-60.

100. *Id.*

discretion would enable judges to carry out a decedent's intent when the rules of intestate succession would not.¹⁰¹

Judges should also have the discretion to distribute the deceased's estate to those who are entitled to an inheritance. For example, a companion who has loved, cared for, and supported a decedent, does not take any part of the estate when the decedent dies under current intestacy laws. Allowing the companion to apply to the court, and to receive, part of the decedent's estate would meet the goal of entitlement.

Statutes allowing discretion also address the problem that has arisen in U.S. courts with judges making law through equitable remedies when the result of current statutes is unjust. For example, in order to allow an unmarried partner to take, courts have created the concept of "meretricious marriages." In the case of a stepchild (or other non-biological child) who lived with the decedent as his own, courts created "equitable adoption." However, these equitable remedies are neither fairly nor consistently applied, and are also often difficult to apply.¹⁰² Allowing discretion ensures more consistent results than these equitable remedies, because they offer specific guidelines in determining the cases. Judicial discretion statutes do not force courts to look to, and creatively stretch the limits of, equitable remedies.

Allowing judicial discretion also addresses an inconsistency in U.S. law: current divorce and child support laws often provide better support for spouses and children than probate law.¹⁰³ Children of divorce fare better financially than children who lose a parent to death, especially when there are stepchildren or children who have been living as the child of the divorced parent but who were not actually his biological children. It is both ironic and unjust that one's children should be better cared for if one divorced than if one dies without a will.

Nevertheless, judicial discretion may create some problems for the court system and for American citizens. Any time judges are allowed discretion, rather than strictly applying a fixed scheme, the results may be inconsistent.¹⁰⁴ This problem can be addressed by carefully drafting statutes that limit the amount of discretion that is allowed, and that require courts to consider the same factors in each case to ensure fair and consistent results.

101. Gaubatz points out that the rules of intestacy are not "intent-responsive." *Id.* at 532.

102. In addition, several states have, by statute, allowed civil partners to take. This is usually limited to either same-sex or opposite sex partners.

103. *See* Gary, *supra* note 1, at 45-55.

104. *See* Glendon, *supra* note 95, at 1194-95. Glendon has also argued that the English law "serves as a charter that allows judges to devise a substantially new estate plan for the deceased in a courtroom setting . . ." *Id.* This is not a problem in cases of intestacy, where there is no estate plan that could be revised.

Critics have also argued that a discretionary scheme would result in a proliferation of litigation that would overwhelm the court system.¹⁰⁵ While there is likely to be some increase in the number of cases or the amount of time spent on cases of intestacy, the system of discretion would place limits on this problem. Current rules of intestate succession would still be in place as the default rule. In order to overcome the default rule, one must apply to the court. If there is no such application, there is no additional time spent on the case. In addition, there are limits on who is eligible to apply for a distribution, which further limits any strain on the court system. A system of discretion would also eliminate litigation surrounding meretricious spouses, equitable children, and other actions that are currently in place to make up for injustices in the U.S. intestacy system.

One problem that England has encountered and that critics point to is the depletion of the estate due to litigation costs.¹⁰⁶ Because many cases of intestacy involve moderate and small estates, this is a legitimate concern.¹⁰⁷ However, the costs to the estate of litigating these cases can be limited by providing guidelines to courts that are simple to apply and result in consistent and fair awards. Clear, concise, and easily-applied statutes will not require complex, expensive litigation. Additionally, as case law becomes more established, it is likely that cases can be dispensed with more efficiently. U.S. states could also follow Ontario's example and charge court costs to the applicant rather than the estate.

Another criticism of allowing judicial discretion in distributing intestate's estates is that probate judges are incompetent to handle this amount of discretion.¹⁰⁸ These critics allege that probate judges are not familiar enough with legal principles to apply these types of statutes, and that, further, they are more apt to accept bribes and engage in other biased behavior.¹⁰⁹ Regardless, it should be noted that probate courts deal with complex legal issues on a regular basis, and have successfully adjudicated such

105. *Id.* at 1189. Glendon claims that "our American experience with discretionary distribution on divorce should make us extremely wary of any system that would encourage a variety of friends and relatives to challenge wills and permit probate judges to rearrange estate plans." *Id.* However, she does not elaborate to tell us what about this experience should make us wary. It should also be noted that her concerns of proliferation are directed at will contests, not cases of intestacy.

Glendon also says that statutes allowing a discretionary provision during the probate period are adequate to address support concerns. *Id.* The only change to intestate succession laws that Glendon suggests is an increase in spousal share when the estate is small. *Id.* at 1190. Several U.S. states have changed spousal share laws to provide better for spouses when the normal statutory share is unfair. *Id.*

106. *Id.*

107. *See* Part II, *supra*.

108. *See* Glendon, *supra* note 95, at 1195.

109. *Id.* at 1189-90.

sophisticated legal principles as equitable adoption, ademption, as well as determining cases of undue influence. In addition, if probate judges are indeed incompetent and biased, this suggests the need for a change in the probate system in general. It does not necessarily follow that judges should not have the discretion to ensure fairness.

VI. CRAFTING A STATUTE THAT WORKS FOR AMERICA

Looking at several of the countries that have statutes allowing judicial discretion, it is possible to craft a scheme that addresses potential problems, but nonetheless best effectuates the goals of U.S. inheritance law, addresses the recent changes in American families, and results in a fairer and more just dispersion of property when one dies without leaving a will. Statutes should set limits on discretion and provide simple guidelines to judges so that decisions are fair and consistent. Limiting these statutes to cases of intestacy will reduce litigation and will not interfere with testator's intent. If guidelines are simple and discretion is somewhat limited, it is less likely that small estates will be depleted. Current regimes for distribution of estates are still the default rules. Those who wish to get around them must apply to the court, lessening the risk of a proliferation of cases.

A. Who Should Be Allowed to Apply for a Distribution?

Like England, Manitoba, and Ontario, the United States should allow a broad class of persons to apply for payment from an estate. Although there is a wide variety of family/household situations in the United States, a statute can be crafted that would yield a fair result for virtually every potential applicant. I propose a statute that would allow the following persons to apply: a spouse, a former spouse receiving maintenance, a child, one whom the deceased treated as a child one whom the deceased treated as a spouse, or anyone who was substantially financially dependent on the decedent at the time of death.

B. What Factors Should Courts Be Required to Consider?

A good U.S. statute would require the court to take into account a variety of simple but relevant factors, including: the intent or desires of the decedent as expressed in a signed writing or other clear and convincing evidence, the duration and closeness of relation between the decedent and the applicant, the conduct of the applicant, the present and future financial needs of the applicant, the applicant's present and future resources and capacity, and the size and nature of the estate.

C. How Should the Estate be Distributed?

Courts should have the flexibility to distribute a variety of awards—lump sum, periodic payments, or other property distribution—depending on the circumstances and the characteristics of the estate.

VII. CONCLUSION

Changes in American society and family have made it necessary that states consider adopting a discretionary approach to distributing property when an individual dies without a will. States should allow probate judges the discretion to award part of a person's estate to those who need it and deserve it, when the deceased did not leave a will and the laws of intestacy would result in an unfair award to distant relatives.

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