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## "Deadbeat Dads": Should Support and Inheritance Be Linked?

Paula A. Monopoli

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## "Deadbeat Dads": Should Support and Inheritance Be Linked?

PAULA A. MONOPOLI\*

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### I. INTRODUCTION

"The duties of parents to their children are those which are indissolubly attached to the fact of causing the existence of a human being."<sup>1</sup>

One of the most important issues facing this country is the well-being of its children. Statistics reflecting the breakdown of American families are sobering.<sup>2</sup> Can children raised in less than intact families

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1. 2 JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY*, § 1 at 227, (1909), cited in Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 82 n.71 (1990).

2. According to one organization:

Americans are more faithful about paying for their cars than for their children, according to a new report issued today by the Children's Defense Fund (CDF).

grow up to become productive citizens? If not, will our nation continue its moral and social decline? As a society, what can be done to encourage and reward parents for remaining a significant part of their children's lives, both in economic and psychological terms? The converse, of course, is what can be done to sanction or punish parents who fail in their obligation to support their children?<sup>3</sup>

Society uses "the law" to order social relationships. The law also functions as an expression of our feelings about obligations among members of society in general and families in particular. For example, every state has laws which impose a duty on parents to support their children.<sup>4</sup> Every state also has laws that sanction parents for the failure to do so.<sup>5</sup>

Inheritance laws, like child-support statutes, reflect social values

The national delinquency rate for used car loans was less than three percent in 1992, while the delinquency rate for child support owed to mothers was an astounding 49 percent in 1990.

Press Release, Children's Defense Fund, June 17, 1994.

The growth in single parent families and the failure of many absent parents—typically fathers—to pay adequate child support are seen as the chief causes for the rising number of children in poverty. More than one in five American children live in poverty, compared to one in seven Americans overall.

Gregory Spears, *Deadbeat Parents May Be Tracked Via Computer Systems*, MIAMI HERALD, June 16, 1994, at A1. The blurring of male/female roles in society and a deemphasis on the unique role of fathers may have exacerbated this problem. See William Safire, *What Fathers Want*, N.Y. TIMES, June 16, 1994, at A27. "What psychological incentive can we give young fathers to do their duty? With all its trials—the nights awake, the worries about not spending quality time, adolescent rebellion, the money for college—fatherhood is tough enough; we don't have to strip away its unique mystique of lifelong respect." *Id.*

3. President Clinton's proposal for welfare reform highlights child-support enforcement as an integral part of reforming the system:

The administration wants to increase child-support collections from the current \$14 billion annually to \$25 billion by 2000, when new state and federal data banks would be used to match lists of those who owe child-support payments with nationwide employment records. 'Many children in our country are being cheated by their own parents, most often the fathers, and we are not doing enough to protect them,' said Donna Shalala, Secretary of the Department of Health and Human Services.

Spears, *supra* note 2.

4. "In America, most states expressly require parents to support minor children." Ascher, *supra* note 1, at 79. This duty of support originated in, "[t]he Elizabethan poor laws and, later on, common law and statutes added the duty of maintenance and support." MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES (1994).

5. Most parents who fail to support their children are fathers. See *supra* notes 2-3. This article will address the problem of fathers who abandon or fail to support their children. The ideas discussed also apply to mothers. The modern trend is to gender-neutralize our language but this may only obfuscate the real problem—fathers who do not support their children. The use of the term "parent" instead of "father" throughout this article might leave the false impression that mothers abandon or fail to support at the same rate as fathers. Such an impression ignores the facts, perhaps at the expense of the analysis.

about family. American inheritance law is responsive to changing societal norms,<sup>6</sup> and examining this body of law reveals a great deal about the uniquely American view of family and inheritance.<sup>7</sup> In addition to re-allocating property at death, inheritance statutes also convey society's view of certain privileges which attach to family relationships and the people included in the definition of family.

The prevailing American view bases inheritance solely on status within the family—individuals inherit from relatives simply because they are linked by blood or adoption. Sons and daughters do not have to be “good” to take from their parents under intestacy statutes and generally, unworthy heirs are not punished by forfeiture of their inheritance.<sup>8</sup>

It is the exception in this country that inheritance rights are linked to behavior.<sup>9</sup> Most states do not require good behavior to inherit; nor, absent murder, do they prevent anyone from taking from an intestate relative. Most Americans would consider a father who abandons or fails to support his children as engaging in “bad” behavior and might label him “unworthy” to inherit from such children.<sup>10</sup> However, most states

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6. Note the 1994 California bill passed by the legislature but vetoed by Gov. Pete Wilson which would have given domestic partners status similar to spouses under the California Probate Code. See discussion *infra* with regard to nonmarital children and their changing position in inheritance law. Note also the efforts of the Uniform Probate Code to respond to changes in social norms; “The main purpose of the revisions is to bring elective-share law into line with the contemporary view of marriage as an economic partnership.” General Comment to § 2-201 of the 1990 Uniform Probate Code.

7. For example, note the difference between American and British views of nonmarital children:

In England, the social stigma associated with illegitimacy was ameliorated by William the Conqueror, who made no effort to disguise his illegitimate origins and frequently referred to himself as William the Bastard. The same, however, was not generally true in this country. The social stigma associated with illegitimacy was actually greater in this country than in England.

Mary K. Kisthardt, *Of Fatherhood, Families and Fantasy: The Legacy of Michael H. v. Gerald D.*, 65 TUL. L. REV. 585, 588 (1991) (footnotes omitted).

8. According to Professor John Langbein, civil law systems have a much richer tradition of unworthy heir litigation due to forced heirship provisions in their inheritance schemes. (Telephone conversation with Prof. Langbein (July 27, 1994)). Presumably, the American tradition of freedom of testation results in fewer situations involving unworthy heirs because a parent may cut a “bad” son or daughter out of the will. Children have no right to take a share if their parents choose to leave the property to someone else. However, in the case of inheritance from children, *de facto* forced heirship exists in this country. Children are forced to leave their estates to their parents because the law bars them from opting out of the intestacy/default system by making a will. This also may account for the parallel unworthy spouse provisions in the New York, North Carolina, Pennsylvania, and Virginia statutes. Elective share provisions for spouses are akin to forced heirship.

9. The most notable exception is the so-called “slayer” rule in many states which bars murderers from inheriting from their victims. See, e.g., CA. PROB. CODE § 250 (West 1994); 20 PA. CONS. STAT. § 2106(c) (1994); UNIF. PROB. CODE § 2-803 (1990).

10. This article does not try to define abandonment or failure to support. However, generally the author suggests that abandonment is both a failure to communicate with and a failure to

have not conditioned the privilege of inheritance on the obligation to support. Few have barred a parent from inheriting based on perceived wrongdoing or unworthiness.<sup>11</sup>

Should supporting a child be a prerequisite to a father's inheriting from that child? Should a father who abandons his child forfeit his inheritance? Should we use the law of succession to achieve a goal other than the simple reallocation of a decedent's property at death? In other words, should we adopt a behavior-based model of succession rather than the status-based model which prevails in most states? This article evaluates the costs and benefits of shifting from a status-based model of inheritance to a behavior-based model of intestate succession by such fathers.

A recent Rhode Island case illustrates the situation. As one foreign journalist wrote, "America's moral crusade against 'deadbeat dads,' fathers who fail to pay child support, has found a new focus of contempt in James Brindamour, a Rhode Island man who left his wife and daughter in 1983."<sup>12</sup> James Brindamour's daughter, Colleen, was born out of wedlock to James and his girlfriend, Rose. James and Rose married four years later but divorced within a year. James had little if any contact with Colleen until she died in a traffic accident at age fifteen in 1993. The accident resulted in a \$350,000 insurance settlement. Despite his lack of contact and his failure to support Colleen, James Brindamour was awarded a share of the \$350,000 settlement under Rhode Island law simply because he was her father.<sup>13</sup>

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support the child. As used in this article failure to support means not complying with a legal obligation to provide for the child economically.

11. While many states have statutes barring fathers of nonmarital children from inheriting, only a few states, Puerto Rico, and the Virgin Islands have statutes barring both nonmarital and marital fathers (fathers of children born within wedlock) from taking. CONN. GEN. STAT. ANN. § 45a-439(a)(1) (West 1993); N.Y. EST. POWERS & TRUSTS LAW § 4-1.4 (Consol. 1994) (entitled "Disqualification of Parent to take Intestate Share"; N.C. GEN. STAT. § 31A-2 (entitled "Acts Barring Rights of Parents"); OHIO REV. CODE ANN. § 2105.10 (Anderson 1993) (entitled "Parent Who Abandons Minor Child Barred from Intestate Succession from Child"); 20 PA. CONS. STAT. § 2106(b) (1994) (entitled "Forfeiture: Parent's Share"); VA. CODE ANN. 64.1-16.3(B) (Michie 1991) (entitled "Statutory Rights Barred by Desertion or Abandonment"); 31 P.R. LAWS ANN. § 2261 (1993) (entitled "Disqualification by Reason of Unworthiness," incorporated into the intestacy statute by *id.* § 2593); and 15 V.I. CODE ANN. tit. 15 § 87 (1964) (entitled "Effect of Divorce, Abandonment or Refusal to Support upon Rights to Distributive Share," and based on the New York Decedent and Estate Law). The 1990 Uniform Probate Code § 2-114(c) extends this rule to all fathers. The 1990 changes to Article II of the Uniform Probate Code have been adopted in Montana (MONT. CODE ANN. §§ 72-2-124 (1993)) as of 1993 and will go into effect in North Dakota (amending N.D. CENT. CODE § 30.1-04-09), as of Aug. 1, 1995.). See 8 U.L.A. 1 (Supp. 1994).

12. Ben Macintyre, *Errant Father Awarded Share of Girl's Estate*, THE TIMES (London), Feb. 1, 1994.

13. *Id.* Rose Brindamour appealed and James eventually settled for cancellation of

The public response to *Brindamour* was outrage and disbelief that the law could yield such a result. Many citizens felt it was unfair and unjust to allow a father to reap a benefit from the tragic death of a child for whom he had provided almost no emotional or financial support. Society's initial reaction may be that the law cries out for change. But, as this article will discuss, such a seemingly simple and fair change has far-reaching implications.

As noted above, only a few American jurisdictions sever the inheritance rights of *all* fathers who abandon or do not support their children.<sup>14</sup> The Uniform Probate Code has recently adopted this minority rule. Is this a trend to be endorsed and encouraged? Should inheritance statutes be used as an expression of society's view of the moral and legal responsibilities of fathers? Or are there more effective and less cumbersome ways to remedy the *Brindamour* problem?

What are the costs of tinkering with intestacy statutes? If we require support as a prerequisite, or include abandonment as a bar to inheritance, will every estate be subject to lengthy litigation about whether and how much support was paid and what constitutes abandonment? If we give courts discretion in individual cases, will judges do a good job of exercising that discretion or will unfairness and unevenness result?

Is it less costly to leave the intestacy statutes alone and instead extend the right to make a will to children? A child could then opt out of the default system of inheritance and could choose to deprive her nonsupporting father of her estate. Should such a right be limited to a negative will providing only that the nonsupporting father shall not take, or should such a right allow unlimited freedom of testation? Or are existing remedies enough? Can trusts, either express or constructive, be used to solve the problem?

## II. THE DEVELOPMENT OF THE LAW

American society traditionally has viewed the father in a family as the head of the household and the family breadwinner. Historically, one of the primary aspects of the father-child relationship has been economic:<sup>15</sup>

The common law rules . . . reflected the notion that the father-child relationship was primarily an economic one. Fatherhood was a central factor in a number of rights: The right of curtesy, for example,

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approximately \$66,000 in back child support he owed and his release from jail. *Deadbeat Dad Gives Up Claim to Fortune*, UNITED PRESS INTERNATIONAL, May 3, 1994.

14. See *supra* note 11.

15. Kisthardt, *supra* note 7, at 588-89.

was an inchoate entitlement, vesting only when a child was born into the marriage. In addition, children were seen as extraordinary economic assets. That this was true even after the Industrial Revolution was evidenced by the father's continued right to the child's earnings.<sup>16</sup>

One of the many economic entitlements of fathers was the right to inherit their children's estates in intestacy.<sup>17</sup> The most significant legal obligation of fathers was the duty to support their children. However, these two concepts have traditionally not been linked in American inheritance law.<sup>18</sup>

At common law, children born out of wedlock ("nonmarital children") had fewer rights to support and inheritance from their fathers than children born within a marriage.

Because of the social and legal significance of kinship, the early common law placed great emphasis on blood ties. Thus, a distinction developed between children of stable, permanent relationships (*i.e.*, marriage) and children of casual relationships. The distinction developed because the paternity of offspring from stable relationships was considered certain whereas the paternity of offspring from casual relationships was often in doubt. . . . An illegitimate child was con-

16. *Id.* (footnote omitted). Modern statutes protect a child's right to his or her earnings and limit the right of a father to his child's earnings during life. Historically, the father's economic rights were tied to certain duties:

Commentary writer James Kent, frequently cited by early nineteenth-century jurists, emphasized the mutuality of the relationship. Kent wrote that because of the father's 'obligation . . . to provide for the maintenance, and, in some qualified degree, for the education of his infant children, he is entitled to the custody of their persons, and to the value of their labor and services.' The right to a child's labor therefore was seen as recompense for the father's obligation of support.

Mason, *supra* note 4, at 7.

17. See Joel C. Dobris, *The Probate World at the End of the Century: Is a New Principal and Income Act in Your Future?*, 28 REAL PROP. PROB & TR. J. 393 (1993): "The default rule is the coat and tie restaurants keep on hand for people who forget to wear one," and "the intestate succession statute provides a free will for people who do not make a will" *Id.* at 397 n.20.

In civil law default rules are called 'yielding rules (*jus dispositivum*), which are subject to the autonomy of the parties in the sense that the parties have the power to make agreements contrary to the rule.'

The *Oxford English Dictionary* provides this illustration from a colonial American statute: 'It shall be lawful . . . to make Probates of Wills, and [in] default of a will to grant Letters of Administration . . .'

Many law professors view the trusts and estates course as an intricate web of default rules. The law of trusts and estates is a world in which the state provides a resolution for everyone. Those who do not like the intestate succession statute go to lawyers to get custom-tailored wills.

*Id.* at 397-98 (citations omitted). But children cannot avail themselves of the custom-tailored rules and are stuck in the web of "off the rack rules" of intestacy.

18. Note that historically this duty only extended to marital children. See Kisthardt, *supra* note 7, at 588.

sidered by the law to be *filius nullius*—no one's son. A bastard, as he was known, therefore suffered from one of the greatest disabilities known at common law: an inability to inherit.<sup>19</sup>

A similar disability existed with regard to the right of nonmarital children to support from their fathers.

As in England, the greatest consequence of illegitimacy in this country was economic. Although the illegitimate child was entitled to support from his mother, he had no right to inherit from his father, nor did he have a legal right of support enforceable against his father. The economic consequences also included an inability to share in statutory benefits and to pursue certain tort actions such as wrongful death suits.<sup>20</sup>

Today, nonmarital children are allowed to take from their fathers once they establish paternity. The flip-side of this issue is whether fathers of nonmarital children (nonmarital fathers) may inherit from their deceased children. Historically, parents of a child born out of wedlock did not inherit from the child since such a child who "died without issue had no heirs. Today, however, most statutes allow parents . . . to inherit from an illegitimate child whenever (in the case of fathers) the claimant supplies appropriate proof of paternity."<sup>21</sup> Some states, as well as the pre-1990 Uniform Probate Code, condition the father's taking from the nonmarital child on the father's having openly acknowledged and supported the child.<sup>22</sup> For example, California's statute reads in pertinent part:

If a child is born out of wedlock, . . . a natural parent . . . [does not inherit] from or through the child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied:

- (a) The parent or a relative of the parent acknowledged the child.
- (b) The parent or a relative of the parent contributed to the support or the care of the child.<sup>23</sup>

Requiring nonmarital fathers to acknowledge and support their nonmarital children serves at least two purposes. One is proof of paternity. While a child born to a marriage is presumed to be the father's child, a child born out of wedlock is not. To ensure that a man claiming an intestate share is really the biological father of the deceased child, he

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19. *Id.* at 587-88 (citations omitted).

20. *Id.* at 588 (citations omitted).

21. WILLIAM M. MCGOVERN, JR., ET AL., WILLS, TRUSTS, AND ESTATES 39 (1987) (citing N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a)(5) (Consol. 1994) and TEX. PROB. CODE ANN. § 42 (West 1983)).

22. See § 2-109(2) of the pre-1990 UPC wherein the father may not inherit from the child, "unless the father has openly treated the child as his and has not refused to support the child."

23. CAL. PROB. CODE § 6452 (West Supp. 1994).



must prove paternity. In the absence of an official adjudication of paternity, acknowledgment and support of the child fulfills this purpose.

The second purpose is to punish a father for not acknowledging and supporting his child. He has already done the child a great disservice by burdening the child with the social and legal disability of illegitimacy. Without this requirement of acknowledgment, it seems unfair to allow a father to inherit from his child without having helped the child to advance in society.

Fathers of marital children generally are not required to support their children to inherit from them. This anomaly results in an unusual situation: If one characterizes preventing a nonsupporting father from inheriting as a "protection" for the dead child, the law offers less protection to children born within wedlock than to children born out of wedlock.<sup>24</sup> The question becomes why such a distinction exists and whether it makes sense. If it is unfair to allow unworthy fathers of nonmarital children to take in intestacy, it seems just as unfair for unworthy fathers of marital children to take.

The major focus of statutes regarding succession and nonmarital children has been to delineate under what circumstances they should be allowed to inherit from their fathers. Actuarially, the fathers usually die first, so the statutes have focused on the issues surrounding when and if an out of wedlock child should take from his father. These statutes have laid out a number of conditions, most of which involved proof of paternity.

As noted previously, the less frequent situation is that of the father taking from his child. Since this situation only raises a problem where paternity is in question, and paternity is legally presumed when a child is born to a married couple, state legislatures have not focused on the subject of marital fathers taking from their children.

This may explain why so few states have seen fit to explicitly bar inheritance by marital fathers who are derelict in their duties. A second reason for the lack of legislation as to unworthy fathers in general may be the absence of an American tradition of barring unworthy heirs from inheriting due to the belief in freedom of testation rather than forced heirship.<sup>25</sup> An additional explanation for the dearth of legislative atten-

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24. State statutes that protect nonmarital children but do not protect marital children whose fathers abandon or fail to support them might be challenged on the basis that they violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *See* *Lowell v. Kowalski*, 405 N.E.2d 135 (1980), where the Supreme Judicial Court of Massachusetts granted a nonmarital child standing to challenge the constitutionality of a statute on the basis of disparate treatment of the estates of mothers and fathers.

25. *See supra* note 8 regarding the interaction of forced heirship and unworthy heirs in civil law systems.

tion may be the context in which the father's inheritance often arises, namely as a result of tortious conduct resulting in the child's wrongful death.

### III. THE CURRENT LAW

There are generally two situations in which fathers inherit significant assets from their children. The first is when a child has no assets during life, but on death his estate has value as a result of a wrongful death claim. The second situation is when a child accumulates substantial earnings or receives a large personal injury or wrongful death award during the child's lifetime (typically for a parent's death).<sup>26</sup> Presumably, few children who die prior to age eighteen earn substantial incomes or receive large tort awards. Thus, most cases where children die with substantial estates are wrongful death cases.<sup>27</sup> Some states now deny parents who abandon or fail to support their children the right to bring a wrongful death action at all. A few states have done this explicitly, either by statute or by case law.<sup>28</sup> In many states, the wrongful death statute compensates relatives based on their losses; thus a father who abandons a child cannot easily prove damages because he has arguably

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26. We do allow children to own property but we do not allow them to devise it. Children may not use a will to cut out a parent who does not provide support or who has abandoned them. In other words, they cannot opt-out of the default system of intestacy.

27. The wrongful death situation is arguably distinct from that in which a child acquires property during his or her life. In the latter case, the child, prior to age 18, the typical statutory age for making a will, might have formed an intent or preference with regard to disposing of it at death.

28. See, e.g., Alabama (*Adkison v. Adkison*, 239 So. 2d 555, 559 (Ala. Civ. App. 1970) *rev'd on other grounds*, 239 So. 2d 562 (1970) (interpreting what later became ALA. CODE § 6-5-391 (1993); "The atmosphere surrounding the Alabama cases pertaining to the rights of parents to sue for the wrongful death of a minor child is highly charged with the common-law principles of parental duty to maintain, support and care for children . . ."); *McWhorter Transfer Co. v. Peek*, 167 So. 291, 293 (Ala. 1936) ("[F]ather has no right of action for death of minor child if he has, by desertion or disability named, ceased to perform the parental duty of maintenance, etc. with reciprocal right to the child's services."); Georgia (GA. CODE § 19-7-1(c) (Harrison 1990) providing for equal distribution between parents after wrongful death of a child but allowing for unequal distribution if evidence warrants); *Sapp v. Solomon*, 314 S.E.2d 878 (Ga. 1984), *aff'g in part and rev'g in part*, *Solomon v. Sapp*, 312 S.E.2d 166 (Ga. Ct. App. 1983) (if father establishes that he paid reasonable support, he is entitled to one-half of wrongful death recovery; if he fails, he is entitled to nothing.); New York (N.Y. EST. POWERS & TRUSTS LAWS § 5-4.4(a)(2) (Consol. 1979), referring to N.Y. EST. POWERS & TRUST LAWS § 4-1.4 (Consol. 1979)); North Carolina (*Williford v. Williford*, 219 S.E.2d 220, 223 (N.C. 1975) (extending N.C. GEN. STAT. § 31A-2 (1984) to N.C. GEN. STAT. § 29-15(3) (1984)) ("It follows that the plaintiff father, having abandoned the deceased when the latter was a minor child, may not now share in the proceeds of the settlement of the claim for wrongful death . . .")). See also Alison M. Stemler, *Parents Who Abandon or Fail to Support Their Children and Apportionment of Wrongful Death Damages*, 27 J. FAM. L. 871 (1988-1989) (citing Vermont (VT. STAT. ANN. tit. 14 § 1492) (1974)) and Indiana (IND. CODE ANN. § 34-1-1-8) (Burns Supp. 1988); and Wisconsin (*Keithley v. Keithley*, 289 N.W.2d 368 (Wis. 1980)).

suffered little, if any, loss. This may explain why more states have not seen a pressing need to alter their intestacy statutes to bar unworthy fathers. However, there are still states such as Rhode Island where a father like James Brindamour is allowed to profit from his child's death.

Wrongful death statutes fall into two categories. The majority of states have statutes based on Lord Campbell's Act. These laws send the award to the surviving relatives without passing the proceeds through the deceased child's estate. Such statutes may compensate the survivors for direct economic loss and non-economic loss such as companionship. They also may permit punitive damages.<sup>29</sup>

A minority of states have a second type of wrongful death statute based on the premise that the lawsuit belongs to the decedent. The decedent's cause of action for negligence is thus statutorily extended after his death. The lawsuit is intended to compensate the decedent for pain and suffering, medical expenses, and loss of earnings. Thus, the monetary award or settlement often is characterized as the decedent's asset, and thus part of his estate. Some of these survival statutes mandate distribution directly to the survivors based strictly on who takes under the state intestacy statute rather than who has suffered a loss.<sup>30</sup>

This latter type of statute often results in the child's intestate heirs, typically the mother and father, sharing equally. Since the vast majority of state intestacy laws do not prohibit unworthy fathers from taking in intestacy,<sup>31</sup> the proceeds of the wrongful death award must be allocated equally between mother and father.<sup>32</sup> As *Brindamour* demonstrates, state statutes that direct the award for items such as lost earnings through the decedent's estate or which distribute the award according to the intestacy statute still yield arguably inequitable results; fathers who do nothing for their children still inherit.<sup>33</sup> Such results would be precluded

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29. Stemler, *supra* note 28, at 871.

30. *Id.* at 872.

31. The exceptions are listed *supra* note 11.

32. One remedy suggested in the literature is the adoption of wrongful death statutes which bypass the decedent's estate and distribute wrongful death awards based solely on losses. For example, the Uniform Law Commissioners' Model Survival and Death Act provides that the "trier of fact shall make separate awards to each of the survivors entitled to damages." UNIF. MODEL SURVIVAL AND DEATH ACT, § 3(f), 8A U.L.A. 595 (1983). The Act does not preclude bad fathers from recovering but those who advocate its adoption argue that an explicit preclusion is unnecessary since a parent who had no relationship with the child cannot prevail under a statute which awards damages based on loss. Those who argue for this resolution acknowledge that parents who abandon and fail to support their children will not recover under the current law in most wrongful death cases. Stemler, *supra* note 28 at 878-879 (citing Unif. Model Survival and Death Act, § 3(f), 8A U.L.A. 594 (1983)).

33. The inequity is illustrated in the *Brindamour* case:

In determining how the money should be divided, Judge Darigan accepted an estimate from Mrs. Brindamour's lawyer that, based on actuarial estimates, Colleen

by amending state intestacy statutes to bar both marital and nonmarital fathers who abandon or do not support from sharing in the child's estate.

Currently, only Connecticut, Montana, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Virginia, Puerto Rico, and the Virgin Islands send the message to all fathers through the intestacy statutes that if they abandon or do not support their child, they will not reap a wind-fall by inheriting from that child. In 1927, North Carolina became the first state to adopt this approach. The North Carolina statute provides that:

Any parent who has wilfully abandoned the care and maintenance of his or her child shall lose all right to intestate succession in any part of the child's estate and all right to administer the estate of the child, except —

(1) Where the abandoning parent resumed its care and maintenance at least one year prior to the death of the child and continued the same until its death; or

(2) Where a parent has been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child.<sup>34</sup>

The Committee that amended this law in 1961 stated:

It seems very inequitable to allow a parent who has abandoned his child to inherit from such child when the child dies intestate. However when a question of this nature has come before the court and the intestacy law of the particular jurisdiction has made no exception because of abandonment, the courts have been reluctant to imply an exception. It can and does happen that the child is too young to make a will cutting off the guilty parent.<sup>35</sup>

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could have earned a total of \$680,574 had she lived a normal life span. He also determined that Rose Brindamour was due \$300,000 for the loss of her daughter's companionship.

The total of \$980,574 represented the amount that could have been paid out in the suit if more money were available.

Since the \$300,000 that Darigan decided was theoretically due Rose Brindamour equaled about 30 percent of the \$980,574, he awarded her 30 percent of the actual \$350,000 settlement, or \$107,065.

The remaining 70 percent - \$243,935- will go into Colleen's estate.

Jim Hummel, *Absent Dad Could Get \$100,000 From Estate*, PROVIDENCE J. BULL., Jan. 29, 1994, at A1. R.I. GEN. LAWS § 10-7-6 (1985) provides that the amount recovered under R.I. GEN. LAWS § 10-7-5 (1985) for lost earnings, "shall go to the decedent's estate and become part thereof."

34. N.C. GEN. STAT. § 31A-2 (1984). See *Williford v. Williford*, 219 S.E.2d 200, 220-221 (N.C. 1975) (where father sought to recover one-half of the proceeds recovered by the mother for the wrongful death of their child, supreme court held that the proceeds should be distributed according to laws of intestacy, and father, who had abandoned the child, was not entitled to share in the proceeds).

35. SPECIAL REPORT OF THE GENERAL STATUTES COMMISSION ON AN ACT TO BE ENTITLED "ACTS BARRING PROPERTY RIGHTS" (Feb. 8, 1961) at 4 [hereinafter *Special Report*].

Prior to this amendment, North Carolina courts had shown such a reluctance to prohibit unworthy fathers from taking an intestate share absent statutory authority. In *Avery v. Brantley*,<sup>36</sup> prior to the enactment of North Carolina's statute, the court felt constrained to award one-half of the child's estate to each parent, "[u]nder the law as written."<sup>37</sup> The mother in *Avery* alleged that the father had abandoned the child. The child subsequently fell down an elevator shaft and died. The mother challenged the distribution of one-half of the wrongful death award to the father. She urged the court to look to the state adoption statute, which stated that a father lost all rights and privileges vis-a-vis his child if he willfully abandoned the child. However, the court stated, "We cannot stretch the language of [that] statute . . . to meet the facts in the present case. To do so we would make, and not construe, the law."<sup>38</sup> More recently, the judge in *Brindamour* stated, "This court, quite frankly, wishes it could have awarded more to Rose Brindamour. . . . But this is a court of law, not a court of emotion or compassion."<sup>39</sup>

The North Carolina legislature responded to *Avery* by enacting a statute which barred all parents who abandon their children from taking an intestate share. Other states followed North Carolina's lead. For example, the New York statute, adopted in 1941, reads in pertinent part:

4-1.4 Disqualification of parent to take intestate share

(a) No distributive share in the estate of a deceased child shall be allowed to a parent who has failed or refused to provide for, or has abandoned such child while such child is under the age of twenty-one years, whether or not such child dies before having attained the age of twenty-one years, unless the parental relationship and duties are subsequently resumed and continue until the death of the child.

(b) In the event that a parent or spouse is disqualified from taking a distributive share in the estate of a decedent, under this section or 5-1.2, the estate of such decedent shall be distributed in accordance with 4-1.1 as though such spouse or parent had predeceased the decedent.<sup>40</sup>

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36. 131 S.E. 721 (1926).

37. *Id.* at 723.

38. *Id.* at 722. North Carolina responded to *Avery* in 1927 by adding a proviso to the intestacy statute (N.C. Gen. Stat. § 28-149(6)) which stated, "provided that a parent or parents who has willfully abandoned the care, custody, nurture and maintenance of such child to its kindred, relatives or other person, shall forfeit all and every right to participate in any part of said child's estate under the provisions of this section". In 1961, the Special Committee was asked to combine this and other provisions regarding unworthy heirs into a single comprehensive chapter. This resulted in the current statute, § 31A-2, which the drafting committee stated, "broadens the former rule." *Special Report*, *supra* note 35, at 4.

39. Hummel, *supra* note 33, at A1.

40. N.Y. EST. POWERS & TRUSTS LAW § 4-1.4 (McKinney 1981). This section was added in connection with a similar prohibition disqualifying parents from sharing in damages recovered for

In recent years, Pennsylvania,<sup>41</sup> Connecticut,<sup>42</sup> Ohio<sup>43</sup> and Virginia<sup>44</sup> have all adopted similar measures. Montana<sup>45</sup> and North Dakota,<sup>46</sup> which have adopted the 1990 changes to Article II of the Uniform Probate Code, have or will soon have a similar rule. The Commonwealth of Puerto Rico has long had a similar prohibition, titled "Disqualification by Reason of Unworthiness." That statute, derived from the Spanish Civil Code, states in pertinent part: "The following are disqualified to succeed by reason of unworthiness: (1) Parents who have abandoned their children or prostituted their daughters or made attempts

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the wrongful death of a child. Patrick J. Rohan, *Practice Commentary*, N.Y. EST. POWERS & TRUST LAW § 4-1.4 (McKinney 1981), at 744.

41. PA. CONS. STAT. § 2106(b) reads in pertinent part:

Any parent who, for one year or upwards previous to the death of the parent's minor or dependent child, has willfully neglected or failed to perform any duty of support owed to the minor or dependent child or who, for one year, has willfully deserted the minor or dependent child shall have no right or interest under this chapter in the real or personal estate of the minor or dependent child.

42. CONN. GEN. STAT. ANN. § 45a-439(a)(1) (West 1993) reads in pertinent part:

If there are no children or any legal representatives of them, then, after the portion of the husband or wife, if any, is distributed or set out, the residue of the estate shall be distributed equally to the parent or parents of the intestate, provided no parent who has abandoned a minor child and continued such abandonment until the time of death of such child, shall be entitled to share in the estate of such child or be deemed a parent for the purposes of subdivisions (2) to (4), inclusive, of this subsection.

43. OHIO REV. CODE ANN. § 2105.10 (Anderson Supp. 1993) reads in pertinent part:

(A). . . (1) "Abandoned" means that a parent of a minor failed without justifiable cause to communicate with the minor, care for him, and provide for his maintenance or support as required by law or judicial decree for a period of a least one year immediately prior to the date of the death of the minor.

(2) "Minor" means a person who is less than eighteen years of age.

(B) Subject to divisions (C), (D), and (E) of this section, a parent who has abandoned his minor child who subsequently dies intestate as a minor shall not inherit the real or personal property of the deceased child pursuant to section 2105.06 of the Revised Code. If a parent is prohibited by this division from inheriting from his deceased child, the real or personal property of the deceased child shall be distributed, or shall descend and pass . . . as if the parent had predeceased the deceased child.

44. VA. CODE ANN. § 64.1-16.3(B) (Michie 1991) reads in pertinent part:

If a parent willfully deserts or abandons his or her minor or incapacitated child and such desertion or abandonment continues until the death of the child, the parent shall be barred of all interest in the estate of the child by intestate succession unless the parent resumes the parental relationship and duties and such parental relationship and duties continue until the death of the child.

45. MONT. CODE ANN. § 72-2-124(3) (1993) reads in pertinent part: "Inheritance from or through a child by either natural parent or the parent's kindred is precluded unless that natural parent has openly treated the child as the parent's and has not refused to support the child."

46. N.D. CENT. CODE § 30.1-04-09 (Supp. 1993) will be amended effective Aug. 1, 1995 as provided by 1993 N. D. Laws, ch. 334 § 10, to conform to the 1990 revisions of Article II of the Uniform Probate Code, which transformed § 2-109 into § 2-114. Section 2-114(c) extends the rule to marital as well as nonmarital parents.

against their chastity."<sup>47</sup>

Finally, the Virgin Islands adopted a similar statute based on the New York Decedent Estate Law.<sup>48</sup> Barring unworthy fathers from taking, however, is still by far the minority rule.

The Uniform Probate Code now also prevents all abandoning or nonsupporting fathers from taking. Prior to the major revisions to Article II, in 1990, the UPC linked support and inheritance only in the case of nonmarital fathers.<sup>49</sup> As previously discussed, this presumably was due to the focus on proving paternity in cases involving nonmarital children and inheritance.

The pertinent intestacy provision of the revised UPC, section 2-114, no longer distinguishes between marital and nonmarital fathers. It prohibits both fathers and mothers who do not support their children from taking from those deceased children, regardless of marital status.<sup>50</sup> That statute reads in pertinent part:

(a) Except as provided in subsection . . . (c), for purposes of intestate succession by, through, or from a person, an individual is the child of his [or her] natural parents, regardless of their marital status. The parent and child relationship may be established under [the Uniform Parentage Act]. . . .

. . . .

(c) Inheritance from or through a child by either natural parent or his [or her] kindred is precluded unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child.<sup>51</sup>

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47. P. R. LAWS ANN. tit. 31, § 2261 (1993) incorporated into the intestacy statute by *Id.* § 2593. Note that Louisiana, which also draws its Code from a civil law system, has a tradition of barring unworthy heirs. *See* LA. CIV. CODE ANN. art. 964 (West 1953); *see also supra* note 8 with regard to the civil law tradition and unworthy heirs.

48. V. I. CODE ANN. tit. 15, § 87 (1964) reads in pertinent part:

No distributive share of the estate of the decedent shall be allowed under the provisions of this chapter . . .

(5) in the estate of a child to a parent who has neglected or refused to provide for such child during infancy or who has abandoned such child during infancy whether or not such child dies during infancy, unless the parental relationship and duties are subsequently resumed and continue until the death of the child.

If the . . . parent is deprived of a distributive share in the estate of a decedent by the provisions of this section the estate of such decedent shall be distributed . . . as though such . . . parent had predeceased the decedent.

49. *See* Pre-1990 UNIF. PROB. CODE § 2-109.

50. UNIF. PROB. CODE § 2-114(c) (1990); LAWRENCE W. WAGGONER ET AL, FAMILY PROPERTY LAW 136 n.63 (1991). "The Mississippi statute placed conditions only on a biological father's right to inherit from a nonmarital child. Pre-1990 § 2-109 had a similar rule. The 1990 UPC [in § 2-114] neither distinguishes between biological mothers and fathers nor between marital and nonmarital children." *Id.*

51. UNIF. PROB. CODE § 2-114 (1990).

The major change to the statute in 1990 was aimed at making the language gender-neutral. The new section 2-114(c) applies to both mothers and fathers. The pre-1990 section 2-109(c) applied only to fathers. In addition, the Commissioners have focused on status-neutralization, i.e., treating inheritance by all children, marital and nonmarital, as identical once they have established paternity. This is accomplished in subsection (a) of section 2-114. Subsection (c) deals with the opposite situation—fathers and mothers inheriting from their children. Read together, subsections (a) and (c) now yield the same results as statutes in the minority of jurisdictions discussed previously. An unworthy father, marital or nonmarital, does not take by intestacy from his child. The drafters of section 2-114 considered this shift important for purposes of both equal protection and fairness when they decided to extend the rule to marital as well as nonmarital situations. As a result, the UPC now adopts the minority rule—requiring acknowledgement and support of all parents who try to inherit from their children.<sup>52</sup>

Section 2-114(c), while it now applies to all fathers, retains the language requiring that a natural parent has “openly treated the child as his [or hers], and has not refused to support the child.”<sup>53</sup> This language remains from the prior section 2-109(2)(ii), and several states have adopted it, or similar language, in statutes dealing with inheritance by nonmarital fathers.<sup>54</sup> This language is not as well suited to marital fathers. A father of a marital child does not need to openly treat the child as his own to indicate his paternity since the marriage itself serves to announce publicly that the child is his. The 1993 revision of the Comment to section 2-114 adds a clarification: “[t]he phrase ‘has not refused to support the child’ refers to the time period during which the parent has a legal obligation to support the child.”<sup>55</sup> This concept seems more applicable to a man not adjudicated as the father until after the

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52. Telephone interview with Prof. Lawrence Waggoner, principal draftsman of the 1990 UPC § 2-114, (Aug. 15, 1994). Prof. Waggoner also notes that, given the complexity of the other major reforms in the revised Article II, the drafters were not able to devote similar attention to § 2-114 at that time. The Joint Editorial board is aware of this issue and plans to revisit § 2-114 in the future.

53. UNIF. PROB. CODE § 2-114 (1990).

54. See, e.g., ALA. CODE § 43-8-48(2)(b) (1991); ALASKA STAT. § 13.11.045(2)(B) (1985); ARIZ. REV. STAT. ANN. § 2109(2)(b) (1975); COLO. REV. STAT. ANN. § 11-109(1)(b)(II) (West 1989); DEL. CODE ANN. tit. 12, § 508(2)(b) (1979) (All states which use language similar to the pre-1990 U. P. C. § 2-109 requiring out-of-wedlock person claiming to be father to openly treat the child as his and not refuse to support the child, in order to inherit from the child.) Note that Tennessee is unique in adding a section which explicitly requires that any child support arrearages must be brought up-to-date, with interest, and paid to the other parent or to the child's estate before a parent is allowed to inherit from a nonmarital child. TENN. CODE ANN. § 31-2-105(2)(b) (1984).

55. UNIF. PROB. CODE § 2-114 cmt. g, 8 U.L.A. 90 (Supp. 1994).



child's birth, and who thus for some interim period had no legal duty of support. Marital fathers are legally bound to support their children from birth.

The jurisdictions that have dealt directly with the issue of both unworthy marital and nonmarital fathers forfeiting their inheritance have used the concept of abandonment, in addition to that of failure to support the child.<sup>56</sup> Abandonment, as opposed to acknowledgement, is a more generally applicable concept which focuses on the father's behavior *after* paternity has been resolved. Both marital and nonmarital fathers abandon their children. The concept of abandonment has been applied to marital fathers in other areas of law, such as neglect and termination of parental rights.

The drafters of section 2-114(c) of the 1990 UPC did not specifically consider the consequences of how extending the prior rule in section 2-109 to marital fathers would affect the disqualification of kindred under the new Section 2-114. The 1990 revisions simply continued this rule. Such a rule seems more appropriate to out-of-wedlock children, who often do not have much connection to their father's kindred. Even if a marital father is disqualified from inheriting, it is not as clear that the statute should also ban his kindred since they are more likely to have had a relationship with the child than nonmarital kindred. The New York, Ohio, and Virgin Islands statutes, for example, do not bar kin from taking, although they do direct where the property goes if the father forfeits it. As with other probate statutes, the property is distributed as if the parent had predeceased the child.<sup>57</sup>

Courts in Montana and North Dakota, those states which have adopted the 1990 revisions to Article II of the Uniform Probate Code,<sup>58</sup> will now have statutory grounds to deny a nonsupporting or abandoning marital father an intestate share of his minor child's estate. However, those courts may have to grapple with applying the phrases "openly

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56. See, e.g., statutes listed *supra* note 11.

57. See N. Y. EST. POWERS & TRUSTS LAW § 4-1.4(b) (McKinney 1981); Ohio Rev. Code Ann. § 2105.10(B) (Anderson Supp. 1993); 15 V.I. CODE ANN. tit. 15 § 87(5) (1964). See Rohan, *supra* note 40, at 744. "It should be noted that, although the derelict parent is barred from inheritance rights in the estate of his child, the statute does not bar the child's paternal or maternal relatives from inheriting despite the parent's wrongful conduct." *Id.* at 745 (citing *In re Peter's Estate*, 104 N.Y.S.2d 647, 648 (1951), and quoting *In re Haaser's Will*, 62 N.Y.S.2d 537, 540 (1946), "[t]here is nothing contained in any provisions . . . which would disqualify a person as a distributee because of a relationship to the decedent through the decedent's father.").

58. Fifteen states have enacted the Uniform Probate Code in full with some amendments—Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina and Utah. UNIF. PROB. CODE, 8 U.L.A. 1 (Supp. 1994). Only Montana and North Dakota, however, have adopted the 1990 Revision of Article II according to the U.L.A. The Montana adoption took effect in 1993 and the North Dakota revision will take effect Aug. 1, 1995.

treated" and "has not refused to support" in the context of marital fathers, where they may not neatly fit if such phrases are narrowly interpreted. The courts also will be forced to cut off an unworthy father's relatives from taking if they are otherwise eligible. The language of the statute mandates this result, even if the relatives have had a close relationship with the child, which is more likely in a marital situation. Perhaps the Commissioners in their next revision of section 2-114(c) should consider adopting language that is more generally applicable to both marital and nonmarital situations, now that the rule applies to both.

#### IV. A COST/BENEFIT ANALYSIS OF ADOPTING A BEHAVIOR-BASED MODEL

Adopting a behavior-based model of intestate succession for all fathers may be appealing because of a desire to punish unworthy fathers for failing to perform their parental duties. However in considering the formulation of intestacy/default rules, less is usually better than more. A clear, simple statute is the best default rule because it results in the most efficient reallocation of property at death. The following analysis will consider the costs and benefits of complicating intestacy statutes to achieve a fair result in cases of unworthy fathers.

The analysis encompasses (1) a review of existing behavior-based models of intestate succession in American law and whether they are sufficiently akin to the unworthy father cases to justify adopting a similar rule; (2) existing theories about how to fashion the best default rule in a particular area of law; (3) whether adopting a behavior-based model is consistent with the purposes of the underlying probate process; (4) whether such a change will alter the behavior of unworthy fathers and thus lower the overall cost to the legal system; (5) whether a behavior-based model of intestate succession is consistent with the underlying philosophical bases of American inheritance law; and (6) whether there are more effective and less costly alternatives to behavior-based models of intestate succession that would still yield fair outcomes.

##### A. *Existing Examples of Barring Inheritance by Unworthy Heirs in American Inheritance Law*

The idea that wrongdoing of an heir should affect whether he takes his share is not common to American inheritance law. The most notable exception is when an heir kills the decedent, thereby accelerating his own inheritance. Many states, along with the Uniform Probate Code, prohibit so-called "slayers" from taking.<sup>59</sup>

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59. *E.g.*, UNIF. PROB. CODE § 2-803 (1990); 20 PA. CONS. STAT. ANN. § 2106(c) (Supp.

Fewer states bar unworthy spouses and parents from inheriting under intestacy statutes.<sup>60</sup> For example, in North Carolina, a spouse who "wilfully and without just cause abandons and refuses to live with the other spouse and is not living with the other spouse at the time of such spouse's death" loses all rights of intestate succession in the estate of the other spouse.<sup>61</sup>

The North Carolina committee that drafted the statute said it intended the law to be a "clearly-drawn, comprehensive and up-to-date Act designed to include practically every instance by which a person may be prevented from acquiring property rights by his own wrongdoing."<sup>62</sup> The underlying rationale for the North Carolina rule seems to be concern about preventing unworthy heirs from taking an inheritance. The drafters intended to bar from taking not only those heirs who murder the decedent, but also bad spouses and parents who fail to live up to society's ideas of their legal and moral duties.<sup>63</sup> These situations involve the rare examples in American law of either *de jure* forced heirship, such as elective shares for spouses, or what this author labels "*de facto* forced heirship," i.e., parents inheriting from children who are legally too young to opt out of the intestacy laws. Forced heirship in these narrow circumstances justifies an unworthy heir statute. Depriving an American decedent of the usual ability to cut out someone who has wronged him militates in favor of a statute which will accomplish that very act.

When considering actions that warrant forfeiting intestacy rights,

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1994) ("Slayer's share. — Any person who participates either as a principal or as an accessory before the fact in the wilful and unlawful killing of any person shall not in any way acquire property or receive any benefits as the result of such killing, but such property or benefits shall be distributed as provided in Chapter 88 of this code (relating to slayers))."

60. See, e.g., N.C. GEN. STAT. § 31A-1 (1984). Subsections (a)(3) and (b)(1) bar all rights of intestate succession; N.Y. EST. POWERS & TRUST LAW (McKinney 1981) § 5-1.2.; 20 PA. CONS. STAT. ANN. § 2106(a) (Supp. 1994), ("Spouse's share. — A spouse who, for one year or upwards previous to the death of the other spouse, has willfully neglected or refused to perform the duty to support the other spouse, or who for one year or upwards has willfully and maliciously deserted the other spouse, shall have no right or interest under this chapter in the real or personal estate of the other spouse"); VA. CODE ANN. 64.1-16.3(A) (Michie 1991) ("If a husband or wife willfully deserts or abandons his or her spouse and such desertion or abandonment continues until the death of the spouse, the party who deserted the deceased spouse shall be barred of all interest in the estate of the other by intestate succession, elective share, exempt property, family allowance, and homestead allowance"); V. I. CODE ANN. tit. 15, § 87(3), (4) ("No distributive share of the estate of a decedent shall be allowed under the provisions of this chapter . . . (3) to a husband who has neglected or refused to provide for his wife, or has abandoned her; or (4) to a wife who has abandoned her husband. . . .")

61. N.C. GEN. STAT. § 31A-1(a)(3) (1984).

62. *Special Report*, *supra* note 35, at 3.

63. The Virginia and Pennsylvania statutes have similar structures, grouping unworthy heirs into one section. VA. CODE ANN. § 64.1-16.3 (Michie 1991); 20 PA. CONS. STAT. ANN. § 2106 (Supp. 1994).

murder is distinguishable from behavior such as abandonment or non-support. With murder, it is the behavior itself which produces the inheritance. Someone kills his father and as a result his father's assets flow to him. Thus, the slayer rule not only punishes, but presumably deters as well. Society does not want to encourage people to kill to accelerate their inheritances. Thus, there are at least two justifications for tying behavior to inheritance in such cases—deterrence and punishment.

However, if someone fails to support his child or spouse, that failure does not directly cause the child's or spouse's death and the resulting wealth transfer. It is not as clear whether forfeiture of inheritance would deter abandonment or nonsupport. This is discussed in more detail below. If one concludes that a forfeiture rule will not deter the conduct, then we must ask whether punishment is a sufficient justification for such a law. Answering this question involves analyzing the purposes of the intestacy law. It also requires an evaluation of the costs and benefits of extending the concept of behavior-based forfeiture to fathers who fail to support their children.

Choosing criteria to evaluate whether limiting inheritance in this way is advisable involves analyzing the purposes of intestacy statutes. It may be that the purposes should change as societal conditions change. Or it may be that inheritance laws should remain limited in their function. Some have argued that such goals as equality of opportunity and even the relatively recent concern for reducing the federal budget deficit are appropriate reasons for substantially altering our inheritance laws.<sup>64</sup>

Such arguments are premised on a view of inheritance as a privilege that can be used as a tool to further social goals other than the mere reallocation of property at death. One might justify extending the unworthy father rule on a similar basis. Arguably, statutes governing inheritance should not only provide for the orderly distribution of property, but should send messages regarding societal values such as the obligation of fathers to support their children. As discussed previously, the effectiveness of such messages is hard to gauge, but the cost of changing the statute is easier to evaluate.

Intestacy statutes are society's rules for reallocating property on the decedent's death.<sup>65</sup> In establishing such rules, society must choose the

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64. Ascher, *supra* note 1, at 70-73.

65. As one scholar has noted:

Any society that respects property rights during lifetime necessarily reallocates those rights at an owner's death. In order to avoid the "endless disturbances" to which Blackstone referred, the rules relating to that reallocation must be simple and enforceable. Inheritance through the decedent's family or by the decedent's will has long met that test.

*Id.* at 78-79.

most appropriate candidates for receipt of the property. Family members, especially the spouse and dependent children, are suitable candidates if society is concerned with keeping the decedent's survivors off the public dole. Society may also want to respect the private property rights of the decedent. In this case, intestacy statutes should be drafted to effectuate the decedent's presumed intent as to how his property should devolve. If society is concerned with other goals, such as equality of opportunity and redistribution of wealth, some have argued that the state should receive the property.<sup>66</sup>

### B. *Fashioning a Default Rule*

In fashioning a default rule in other areas of the law, some commentators advocate the use of efficiency as a goal.<sup>67</sup> For example, in contract law some suggest that default rules should come as close as possible to what most people would want. The rationale for using this "presumed intent" approach to statutory rulemaking is that it is the most efficient method. In other words, if society can only make one size suit for everyone, the one that fits the most people should be chosen. In that way, the amount of costly custom-tailoring required to make the suit fit can be minimized. Similarly, the closer that legal default rules can be tailored to what most people want, the lower the costs to the parties involved, to the legal system, and to society.

Presumed intent is also a long revered precept in inheritance jurisprudence, based on the tradition of honoring the decedent's rights in his property even after death. Judges and legislatures alike cite it as the guiding principle in fashioning intestacy rules and in interpreting wills.<sup>68</sup> Thus, the traditional view that the intestacy/default rules should mirror the decedent's intent is also consistent with the position that the most efficient default rule is the one closest to what the parties themselves would have done.

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66. *Id.* at 88. Ascher argues that the presumption on death should be that all property goes to the state. "It is hardly open to debate that inherited wealth contradicts equality of opportunity . . . . How society reallocates accumulated wealth at death is therefore a critical determinant of the degree of equality of opportunity succeeding generations will enjoy." *Id.*

67. See Dobris, *supra* note 17, at 407. "Many reasons justify good default rules. First, there are the practical reasons. Professors Ayres and Gertner recently wrote, 'The choice of an inefficient default rule can generate inefficiencies that, because of strategic bargaining, are much greater than the cost of contracting around the inefficiency.'" *Id.* (quoting Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 733 (1992)).

68. Despite such declarations, succession law rewards people for not using the default rules. Transfer tax laws and probate laws that make it more efficient and less costly to have one's property pass according to the custom-tailored directions of a will or testamentary substitute encourage people to opt-out of the cumbersome intestacy process.

Therefore, one might first ask whether a rule barring inheritance by "unworthy" fathers reflects the wishes of deceased children. If one were to poll the Colleen Brindamours of the world as to whether they would want their fathers to share in their estates, one might guess that they would say no. An abandoning and nonsupporting father would not be a likely candidate for a child's largesse. If these children knew that their estates would be enlarged by a wrongful death settlement, and if they had the opportunity to make a will leaving their property to anyone, they might well have chosen to cut their father out.

While the supposition that such children would not want their father to share in their estate may not seem unreasonable to an adult, literature on child psychology establishes that even children with abusive and neglectful parents desperately want to maintain their relationship with those parents.<sup>69</sup> Studies indicate that children continue to love and bond with parents who have badly abused and/or abandoned them.<sup>70</sup> The premise that children like Colleen Brindamour would not want their fathers to share may be more of an adult perspective on what is fair, rather than an accurate picture of the actual intent of a child vis-a-vis a bad parent. It is often difficult to create a rule that accurately reflects most adult decedents' intent. In these cases, it may be even harder to gauge the presumed intent of children.<sup>71</sup>

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69. See, e.g., Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 696-97 (1976). Note however, that Colleen's father claimed that he tried to contact her and that her mother did not let him. It is questionable whether the intestacy law can efficiently take into account whether Dad really loved the child and vice versa.

70. *Id.* ("There is substantial clinical evidence that some children in foster care retain very strong ties to their natural parents. In fact, some children continually run away to their own homes or have to be moved from foster home to foster home because they refuse to accept anyone in place of their own parents.").

71. A good example of this difficulty is found in the cases striking down, as unconstitutional, laws barring out-of-wedlock children from taking in intestacy. States tried to justify these laws as reflecting the desire of most citizens to bar nonmarital children from inheriting from their biological fathers unless the father acknowledged paternity and/or the parents had later married. However, the empirical evidence indicated that the statutes did not in fact reflect public attitudes. These statutes were generally held unconstitutional in a series of cases in the late 1970s and early 1980s as violative of equal protection. For example, in *Trimble v. Gordon*, 430 U.S. 762, 765-66 (1977), the United States Supreme Court struck down an Illinois statute that limited the right of a child born out of wedlock to inherit from her natural father to situations where the child's parents had intermarried and the father had acknowledged the child as his. In commenting on this case, Fellows, Simon & Rau noted that:

One of the arguments presented to the Supreme Court in support of the statute was that it mirrors the presumed intentions of the citizens; i.e., unless there was acknowledgement of the child in addition to marriage to the natural mother, a father would prefer that his nonmarital child not share in the estate. . . . In fact, empirical evidence demonstrates that these statutes do not conform to citizen preferences.

As society changes over time so, too, does presumed intent. For example, rules barring nonmarital children from inheriting were, in part, an expression of society's disapproval of extramarital sex. As society changed and out of wedlock births became more socially acceptable, courts adjusted their treatment of these children.<sup>72</sup> The view of fathers who abandon their children has changed as well. Today, fathers are viewed as having little if any legal entitlement to a child's earnings, and the failure to support a child is seen as a heinous dereliction of duty. Society now punishes abandonment and lack of support more severely than in the past.<sup>73</sup> These social changes may merit a reevaluation of the types of behavior that warrant forfeiture of inheritance rights, and may justify a change in the intestacy/default rule.

The presumed intent approach in contract law focuses on replicating what the bargaining parties would have wanted. A default rule that represents the presumed intent of most bargaining parties is the most efficient because it results in less costly custom-tailoring and, presumably, in less litigation. The case of inheritance, however, is not exactly analogous. Here, "bargaining parties" are replaced by "giving" and "receiving" parties. Furthermore, the deceased child may not be the party that should be considered in fashioning the default rule. After all,

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The findings in prior studies indicate that the public favors allowing nonmarital children to inherit once paternity is ascertained.

Fellows, et al, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 321, 371-72. Courts often acknowledge that carrying out presumed intent, while a significant goal in the law of succession, may be subordinate to other more important goals. Laws barring out of wedlock children from inheriting from their fathers would have given way, even if they did reflect most decedents' wishes, because the constitutional rights of nonmarital children were of more weight than other factors such as presumed intent or administrative convenience.

72. The Constitution's equal protection principles have been applicable to the states since the Fourteenth Amendment was adopted. It took a long time, however, for courts to view the treatment of nonmarital children in intestacy statutes as violative of those principles. This may be due to a combination of jurisprudential expansion of the interpretation of the Fourteenth Amendment and the American judiciary's responsiveness to the societal changes going on around it. Judges do not make law in a vacuum, and the law must continue to be somewhat reflective of the society's values or it will lose its unique role as the mechanism for social order. It may be, however, that such official acceptance of nonmarital births has contributed to an increase in such births. Granted, such statutory changes may be seen as merely responsive to the growth in nonmarital births, but it may also be that such laws are a catalyst to continued and, perhaps, accelerated growth of the phenomenon. Laws send messages to citizens beyond their articulated purpose and thus often have a broader impact on society.

73. Members of the Congressional Caucus on Women's Issues have recently developed a bill that would (1) mandate direct wage withholding of child support obligations by employers when child support orders are issued or are modified by state courts; (2) require states to withhold drivers' and occupational licenses from those failing to make child support payments and (3) require states to make it a crime to willfully fail to pay child support and to provide criminal penalties for such failure. Rhonda McMillan, *Child Support Enforcement Gets Boost*, A. B. A. J., Sept. 1994, at 87 (describing H.R. 4570).

the child is dead, and it is the mother—who supported, provided, and cared for the child—who is the likely party to protest the father's inheriting from the child. She, not the deceased child, stands to benefit from the economic transfer, much like a third-party beneficiary. Perhaps the default rule should be aimed at minimizing costly legal challenges by the receiving parties, the heirs, as opposed to focusing on the bargaining parties, as in contract law. Requiring support and punishing abandonment might arguably reduce probate litigation, because mothers are more likely to be satisfied that justice has been done if they are economically benefitted to the exclusion of the father. Rose Brindamour would not have felt compelled to sue if her husband had not been allowed to inherit. If there were a statute clearly excluding inheritance by an abandoning or nonsupporting father, presumably James Brindamour would have had no right to claim an intestate share, so Rose Brindamour would have had no reason to go to court to stop him. Thus, the behavior-based rule results in increased efficiency. Or does it?

If such a statute had existed in the *Brindamour* case, a fact finder would have had to decide whether, how much, and in what form there had been support, or whether it was a case of abandonment. *Brindamour* is a graphic example of the multiple courts that might be involved in such a case. James Brindamour claimed that he paid his child support in cash. He lacked records, but he did possess witnesses (who were not allowed to testify) claiming that his wife collected the payments at his place of employment every week. The Superior Court determined what portion of the insurance company settlement went to the mother for loss of consortium and what portion went to the child's estate for lost wages and medical expenses. The family court determined whether and how much support James Brindamour had actually paid, and ordered him incarcerated pending payment. The appeals court and the state supreme court heard pleas from both sides for relief. All of these courts were involved before the Probate Court even began to perform its function.

### C. *The Purposes of the Probate Process*

What is the function of the modern Probate Court and how does it relate to the issue of fathers inheriting from their children? Several purposes underlie the modern probate process. The probate process is designed to settle the decedent's affairs and to ensure that the decedent's property reaches the proper recipients.<sup>74</sup> To accomplish this, the probate

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74. John H. Langbein, *The Non-probate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1117 (1984). "Probate performs three essential functions: (1) making property owned at death marketable again (title-clearing); (2) paying off the decedent's debts



court enforces either the custom-tailored product, the decedent's will, or the default rules, the intestacy statute. The court's job is to effectuate closure.<sup>75</sup>

Closure is important for a variety of economic and social reasons. Property must be reallocated on death. Creditors must be paid off. Heirs or legatees must receive their distributions. Tax authorities must be given their due. In addition, families may benefit from a formal, mediated process of settling the decedent's affairs. Emotionally, the probate process may be akin to the ritual function that a funeral performs in helping families come to some acceptance of the death. In addition, families, creditors, and other takers often need a neutral mediator to reallocate the decedent's assets and settle disputes efficiently.

In effectuating this last goal, intestacy statutes should be as clear as possible. Adding support as a requirement means that some court, either family or probate,<sup>76</sup> must determine whether a father actually did support his child. If abandonment triggers a forfeiture, the court must decide what constitutes abandonment and whether it occurred. Adding this step to the process appears to make it less efficient, in that the probate court must engage in fact-finding in addition to simply identifying heirs under the intestacy statute.

The *Brindamour* case, however, suggests that even without a support or abandonment provision in Rhode Island, the probate process was still inefficient. Mothers, such as Rose Brindamour, who are forced to split an estate with the father and who may feel justifiably offended by the lack of "fairness" in having an abandoning and nonsupporting father inherit, will challenge the father's inheritance on an *ad hoc* basis. Most courts will feel bound by a statute that does not contain a bar to "unworthy" fathers. Some courts, however, rule against fathers even in the face of a clear intestacy statute.<sup>77</sup> Such deviations from the statute by courts reading in a nonexistent exception encourage mothers like Rose Brindamour to challenge the allocation to the father even though the statute does not explicitly bar unworthy fathers.

Adopting a behavior-based model may require courts to make lengthy inquiries into the issue of abandonment or failure to support and may delay the final distribution of the estate. The lack of a clear statute, however, may cause similarly lengthy proceedings as a result of chal-

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(creditor protection); and (3) implementing the decedent's donative intent respecting the property that remains once the claims of creditors have been discharged (distribution)." *Id.*

75. *Id.*

76. Note that in some states probate and family matters are heard by the same court. In other states, separate courts hear these matters.

77. Stemler, *supra* note 28, at 875-76 (citing *Keithley v. Keithley*, 289 N.W.2d 368 (Wis. Ct. App. 1980); *Guy v. Johnson*, 448 N.E.2d 1142 (Mass. App. Ct. 1983)).

lenges by nonabandoning parents. It is not clear that the absence of a requirement that a father support his child, i.e., adherence to a status-based model, is more efficient in reducing either the amount of litigation involved in these cases or the length of the probate process.

#### D. *Will Such a Change Alter Behavior?*

Even if a behavior-based model results in slightly more litigation in individual cases, should the purposes of the intestacy statute be expanded to include punishing all unworthy fathers anyway?<sup>78</sup> Perhaps we should look at the broader impact of such a rule on the legal system, i.e., the net efficiency effect. Will such a behavior-based model encourage fathers to pay more child support? Such improved behavior may offset the added societal costs of probate delay by reducing the amount of child support enforcement litigation.<sup>79</sup>

An economic analysis of the behavior-based model might apply the theory that the participants in the legal process, "behave as if they were rational maximizers. . . . Like ordinary consumers, they economize by buying less of a good or commodity when its price rises and more when it falls."<sup>80</sup> Under this analysis, the good in a non-market situation is a particular kind of behavior, e.g., criminal activity, and the price is a legal sanction, e.g., a term of imprisonment. In the inheritance context, the good is the economic benefit derived by a father by failing to pay child support and the price is the resulting punishment by forfeiture of an inheritance from his child, discounted by the probability of the child's dying before the father.

Depending upon the likelihood of inheritance, a father might act differently if different intestacy rules applied. In the case of wrongful death, the child has no estate until after death. A father is unlikely to pay child support or refuse to abandon a child simply because of the slim chance that his child will be the victim of negligence and the recipient of a wrongful death award. In other words, a father would discount the price paid for the nonsupporting or abandoning behavior by the probability that the child will predecease him and that such death, if it does occur, will be a result of a tortious act that yields a large settlement or award.

However, in cases where the child has an estate during life, com-

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78. Several states already punish the fathers of nonmarital children in such fashion. See *supra* part III.

79. Or would the deprivation of a traditional right based simply on status contribute to the message to fathers that they are no longer important, thus adding to the lack of support now occurring? See Safire, *supra* note 2.

80. Richard A. Posner, *Observation: The Economic Approach to Law*, 53 TEX. L. REV. 757, 763 (1975).

prised of either accumulated earnings or a tort award for a parent's death or a personal injury to the child, there is a greater likelihood that the father, as a rational maximizer, will pay child support. Here, the price of not paying is increased by the possibility of forfeiting a significant amount of money. The larger the child's estate, the higher the potential cost of failure to pay child support.

Even if it is not clear that a behavior-based model is the most efficient rule, society may still want to adopt a rule which links bad behavior to forfeiture of inheritance.<sup>81</sup> In some cases, "society is in fact willing to pay a certain price in reduced efficiency for policies (e.g., forbidding racial and religious discrimination) that advance notions of justice, . . . to preserve intact the social fabric."<sup>82</sup> The view of inheritance as a tool for achieving goals other than the simple reallocation of property on death is implicit in such an approach. Is this approach consistent with the philosophical bases for American inheritance law?

#### E. *The Philosophical Bases of American Inheritance Law*

One could solve the problem discussed in this article by simply abolishing inheritance. In his article entitled *Curtailing Inherited Wealth*,<sup>83</sup> Mark Ascher challenges the well accepted American view that inheritance is, if not a right, a highly protected statutory entitlement. Ascher proposes discarding the concept of freedom of testation and in its place adopting the premise that property rights should end at death. He contends that inheritance is something our society should tolerate only when necessary.<sup>84</sup>

Ascher explores the two competing philosophical theories of inheritance in the American legal system. The first, based on natural law, is that children are entitled to inherit from their parents because of the right to be, "nourish'd and maintained by their Parents."<sup>85</sup> This view, which has not been widely adopted by American courts, competes with the

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81. As to different definitions of justice and their relationship to economic analysis, see *id.* at 777-78. Also note the news accounts of Colleen Brindamour's friends picketing and shouting epithets at her father in front of the Kent County courthouse. See *supra* notes 12-13. Respect for the law, which society relies on to maintain order, is undermined if the laws are perceived as unfair or unjust. Therefore, society has an interest in not only the most efficient rule but in the one perceived as fairest by the most people.

82. *Id.* at 778.

83. Ascher, *supra* note 1.

84. *Id.* at 73. Ascher's proposal allows an unlimited exemption for wealth flowing upstream to lineal ascendants. This exemption is aimed at encouraging people to support elderly parents who presumably will therefore not use public resources like Medicaid to fund long-term care. *Id.* at 74.

85. *Id.* at 76 (quoting J. LOCKE, TWO TREATISES OF GOVERNMENT bk. 1, § 89, at 206-07 (P. Laslett ed. 1988)).

second theory explored by Ascher, which sees inheritance not as a natural but as a civil right. According to Blackstone, this latter "positivistic" conception of inheritance was merely a custom eventually transformed into positive law.

A man's children or nearest relations are usually about him on his death-bed, and are the earliest witnesses of his decease. They became, therefore, generally the next immediate occupants, till at length, in process of time, this frequent usage ripened into general law.<sup>86</sup>

Society converted this custom into law for purposes of efficiency; it was the most orderly and least problematic system for reallocating wealth. Ascher notes that Blackstone's positivistic theory, rather than Locke's natural rights theory, "has always dominated this country's thinking on inheritance."<sup>87</sup>

Under Locke's theory of natural rights, the basis for the child's right to inherit from the parent was that children were "born weak, and unable to provide for themselves."<sup>88</sup> The underlying premise of the natural rights theory of inheritance was the duty of parents to support the children that they brought into the world. The same duties, however, generally do not flow from minor children to their parents. As a result, able-bodied parents presumably have no right to call on their children, especially minors, for support.<sup>89</sup> Thus, in considering a father's right to inherit from a child, the natural rights rationale that the intestate taker is entitled to support, and thus an inheritance, is inapplicable.

The opposing theory, the positivistic view of inheritance, is perhaps best summed up in a letter from Thomas Jefferson to James Madison dated September 6, 1789:

"[T]hat the earth belongs in usufruct to the living": that the dead have neither powers nor rights over it. The portion occupied by an individual ceases to be his when he himself ceases to be, and reverts to the society. . . . If [the society has] formed rules of appropriation, those rules may give it to the wife and children, or to some one of them, or to the legatee of the deceased. So they may give it to his creditor. But the child, the legatee, or creditor takes it, not by any natural right, but by a law of the society. . . . Then no man can, by *natural right*, oblige the lands he occupied, or the persons who succeed him in that occupation, to the pa[y]ment of debts contracted by him. For if he could, he might, during his own life, eat up the usu-

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86. *Id.* (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES\* 10-11).

87. *Id.* at 77.

88. *Id.* at 76 (quoting Locke, *supra* note 85, § 88, at 207).

89. Although there may be moral and, in some states, legal duties to support elderly, dependent, and infirm parents.

fruct of the lands for several generations to come, and then the lands would belong to the dead, and not to the living, which would be the reverse of our principle.<sup>90</sup>

According to Ascher this positivistic theory of inheritance has prevailed over the natural rights theory for a number of reasons:

1) The theory makes intuitive sense. If a society recognizes property rights during life, those property interests must of necessity be re-ordered after death. Simple, clear rules facilitate this process. Family members are efficient candidates for receipt of the decedent's property because they are easily identified. However, this choice of family does not mean that inheritance must be included as a stick in the bundle of rights which make up the decedent's property.<sup>91</sup>

2) The natural rights theory is flawed or limited at best. Even if one agrees that minor children have a right of support from their parents, it does not necessarily follow that adult children enjoy such a right. In addition, even minor children's rights need not extend to all of a parent's estate, regardless of how large it may be.

3) The natural rights theory is inconsistent with the reality of American succession law. In fact, children in this country do not inherit all, or for that matter any, of their parents' wealth in many cases. Ascher characterizes their rights as more contingent than natural. He uses the Uniform Probate Code's intestacy statute as an example of a child not inheriting at all if the other parent were married to the decedent at death.<sup>92</sup> The marital deduction allowed under the federal estate and gift tax system also indicates a preference for spouses over children.<sup>93</sup> Even if one is not married, one may still choose to disinherit one's children by will.<sup>94</sup>

4) Finally, the natural rights theory is "relevant but ambiguous." If one argues that inheritance is a property right protected by the Constitution, it must be acknowledged that such a theory is inconsistent with the natural rights world view. The primary focus of natural rights ideology is people, not property. Inheritance by its very terms, is inconsistent with egalitarianism and thus clashes with the natural rights ideal of an egalitarian society. Even prominent proponents of the natural rights approach, such as Thomas Jefferson, did not embrace its extension to

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90. 15 T. JEFFERSON, *THE PAPERS OF THOMAS JEFFERSON* 392-93 (J. Boyd ed. 1958), quoted in Ascher, *supra* note 1 at 80-81.

91. Ascher, *supra* note 1 at 78-79.

92. *Id.*

93. *Id.*

94. *Id.* at 79-80. Note, however, the limited exception of some pretermitted heir rights in certain children.

inheritance.<sup>95</sup>

Ascher concludes that the natural rights theory and the positivistic theory of inheritance coexist in the American psyche. Sufficient jurisprudential basis exists under either theory for limiting an unworthy father's right to inherit. The natural rights theory supports the right of a child to inherit because the child has a natural right to support from his parent. There is no concomitant natural right of a parent to have a child support him.

The positivistic theory of inheritance views inheritance as a response to the need to reallocate wealth upon death. Family members are an efficient choice to receive this wealth, but the positivistic theory does not hold that they thereby have a right to it. Many societal goals may be consistent with this theory, and surely society has the power to control post-death wealth transfers to meet its own needs. For instance, this positivistic theory is consistent with limiting wealth transfers to worthy fathers who create productive children/citizens by fulfilling their duty of support.

A proposal to limit inheritance for abandonment or failure to support is also consistent with constitutional theories of inheritance. As pointed out by Ascher, many American courts, including the United States Supreme Court, have clearly stated that, "[N]othing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."<sup>96</sup> The broad power of the states to regulate rules governing succession has been widely upheld.<sup>97</sup> As noted above, bars to inheritance for unworthy heirs already exist in some intestacy statutes.<sup>98</sup>

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95. *Id.* (quoting S. Katz, *Republicanism & The Law of Inheritance In the American Revolutionary Era*, 76 MICH. L. REV. 1, at 7 (1977)).

96. *Id.* at 84 (quoting *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942)). Ascher observes that while states may abolish inheritance, that does not mean that Congress can. He cites to *Hodel v. Irving*, 481 U.S. 704, 717 (1987), for the proposition that "complete abolition of both the descent and devise of a particular class of property may be a taking [under the Fifth Amendment]". *Id.* Other commentators have given greater significance to the Court's decision in *Hodel*. See, e.g., Ronald Chester, *Is the Right to Devise Property Constitutionally Protected?: The Strange Case of Hodel v. Irving*, 24 S.W.U.L. REV. 1195 (1995). "Writing for a unanimous Court, Justice O'Connor declared, without reference to the dominant American political and legal theory to the contrary, and in direct defiance of *Irving Trust Co. v. Day*, that the right to pass property at death . . . is a significant constitutionally protected property right." *Id.* at 1198 (citations omitted). Chester characterizes *Hodel* as an "apparent 'sea-change' in the Supreme Court's view of inheritance" which is arguably a triumph of the natural rights view over the positivistic view of inheritance. *Id.* at 1197-99.

97. E.g. *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942); *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 48 (1944).

98. For example, many states have statutes that bar murderers from taking from their victims, and New York, North Carolina, Pennsylvania, and Virginia bar spouses from taking if they abandon the decedent. "It is significant that although statutes bearing upon one or more branches

Various theories of private property rights are also consistent with limitations on inheritance. Locke based private property rights on the fact that one expended labor to acquire property.<sup>99</sup> John Stuart Mill grounded private property rights on the fact that people produced the property "by their own exertions."<sup>100</sup> Ascher thus argues that since adult children do not participate in the labor producing the parents' property, they should have no property interest in it.<sup>101</sup> Similarly, a nonsupporting father does nothing to produce the estate of the deceased minor child, unlike the mother who rears, feeds, clothes, and shelters the child.

In John Stuart Mill's view, there may have been a stronger family claim to inheritance in feudal times. The King granted the property to a family, and the extended family worked the land and shared in its production. The labor of many family members went into the land. Therefore, the concept of property rights as derived from labor made sense. However, as Mill stated:

[T]he feudal family . . . has long perished, and the unit of society is not now the family or clan . . . but the individual; or at most a pair of individuals, with their unemancipated children. Property is now inherent in individuals, not in families: the children when grown up do not follow the occupations or fortunes of the parent: if they participate in the parent's pecuniary means it is at his or her pleasure, and not by a voice in the ownership and government of the whole. . . .<sup>102</sup>

Mills' description of post-feudal society is even more accurate today. Under this description, there is arguably still justification for parents to inherit from their children since they invest time, energy and money in raising those children and thus have a hand in the accumulation of their estates. While most parents may have such a basis for inheriting from minor children, a nonsupporting or abandoning father has no such basis for inheriting his deceased child's intestate estate.<sup>103</sup>

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of the general problem have been enacted in almost half of the states, no one of them has ever been held unconstitutional. The constitutionality of a statute has been directly attacked in only one case, in which it was easily upheld; but there are numerous cases in which its constitutionality was tacitly assumed." John W. Wade, *Acquisition of Property by Wilfully Killing Another - A Statutory Solution*, 49 HARV. L. REV. 715, 720-21, (citing *Hamblin v. Marchant*, 175 Pac. 678, *aff'd on rehearing*, 180 Pac. 811 (Kan. 1919) (upholding the constitutionality of a "slayer" statute)).

99. Ascher, *supra* note 1, at 81.

100. Mill, *supra* note 1, § 1, at 218, *quoted in* Ascher, *supra* note 1, at 81.

101. Ascher, *supra* note 1, at 81.

102. Mill, *supra* note 1, § 3 at 222, *quoted in* Ascher, *supra* note 1, at 81.

103. However, a father who has not abandoned a child, but is merely slightly behind in child support might have some claim. If he has been available to the child and has an established relationship with her, and the support is not significantly in arrears, perhaps he should have some

### F. *Are There Effective and Less Costly Alternatives?*

Whether a particular change in the intestacy statute is advisable depends upon the alternatives to such a change. Can the same result be achieved at less cost by amending a different statute or using another legal remedy? Are there other ways that the law can prevent abandoning or nonsupporting fathers from inheriting from their minor children, and are the alternatives as effective or less costly than altering the intestacy/default rules?

(a) Judges can impose a constructive trust on a father's intestate share to avoid unjust enrichment. A constructive trust is an equitable remedy that judges may use to undo what they see as an unjust or inappropriate result arising from the strict application of a statute or case law. As Dukeminier and Johanson describe it:

When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. A constructive trustee is under a duty to convey the property to another on the ground that retention of the property would be wrongful.<sup>104</sup>

Courts who have imposed constructive trusts have cited the following prerequisites: "(1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer of property in reliance on the promise, and (4) unjust enrichment of the transferee."<sup>105</sup> Constructive trusts are most commonly used when someone procures an inheritance by fraud. However, they have also been used when a confidential relationship or a promise is lacking but the court wants to prevent unjust enrichment by the recipient. The classic example is the recipient who stands to inherit from someone he murdered.<sup>106</sup>

Toward the end of the nineteenth century, the argument that a murderer should not be allowed to inherit began to be made with some frequency. At first, a majority of courts in this country rejected it. Typically, the court professed unhappiness at letting the murderer inherit, but said that any change in the law must come from legislation. . . .

. . . Dean Ames in a leading article first published in 1897 . . . suggested, however, that in order to prevent "the flagrant injustice of an atrocious criminal enriching himself by his crime," courts of

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share of the child's estate based on his investment in that child. Fairness would seem to dictate that such share be offset by his delinquent child support.

104. JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 460 (4th ed. 1990).

105. *Id.* at 460-61.

106. *Id.* at 461.



equity should impose a constructive trust on the murderer. . . . The use of the constructive trust in this situation has been favored by other writers including the authors of the Restatement of Restitution and has been followed by many courts.<sup>107</sup>

The use of constructive trusts in this context arguably allows the courts to do justice without being forced to read implied exceptions into the intestacy statutes. The constructive trust device simply "compel[s] the murderer to surrender the profits of his crime."<sup>108</sup> William McGovern disagrees with this rationale, calling it "somewhat disingenuous" and notes the cumbersome nature of the remedy due to the split between courts of law and courts of equity.<sup>109</sup> He advocates the statutory solution that the Uniform Probate Code and some states have adopted.<sup>110</sup>

The slayer statutes are similar in theory to the situation discussed herein. Both involve unworthy heirs and the use of constructive trusts as a remedy to achieve justice. As McGovern notes, however, making forfeiture of inheritance in the slayer situation a statutory exception to the intestacy rule has the advantage of both clarity and evenness of application. Similarly, making forfeiture of an unworthy father's inheritance from his child a statutory exception appears to be the clearest and easiest rule to apply.

(b) Minor children, due to their lack of legal capacity, are generally not allowed to opt out of the intestacy default rules. The idea that a testator must have sufficient capacity to form the requisite intent to make a testamentary gift is fundamental to the law of wills. Capacity in this context means that one understands the nature of one's property, the natural objects of one's bounty, and the nature of the testamentary act of giving.

Our society's understanding of a child's more limited psychological comprehension of the world in contrast to that of an adult, is reflected in many areas of the law. The law limits a child's right to contract, to make medical decisions, to be a witness in a court proceeding, to vote, to make inter vivos gifts, and to execute wills and trusts. These limitations mirror our belief that a particular level of understanding and comprehension, i.e., capacity, is required to perform these acts and be bound by them.

In the United States, the age of majority has been lowered from the age of twenty-one to eighteen. The right to testify in court has been

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107. William M. McGovern, Jr., *Homicide and Succession to Property*, 68 MICH. L. REV. 65, 67-68 (1969) (quoting J. Ames, *Can a Murderer Acquire Title by His Crime and Keep It?* 36 AM. LAW REG. 225 (1897)) (citations omitted).

108. *Id.* at 68.

109. *Id.* at 68-71.

110. UNIF. PROB. CODE § 2-803 (1990); CAL. PROB. CODE § 250 (West 1990).

extended to increasingly younger children. Moreover, there is a movement in the criminal law to make younger children accountable as adults for crimes they commit. If a child with an abandoning or nonsupporting father were granted the privilege of making a will, she could, by testamentary act, opt out of the intestacy scheme and prevent him from taking a share of her estate.

Children who own substantial assets during life must have a guardian appointed to manage those assets.<sup>111</sup> Guardians can establish inter vivos trusts to manage the minor's property, but they cannot make wills because the law views that as an intimately personal right. Thus, such property is left to pass pursuant to the intestacy laws if the minor dies prior to reaching the age required to make a will.<sup>112</sup>

The age required to make a will in most states is eighteen, the age of majority. Some children under the age of eighteen, however, may make wills as emancipated minors. Presumably, these children have demonstrated financial and emotional independence sufficient to warrant the extension to them of various adult rights. However, even if the right to make a will were extended to unemancipated minors as well, it is not clear that such a change would solve the *Brindamour* problem. In cases of wrongful death, a minor child does not know she will be the victim of negligence. She will usually have no appreciable estate during life and will therefore be unlikely to make a will disinheriting her unworthy father.

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111. This is a well-established rule.

In most jurisdictions, there is no impediment to ownership of property by a minor. . . . The problems . . . arise when it is necessary or desirable to deal with property owned by a minor. The minor's incompetency will bar any action with respect to the property. The property cannot be sold, exchanged, or disposed of in any manner by the minor because minors generally can disaffirm contracts which they enter into during minority . . . .

Due to the inability of a minor to deal with his or her property, legal guardianships have been used.

Gifts to Minors, Tax Mgmt. (BNA) 403-3rd § E, at A-15 (1988).

112. That age has changed throughout history and has varied among societies. As Atkinson notes in his treatise on wills:

The civil law rule was that males of fourteen and females of twelve had the age capacity to make a will. Above these years persons had testamentary powers provided they had sufficient mental capacity. Below these ages no degree of mental maturity and soundness would suffice . . . .

The original Statute of Wills, 1540, literally permitted a devise of land by minors, but within three years an amendment declared that the devises should not be good unless the testator was twenty-one years of age. This has been the English rule ever since as to wills of realty, and after the Wills Act, 1837, as to the testaments of personalty as well.

THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 50, at 229-30 (2d ed. 1953) (citations omitted).

Even if a child does have a substantial estate, extending the right to make a will to unemancipated minors raises problems of undue influence by the mother, the natural default taker if the father is disinherited. An unemancipated minor living with his mother is very likely to succumb to his mother's natural animosity toward an abandoning or non-supporting father. A testator under undue influence has been defined as one who, "if he could speak his wishes to the last . . . would say, 'this is not my wish, but I must do it'."<sup>113</sup> This definition of undue influence immediately brings to mind the parent-child relationship and the absolute financial, emotional and legal domination by a parent over a minor child.

Presumably, society's consensus as to the capacity necessary to dispose of property would not extend to children younger than about twelve years of age. Most people would agree that a child of four or five should not be allowed to make a will. Thus, the power to make a will cannot solve the problem of an unworthy father inheriting from those children still too young to make a will. The only solution that prevents the fathers of children of any and all ages from taking is to alter the default rules and amend the intestacy statutes.

Extending the power to make a will to children will also result in some abandoning fathers actually being explicitly *included* in their children's wills. As noted before, children whose parents abandon or abuse them often retain strong psychological bonds with such parents.<sup>114</sup> Society has a strong interest in preventing the inclusion of abandoning or abusive parents in the wills of their children despite the child's wishes. It also has a stronger interest in decisionmaking for minors than for adults, given a minor's lack of judgement and the need to protect the minor from himself. If one were to apply a balancing test, the societal interest in encouraging fathers to perform their duties militates for allowing the state to decide how the child's estate should be distributed, even in the face of contrary desires by the child.

Another problem with extending the privilege to make a will to children involves the range of candidates for receipt of their estate. The supporting parent, often the mother, is the candidate that most people would feel is worthy to take the deceased child's estate. If a child is granted complete power of disposition over her property however she might not choose her mother but rather a best friend. This problem might be solved by use of a negative declaration, as opposed to giving

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113. DUKEMINIER & JOHANSON, *supra* note 104, at 144 (quoting Sir James Hannen, in *Wingrove v. Wingrove*, 11 Prob. Div. 81 (1885)).

114. See *Wald*, *supra* note 69, for a discussion of children retaining bonds with abusive or neglecting parents.

the minor child absolute freedom of testation. However, negative wills have long been disfavored under American law.<sup>115</sup> As some scholars have noted, this position has recently come under fire as doing damage to the principle of testamentary intent. Nonetheless, it still appears to be the general rule.<sup>116</sup>

(c) As discussed above, guardians may be appointed to manage the estates of children with substantial estates. These guardians can establish express trusts to manage the property for the child's benefit during life but cannot make a will to dispose of the child's property after death. Presumably, the express trust suffers the same problems outlined above regarding wills. The child without assets will not see a need to set up a trust, and the minor child with assets lacks the appropriate testamentary capacity to direct the disposition of his assets on death.

Imposing a constructive trust on an unworthy father's intestate share would solve the problem but is cumbersome and costly. A will or an express trust containing dispositive choices would not always provide a solution in the context of a wrongful death. Extending the privilege to make a will to unemancipated minors raises problems of capacity and undue influence. Thus, the alternatives to amending the intestacy statutes are in fact more costly and/or not effective.

#### V. ADOPTING AN EFFICIENT BEHAVIOR-BASED MODEL OF INHERITANCE FOR UNWORTHY FATHERS

What type of statute barring abandoning or nonsupporting fathers from taking in intestacy is the least costly while still producing a fair result? Several costs are inherent in moving from a purely status-based system of inheritance to a behavior-based model. In a status-based scheme, the court need only decide who is a relative based on accepted principles of consanguinity. Once that determination is made, the property simply flows according to the particular state's intestacy statute.

In a behavior-based model, however, the court must make a threshold decision as to whether a father has abandoned or failed to support

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115. DUKEMINIER & JOHANSON, *supra* note 104, at 433.

An old rule of American wills law says that disinheritance is not possible by simple declaration that 'my son John shall receive none of my property.' To disinherit, it is necessary that the entire estate be devised to other persons. . . . A testator cannot alter the intestate distribution scheme without giving the property to others.

*Id.*

116. *Id.* (citing J. Andrew Heaton, Comment, *The Intestate Claims of Heirs Excluded by Will: Should "Negative Wills" Be Enforced?*, 52 U. CHI. L. REV. 177 (1985)). But see UNIF. PROB. CODE § 2-101(b) cmt. (1990) ("By specifically authorizing so-called negative wills, subsection (b) reverses the usually accepted common-law rule, which defeats a testator's intent for no sufficient reason.").

the deceased child. If he has, then he is eliminated from the chain of inheritance. Thus, the initial decision as to who is eligible to take in intestacy is more difficult and potentially more time-consuming in a behavior-based model. One of the first goals, therefore, in developing a behavior-based model is to identify the most efficient decisionmaker to make the threshold finding of abandonment or lack of support.

A primary factor involved in the cost of moving from a status-based to a behavior-based model is the increased opportunity for judicial discretion. Deviating from a purely status-based model raises questions regarding the amount of contact with the child that is adequate to prevent forfeiture by the father. Does being around for two years of the child's life, three visits a year, or a birthday and a Christmas card suffice? Giving such discretion to probate judges in those states where the probate court lacks jurisdiction over domestic relations matters may be the most inefficient approach to a behavior-based model.<sup>117</sup>

One way to minimize the cost of such a model is to develop a statute that ties a finding of abandonment or lack of support to a prior adjudication by a different court, presumably a family court. This has not generally been the approach in the few states that have adopted this model. These statutes contemplate a *de novo* inquiry by the probate court into the father's behavior, thereby requiring the application of elusive concepts like abandonment or nonsupport.

States have developed various methods of defining these concepts. For example, in *Estate of Devin W. Etheridge*,<sup>118</sup> the New York Surrogate's Court imported the definition of nonsupport from the statute providing for spousal forfeiture of an intestate share for nonsupport. The New York statute at issue in *Etheridge* required that the court find: (1) there was a failure to support; (2) the disqualified spouse had the means to provide support; (3) no grounds exist to exonerate the spouse from this obligation; and (4) the support was requested. The court differenti-

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117. Whether giving more discretion to probate courts will yield fair and consistent results is also a function of the quality of the American probate bench.

There have long been difficulties in staffing the American probate bench, and some of the people who serve there . . . are menacing

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. . . [T]he integrity and ability of the American probate bench has [sic] so often been found wanting that confidence in the predictability and correctness of adjudication in these courts has been impaired. Americans can only look with envy to the esteemed and meritocratic chancery bench that conducts probate adjudication in English and Commonwealth jurisdictions.

John H. Langbein, *Will Contest*, 103 YALE L.J. 2039, 2044 (1994) (reviewing DAVID MARGOLICK, *UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON AND JOHNSON FORTUNE* (1993)).

118. Sur. Ct., 202 N.Y.L.J. 109 (1989).

ated between spouses and children by noting that if (3) or (4) are applied:

[A] parent would only be "exonerated" for non-support, notwithstanding the ability to support, if it could be established that support was tendered and rejected or, at the very least, the failure to support was based upon a reasonable belief that another person was providing the support and any offer of support would be futile because it would be rejected.<sup>119</sup>

The New York statute is couched in the alternative: Either (1) parental failure or refusal to provide for the child or (2) parental abandonment, is sufficient to deprive the parent of the right to inherit from the child.<sup>120</sup> Abandonment "has been defined as 'a voluntary breach or neglect of duty to care for and train a child and the duty to supervise and guide his growth and development.'"<sup>121</sup> The burden is on the parties asserting abandonment to prove such behavior on the part of the father.<sup>122</sup>

The Ohio statute defines "abandoned" in the statute itself:

'Abandoned' means that a parent of a minor failed without justifiable cause to communicate with the minor, care for him, and provide for his maintenance or support as required by law or judicial decree for a period of a least one year immediately prior to the date of the death of the minor.<sup>123</sup>

These models, whether they import a definition from another area of the law or explicitly define abandonment in the statute itself, have a common flaw. Models that contemplate a postmortem de novo inquiry

119. *Id.* The Surrogate's Court in *Etheridge* faced a proof issue similar to that which the *Brindamour* case raised. The father in each case alleged that support had been paid in cash. The court gave this claim no credence because there was a lack of receipts and witnesses.

120. N.Y. EST. POWERS & TRUSTS LAW § 4-1.4 (McKinney 1981); Rohan, *Practice Commentary*, *supra* note 40, at 744.

121. *Id.* (citing *In re Musczak's Estate*, 92 N.Y.S.2d 97, 99 (1949), and noting that "[t]he fact that a separation or divorce decree has been procured against the derelict parent. . . with or without visitation rights in the derelict parent, may substantially dilute the duty of such parent to supervise the growth and development of the child, but it does not entirely absolve the parent from performance of such duty," citing *In re Daniel's Estate*, 90 N.Y.S.2d 26 (1949)).

122. *Matter of Estate of Clark*, 501 N.Y.S.2d 479 (1986).

In *Matter of Estate of Clark* . . . the Appellate Division, Third Department, re-affirmed the principle that abandonment by a father is not to be presumed, and the burden of proof rests upon the party asserting such abandonment. Moreover, a prima facie case of abandonment is not made out by a mere showing that the father left the family domicile during the decedent's minority.

Rohan, *supra* note 40, at 130.

123. OHIO REV. CODE ANN. § 2105.10(A)(1)(Anderson Supp. 1993). The Ohio statute places the burden of proving abandonment, by a preponderance of the evidence, on the administrator in a separate probate court proceeding. The statute is detailed in its outline of this proceeding. *See id.* § 2105.10(D).

by the probate court into the unworthy father's behavior during the child's life are least likely to minimize the cost of amending intestacy statutes to achieve a fair result. A statute that requires the probate court to give deference to a family court's ruling during the child's life as to abandonment or failure to support reduces the court's discretion, and thus the time and costs of implementing a behavior-based model.<sup>124</sup> A family court presumably hears nonsupport cases on a regular basis and has the expertise to efficiently dispose of such matters. Unlike the provisions in the Ohio statute,<sup>125</sup> under such a model the probate court

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124. In many states the probate court is distinct from the family court. In some states, such as Massachusetts, however, the probate court hears both probate and domestic relations cases. In such a state, the probate court is sufficiently expert to efficiently dispose of the issue of abandonment and support itself.

125. OHIO REV. CODE ANN. § 2105.10(D)–(E) (Anderson Supp. 1993):

(D)(1) The prohibition against inheritance set forth in division (B) of this section shall be enforceable only in accordance with a probate court adjudication rendered pursuant to this division.

(2) If the administrator of the estate of an intestate minor has actual knowledge, or reasonable cause to believe, that the minor was abandoned by a parent, the administrator shall file a petition pursuant to section 2123.02 of the Revised Code to obtain an adjudication that the parent abandoned the child and that, because of the prohibition against inheritance set forth in division (B) of this section, the parent shall not be considered to be an heir at law of, and shall not be entitled to inherit the real and personal property of, the deceased child pursuant to section 2105.06 of the Revised Code. That parent shall be named as a defendant in the petition and, whether or not that parent is a resident of this state, shall be served with a summons and a copy of the petition in accordance with the Rules of Civil Procedure. In the heirship determination proceeding, the administrator has the burden of proving, by a preponderance of the evidence, that the parent abandoned the child. If, after the hearing, the probate court finds that the administrator has sustained that burden of proof, the probate court shall include in its adjudication described in section 2123.05 of the Revised Code its findings that the parent abandoned the child and, because of the prohibition against inheritance set forth in division (B) of this section, the parent shall not be considered to be an heir at law of, and shall not be entitled to inherit the real and personal property of, the deceased child pursuant to section 2105.06 of the Revised Code. If the probate court so finds, then, upon the entry of its adjudication on its journal, the administrator may make a final distribution of the estate of the deceased child in accordance with division (B) of this section.

(3) An heirship determination proceeding resulting from the filing of a petition pursuant to this division shall be conducted in accordance with Chapter 2123. of the Revised Code, except to the extent that a provision of this section conflicts with a provision of that chapter, in which case the provision of this section shall control.

(E) If the administrator of the estate of an intestate minor has not commenced an heirship determination proceeding as described in division (D) of this section within four months from the date that he receives his letters of administration, then such a proceeding may not be commenced subsequently, no parent of the deceased child shall be prohibited from inheriting the real or personal property of the deceased child pursuant to division (B) of this section, and the probate of the estate of the deceased child in accordance with section 2105.06 and other relevant sections of the Revised Code shall be forever binding.

would not undertake an independent inquiry into nonsupport or abandonment, and would simply honor a family court finding.

States considering a behavior-based model might consider adopting a statute that uses rebuttable presumptions to cut down on litigation as to the issue of unworthy behavior. For example, if a family court entered an order of child support during the child's life and issued a judgement against the father for noncompliance with the support order, there would be a rebuttable presumption that the father is an "unworthy father" for purposes of inheriting from the deceased child. If the father had compelling reasons for failing to support or for abandoning the child, such as severe physical or mental disability, he could move for a hearing on the matter in family court. If the family court exonerated him, he could bring that finding back to the probate court which would be bound to honor it for purposes of intestate succession. This procedure (1) puts the task of deciding the elusive question of whether there has been abandonment or nonsupport where it belongs, in a court that has experience in these matters; and (2) cuts down on frivolous litigation by deterring abandoning and nonsupporting fathers from bringing an action without a compelling excuse, or without substantial evidence with which to rebut the presumption.

Similarly, a rebuttable presumption could be employed to indicate that a father is a "worthy" father and should take in intestacy if no order had been entered against him during the child's life. Such a presumption puts the burden on the supporting parent, typically the mother, to go to court during the child's life to seek child support. The mother is generally the primary economic beneficiary if the father is barred. Therefore, it seems reasonable to place some burden on her to demonstrate, during the child's life, that she and the child were actually harmed by the father's abandonment or failure to support. The mother could also rebut the presumption in favor of the father in family court if she had a compelling reason for not seeking support during the child's life.<sup>126</sup> Again, the probate court would either be required to find the father worthy and distribute a share of the child's estate to him in the absence of a nonsupport order during life, or, if the mother successfully rebutted the presumption in a family court hearing, declare the father unworthy and forfeit his share.

Such a model would also allow for an efficient resolution of two subsidiary problems that arise in these cases. The first is the issue of

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126. Even if a father leaves the state, there are now interstate mechanisms allowing a mother to go to court in her own state and enforce a judgement against the father in whatever state he may be. For a comprehensive discussion of these mechanisms, see generally 2 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* (West 2d Ed. 1987).



whether abandonment or failure to support was willful. As noted above, a father who is permanently disabled and incapable of working may legitimately be unable to support the child and still have a nonsupport judgement entered against him. The second is the redemption of unworthy fathers. Fathers who abandoned or failed to support in the past may begin to reestablish a relationship with the child and provide some support in the period prior to the child's death. The North Carolina and New York statutes allow for such a redemption of unworthy fathers. Both contain a reference to the resumption of the parental relationship, as do the Virginia and Virgin Islands statutes.<sup>127</sup> Under the New York statute, a bad father forfeits his inheritance, "unless the parental relationship and duties are subsequently resumed and continue until the death of the child."<sup>128</sup> The North Carolina statute is more specific. The father may again inherit, "[w]here the abandoning parent resumed its care and maintenance at least one year prior to the death of the child and continued the same until its death," or where the parent, if deprived of custody, "has substantially complied with all orders of the court requiring contribution to the support of the child."<sup>129</sup> A behavior-based model that uses the family court as a forum to decide the issues of abandonment or nonsupport, also provides an automatic forum for a father to prove a legitimate reason for his behavior or to establish his redeeming behavior prior to the child's death.

This system of rebuttable presumptions balances the need for an efficient probate process and the desire for a fair allocation of the deceased child's estate. While it still lengthens the probate process if a parent moves for a hearing by the family court, this model does not place the difficult inquiry into abandonment or nonsupport with the probate court, the court least able to reach an efficient disposition of these issues.

Finally, an efficient behavior-based model must also provide a simple mechanism to pass property if a father is eliminated from the intestacy scheme based on his behavior. If a father is barred, New York, Ohio, and the Virgin Islands pass the property as if the father predeceased the child, and unlike the UPC, do not bar the father's relatives from taking.<sup>130</sup> This mechanism is most likely to produce an efficient

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127. The Virginia statute states that "the parent shall be barred . . . unless the parent resumes the parental relationship and duties and such parental relationship and duties continue until the death of the child." VA. CODE ANN. § 64.1-16.3(B) (Michie 1994 Supp.); V. I. CODE ANN. tit. 15, § 87(5)(1964).

128. N.Y. EST. POWERS & TRUST LAW § 4-1.4(a) (McKinney 1995).

129. N.C. GEN. STAT. § 31-A-2(1)-(2) (1984).

130. N.Y. EST. POWERS & TRUST LAW § 4-1.4(b) (McKinney 1995); OHIO REV. CODE ANN. § 2105.10(B) (Anderson Supp. 1993); V. I. CODE ANN. tit. 15, § 87 (1964) (based on the New

disposition of the child's estate, and to minimize litigation by the father's unhappy relatives who may have had a close and supportive relationship with the child. These relatives would not generally share the estate with the mother because, under most intestacy statutes, the mother takes the entire estate if the father predeceases the mother. An unworthy father's kindred would typically only take if the mother were deceased (or were found to be unworthy herself).

## VI. CONCLUSION

This article has addressed the costs and benefits of adopting a behavior-based model of inheritance by fathers from their deceased children. In considering intestacy/default rules, less is usually better than more. A simple, clear statute is the preferred default rule because it results in the most efficient reallocation of property at death. American inheritance law has been relatively less concerned with "fair" reallocation of property at death because of its embrace of extensive freedom of testation and minimal forced heirship. In the case of children who die as minors and leave property, however, *de facto* forced heirship is the rule. Minor children cannot opt out of the default system of intestacy by executing a will. They are therefore forced to leave property to their parents, even if their parents are unworthy.

While it is generally the better rule to leave the default statutes simple and to avoid addressing every exceptional situation, there is a much stronger argument for deviating from a status-based model and introducing a behavior-based test for parents inheriting from children. Usually, the fact that the situation at issue occurs infrequently militates in favor of not complicating the default statute. In this case, however, the decedent is a child and is therefore not allowed to opt out of the default system. This, together with the uncommon nature of the cases, weighs in favor of addressing the situation in the intestacy statute. Such cases will not occur often and should not hinder the efficient operation of the intestacy statutes.

Finally, adopting a behavior-based model of inheritance in these cases has the added social benefit of limiting the temptation for judges to engage in the "new model of bold, assertive judging."<sup>131</sup> A clear statute will eliminate the need for judges to read nonexistent exceptions into the

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York statute, it states, "If the . . . parent is deprived of a distributive share in the estate of a decedent . . . the estate of such decedent shall be distributed . . . as though such . . . parent had predeceased the decedent.").

131. Mary Ann Glendon, *Partial Justice*, COMMENTARY, Aug. 1994, at 22-26. Glendon identifies the dangers of "adventurous judging" and criticizes the notion that, "there are wrongs to be righted and that it is the responsibility" of judges to do it. She argues that decisions based on a judge's personal sense of fairness and perception of "what outcome is just, who needs protection,

intestacy statutes in order to remedy a perceived injustice. Clear legislative action is preferable to having judges legislate from the bench.

A carefully crafted rule that bars marital and nonmarital parents who abandon or fail to support their children from taking in intestacy should be adopted by more states. If state legislatures do not address this issue, courts will continue to do so on an ad hoc basis, like Judge Darigan in the *Brindamour* case. They will do so with few, if any, carefully considered guidelines. Such case by case adjudication results in inconsistent application of the law, outrage on the part of the public against such unfair allocations of property on a child's death, and a concomitant lack of respect for the law. Adopting a behavior-based model of inheritance in these cases can produce both a fair and efficient result, and an outcome that benefits both the parties involved and the legal system as a whole.

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and who deserves compassion" will wreak havoc with the principle of coherent, predictable results on which our system is based. *Id.*