Abandoning Parents Under Intestacy: Where We Are, Where We Need to Go

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Introduction

American children are increasingly being raised in single parent homes, often below or near the poverty line. One consequence is that the issues of child welfare and child support receive significant media and legal attention, and beneficial changes in the legal landscape have occurred.[1] Away from the highly visible and immediate problems of child welfare and child support are less celebrated legal issues, that often graphically underscore the systemic nature of the law's difficulty in dealing with questions of parental irresponsibility. One such example involves the overlay of a parent who has abandoned a child, with the disposition of property at that child's death. Two fact patterns set the stage for discussion.

First, an infant boy contracts meningitis, is misdiagnosed and improperly treated, and consequently suffers permanent severe brain damage. The mother and father jointly care for their son for two years; the father later voluntarily abandons the mother and son. The father starts a new life and family far away from his former wife and son. The mother continues to care for her son for eighteen years without any assistance or contact from the father. After years of litigation, money is finally awarded to the young man for his injuries. Thereafter the son dies.

The second scenario concerns a fifteen-year-old teenage boy killed in a car accident. The child's estate pursues a wrongful death action and obtains a money settlement. The young boy's parents were divorced when he was two. His mother voluntarily moved far away and started a new life. The son had not seen or heard from his mother in any of the thirteen years following the divorce. The father has raised his son for thirteen years without any assistance from the mother.[2]

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1. *See, e.g.*, Family Support Act, 42 U.S.C. § 666(a)(5)(B) (1988). *See also* Paula Roberts, *Child Support Enforcement: An Introduction*, 25 Clearinghouse Rev. 868 (1991); America's Children at Risk: A National Agenda for Legal Action (A.B.A. 1993).

2. *See* Hotarek v. Benson, 557 A.2d 1259 (Conn. 1989); discussed in M. Katherine Glassman & Marie T. Falsey, *Connecticut Probate Law 1989*, 64 Conn. B.J. 43, 55-56 (1990). The first scenario is hypothetical.

In both of these scenarios, there is property to be distributed because of the child's death. In both cases, the decedent was without legal capacity to execute a will or any other effective expression of testamentary disposition. Lacking valid instruction from the decedent, the distribution of the property may be governed by the jurisdiction's intestate rules.

In the first hypothetical involving the decedent's own property, distribution of his estate is a direct application of the jurisdiction's intestate rules. That is, after all, what it means to die without a will. In the second hypothetical involving wrongful death, the distribution of the award will depend on that particular jurisdiction's wrongful death laws. Some jurisdictions provide for distribution to or paralleling the decedent's estate, and thus the intestate rules will again govern. Other jurisdictions provide for distribution based on a standard of dependency or according to the personal loss sustained.

In the vast majority of jurisdictions the intestate rules treat an abandoning parent as an equal heir with the non-abandoning parent. Equity requires a different result. Moreover in those jurisdictions where the wrongful death statute applies a dependency standard for distribution, the abandoning parent generally does not share equally in the distribution of wrongful death proceeds, even though that parent would share equally in an intestate distribution. Consistency, as well as equity, requires that an abandoning parent in either scenario not participate in the property distribution.

This Article will first review the statutory rules governing the distribution of property of an intestate decedent and the distribution of proceeds under wrongful death statutes. Three solutions to the inequity of an abandoning parent as legal heir will be presented. The first solution is a matter of statutory interpretation of parent as heir. The second considers a common law theory that has ancient Roman law origins. The third involves the application of existing statutes.

I. STATUTORY RULES GOVERNING DISTRIBUTION

The situation of a parent who willfully abandons the duties and obligations owed to a child arises principally during the child's minority since parental legal duties generally cease when a child reaches majority.[3] Thus, the abandonment is at a time when the child lacks legal capacity to execute a will.[4] Distribution of a minor child's property (for example, the proceeds of

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3. Some jurisdictions may impose continuing obligations upon parents if an adult child is disabled. *See* JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE, § 10.18 (1986 & Supp. 1992) Also, parents in a divorce context may be obligated by decree for ongoing obligations of child support, usually related to college education and medical expenses. Jeff Atkinson, *Support for a Child's Post-Majority Education*, 22 LOY. U. CHI. L.J. 695 (1991).

4. Virtually all American jurisdictions impose an age requirement for the execution of a will. THOMAS E. ATKINSON, LAW OF WILLS 230 (2d. ed. 1953). Many jurisdictions require a testator to be at least eighteen, although the age varies. *See* WILLIAM J. BOWE & DOUGLAS H.

a personal injury lawsuit) will be governed by the intestate rules. Similarly, if the child reaches majority but lacks the requisite mental capacity to execute a will, the intestate rules will govern.[5]

In a wrongful death action, the decedent generally does not own the property that is to be distributed by reason of his death, so the intestate rules do not apply. Instead, distribution of the proceeds is governed by the jurisdiction's wrongful death statute. Generally those statutes follow one of two dispositive patterns: (1) a distribution based on a fact-specific standard of dependency, or (2) a distribution to or parallel to that of the decedent's estate (be it testate or intestate).

The source of the property is therefore the distinguishing feature: the child's own property will be distributed pursuant to the jurisdiction's intestate laws, whereas property statutorily created by virtue of the child's wrongful death will be distributed according to the wrongful death statute.

A. Rules of Descent and Distribution

All states provide rules governing the transfer at death of a decedent's property.[6] When a decedent as in our hypotheticals cannot leave a will, the state's intestate statute will provide the rules for distributing the decedent's property. In both hypotheticals, the decedent is unmarried, with no descendants, and with a surviving mother and father. There may or may not be a sibling of the whole blood, and there is a sibling of the half blood.

Applying this fact pattern to the various intestate rules throughout the United States reveals that in the vast majority of states the decedent's surviving parents would receive the entire estate equally under those intestate rules, without regard to abandonment.[7] In several jurisdictions, brothers and

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PARKER, PAGE ON WILLS § 12.8 (rev. ed. 1959). In Georgia, for example, the age is fourteen. GA. CODE ANN. § 53-2-22 (1982).

5. *See* SAMUEL J. BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW 435-41 (3d ed. 1985) for an illuminating discussion of the application of the "sound mind" standard for testamentary capacity.

6. For a summary listing of such sources, *see* Jeffrey A. Schoenblum, PAGE ON THE LAW OF WILLS, APPENDIX (1991).

7. *See, e.g.*, ALA. CODE § 43-8-42 (1991); ALASKA STAT. § 13.11.015 (1985); ARIZ. REV. STAT. ANN. § 14-2103(A) (Supp. 1992); ARK. CODE ANN. § 28-9-214 (Michie 1987); CAL. PROB. CODE § 6402 (West 1991); COLO. REV. STAT. ANN. § 15-11-103 (West 1989); CONN. GEN. STAT. ANN. § 45a-439 (West Supp. 1993); DEL. CODE ANN. tit. 12, § 503 (1987); FLA. STAT. ANN. § 732.103 (West Supp. 1993); HAW. REV. STAT. § 532-4 (1993); IDAHO CODE § 15-2-103 (1979); IOWA CODE ANN. § 633.219 (West 1992); KAN. STAT. ANN. § 59-507 (1983); KY. REV. STAT. ANN. § 391.010 (Michie/Bobbs-Merrill 1984); ME. REV. STAT. ANN. tit. 18-A, § 2-103 (West 1981); MD. CODE ANN., EST. & TRUSTS § 3-104 (1991); MASS. GEN. L. ch. 190, § 3 (1981); MICH. COMP. LAWS ANN. § 700.106 (West 1980); MINN. STAT. ANN. § 524.2-103 (West Supp. 1993); MONT. CODE ANN. § 72-2-113 (Supp. 1993); NEB. REV. STAT. § 30-2303 (1989); NEV. REV. STAT. § 134.050 (1981); N.H. REV. STAT. ANN. § 561:1 (1974); N.J. STAT. ANN. § 3B:5-4 (West 1983); N.M. STAT. ANN. § 45-2-103 (Michie 1989); N.Y. EST. POWERS & TRUSTS LAW §

sisters share with the parents on a per capita basis,[8] with most of those jurisdictions treating siblings of the half-blood the same as siblings of the whole blood.[9] Louisiana gives the parents a usufruct and the brothers and sisters the ownership subject to the usufruct.[10] Only a handful of jurisdictions statutorily exclude abandoning parents from inheriting,[11] while the majority of intestate rules are silent as to the effect of abandonment.

A guiding principle in fashioning intestate rules is that those rules should reflect the normal desires of an owner of wealth as to the disposition of property at death.[12] It seems obvious that an owner of wealth would prefer a known caring parent to an unknown abandoning parent. In our hypotheticals, the intestate rules often fail this objective.

4-1.1 (McKinney 1981); N.C. GEN. STAT. § 29-15 (1984); N.D. CENT. CODE § 30.1-04-03 (1976); OHIO REV. CODE ANN. § 2105.06 (Anderson 1990); OKLA. STAT. ANN. tit. 84, § 213 (West 1990); OR. REV. STAT. § 112.045 (1990); 20 PA. CONS. STAT. ANN. § 2103 (1993); R.I. GEN. LAWS § 33-1-1 (1984); S.C. CODE ANN. § 62-2-103 (Law. Co-op. 1987 & Supp. 1992); S.D. CODIFIED LAWS ANN. § 29-1-6 (1984); TENN. CODE ANN. § 31-2-104 (1984); TEX. PROB. CODE ANN. § 38 (West 1980); UTAH CODE ANN. § 75-2-103 (1993); VT. STAT. ANN. tit. 14, § 551 (1989); VA. CODE ANN. § 64.1-1 (Michie 1991); WASH. REV. CODE ANN. § 11.04.015 (West 1987); W. VA. CODE § 42-1-3(a) (Supp. 1992); WIS. STAT. ANN. § 852.01 (West 1971 & Supp. 1992).

8. GA. CODE ANN. § 53-4-2 (Supp. 1992); 755 ILL. COMP. STATS. § 5/2-1 (1993); IND. CODE § 29-1-2-1 (Supp. 1992) (but a surviving parent's share shall not be less than one-quarter of the estate); MISS. CODE ANN. § 91-1-3 (1972); MO. REV. STAT. § 474.010 (1992); WYO. STAT. § 2-4-101 (1992).

9. GA. CODE ANN. § 53-4-2 (Supp. 1992); 755 ILL. COMP STATS. § 5/2-1 (1993); IND. CODE § 29-1-2-5 (1979); and WYO. STAT. §2-4-104 (1980). Both Mississippi and Missouri seem to exclude half-blood collaterals from inheriting, except if there are only half-blood collaterals. MISS. CODE ANN. § 91-1-5 (1972); MO. REV. STAT. § 474.040 (1992).

10. LA. CIV. CODE ANN. art. 891 (West Supp. 1993).

11. *E.g.*, N.C. GEN. STAT. § 31A-2 (1984); N.Y. EST. POWERS & TRUSTS LAW § 4-1.4 (McKinney 1981); 20 PA. CONS. STAT. ANN. § 2106(b) (Supp. 1993); CONN. GEN. STAT. ANN. § 45a-439 (West Supp. 1993); VA. CODE ANN. § 64.1-16.3 (Michie Supp. 1993); OHIO REV. CODE ANN. § 2105.10 (Anderson Supp. 1992). *See infra* notes 67-95 and accompanying text.

12. Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963): "The laws of intestate succession are frequently asserted to be governed by the principle 'that when a man dies without a will the law should try to provide so far as possible for the distribution of his estate in the manner he would most likely have given effect to himself if he had made a will.'" Uniform Probate Code 36 (7th ed. 1987): "The Code attempts to reflect the normal desire of the owner of wealth as to disposition of his property at death. . . ." *See also* Mary Louise Fellows, *et. al.*, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319 (1978); and Martin L. Fried, *The Uniform Probate Code: Intestate Succession and Related Matters*, 55 ALB. L. REV. 927 (1992). *But see* Mark L. Ascher, *The 1990 Probate Code: Older and Better or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639 (1993).

B. Wrongful Death Distribution

Under English common law there was no civil action for wrongful death.[13] In 1846, the English parliament first authorized a civil cause of action for wrongful death—the Fatal Injuries Act, more commonly known as Lord Campbell's Act.[14] It allowed "families of persons killed by accidents" to recover for damages "proportioned to the injury resulting from such death."[15] Today all fifty states have adopted some form of wrongful death statute, with some having multiple forms of recovery.[16]

In the second hypothetical involving the fatal car accident, the decedent is an unmarried minor, with no descendants, and with a surviving mother and father. Applying these facts to the various wrongful death statutes reveals that the majority of jurisdictions distribute the wrongful death proceeds on a fact specific basis of subjective relationship and dependency.[17] Recovery

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13. The reference most often cited is Baker v. Bolton, 1 Campb. 493, 170 Eng. Rep. 1033 (K.B. 1808): "In a civil Court the death of a human being could not be complained of as an injury; and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence." The most traditional rationale is the felony-merger doctrine. *E.g.*, Higgins v. Butcher, 1 Brownl. & Golds 205, Yelv. 89, 80 Eng. Rep. 61 (K.B. 1607): "[I]f a man beats the servant [of another] so that he dies of that battery, the master shall not have an action against the other for battery and loss of the service, because the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into felony, and that drowns the particular offence and private wrong offerd to the master before, and his action is thereby lost. . . ." *But see* Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043 (1965); Mary C. Sweeney, *Right of Surviving Spouse to Damages for Loss of Consortium*, 26 TRIAL LAW. GUIDE 221 (1982-83). *See also* Anne E. Seman, Note, *Pecuniary Injuries Under the Illinois Wrongful Death Act: Is the Loss of a Child's Society Included?*, 15 LOY. U. CHI. L.J. 595 (1984); Adrienne Lehrbaum-Weiss, Case Comment, *Bullard v. Barnes—Parental Recovery for Lost Society and Companionship of a Minor Child Under the Illinois Wrongful Death Act*, 34 DEPAUL L. REV. 803 (1985).

14. Officially entitled "An Act compensating the Families of persons Killed by Accidents," (Fatal Injuries Act) 1846, 9 & 10 Vict., ch. 93 (Eng.).

15. *Id.*

16. STUART M. SPEISER ET AL., RECOVERY FOR WRONGFUL DEATH § 1:13 (3d ed. 1992). There are two basic types of state statutes providing for recovery in wrongful death situations. The more common pattern is a death act, based on Lord Campbell's Act, which provides a new direct cause of action on behalf of designated persons to recover for the decedent's wrongful death, with damages generally measured by the loss to the survivors. The less common pattern is a survival act, with a cause of action lodged in the decedent's executor or administrator, with damages measured by injuries suffered by the decedent, which may include the loss of the decedent's ability to carry on life's activities. Some jurisdictions have both, as well as special legislation. *Id.* at § 1:14.

17. *See* ARIZ. REV. STAT. ANN. § 12-612 (1992) ("in proportion to their damages"); ARK. CODE ANN. § 16-62-102 ("shall fix the share of each beneficiary"); CAL. CIV. PROC. CODE §§ 376 and 377.61 (West 1973 & Supp. 1993) ("shall determine the respective rights in an award"); DEL. CODE ANN. tit 10, § 3724 (Supp. 1992) ("to the beneficiaries proportioned to the injury"); HAW. REV. STAT. § 663-3 (1988) ("shall allocate the damages to the persons entitled thereto"); IDAHO CODE § 5-310 (1990); 740 ILL. COMP. STAT. § 180/2 (1993) ("to each of . . . the next of kin . . . in the proportion . . . that the percentage of dependency . . . bears to the sum"); IND. CODE ANN.

generally would be to the caring parent,[18] with the abandoning parent usually excluded from recovery based on a fact specific standard of dependency.[19]

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§ 34-1-1-8 (West Supp. 1992) ("according to their respective losses"); KAN. STAT. ANN. §§ 60-1902, 1903 (1983 & Supp. 1992) ("who has sustained a loss" "but the amounts of their respective recoveries shall be fair and just under all the facts and circumstances"); MD. CODE ANN., CTS & JUD. PROC. § 3-904 (1989); MINN. STAT. ANN. § 573.02 (West 1988) ("court determines proportionate pecuniary loss"); MO. ANN. STAT. § 537.090 (Vernon 1988); NEB. REV. STAT. § 30-810 (Supp. 1992) ("in the proportion that the pecuniary loss suffered by each bears to the total"); NEV. REV. STAT. ANN. § 41.085 (Michie 1986) ("heirs may prove their respective damages . . . and the court or jury may award each person pecuniary damages"); N.J. STAT. ANN. § 2A: 31-4 (West 1987); N.Y. EST. POWERS & TRUSTS § 5-4.4 (McKinney Supp. 1993) ("to the persons entitled thereto in proportion to the pecuniary injuries suffered by them"); N.D. CENT. CODE § 32-21-02 (1976) ("such damages . . . proportionate to the injury resulting from the death to the persons entitled to the recovery"); OHIO REV. CODE ANN. § 2125.03 (Anderson Supp. 1992) ("the court shall adjust the share of each beneficiary" as is equitable); OKLA. STAT. ANN. tit. 12, §§ 1053, 1055 (West 1988) ("distributed according to their grief and loss of companionship"); OR. REV. STAT. §§ 30.040, 30.050 (1988) ("to each beneficiary in accordance with the beneficiary's loss"); S.D. CODIFIED LAWS ANN. § 21-5-8 (1987) ("amount . . . shall be apportioned among the beneficiaries . . . as shall be fair and equitable, having reference to the age and condition of such beneficiaries"); TEX. CIV. PRAC. & REM. CODE ANN. § 71.010 (1986) ("shall be divided, in shares as found by the jury"); UTAH CODE ANN. § 78-11-6 (Supp. 1992); VT. STAT. ANN. tit. 14, § 1492 (1989); VA. CODE ANN. §§ 8.01-53, -54 (Michie 1992) ("shall specify the amount or proportion to be received by each of the beneficiaries'); WASH. REV. CODE ANN. § 4.24.010 (West 1988) ("This section creates only one cause of action, but if the parents of the child . . . are separated damages may be awarded to each plaintiff separately , as the court finds just and equitable"); WYO. STAT. § 1-38-102 (1977) ("Every person . . . may prove his respective damages, and the court or jury may award such person that amount of damages to which it considers such person entitled").

Some of these jurisdictions award certain damages to the decedent's heirs or estate. *See, e.g.*, OKLA. STAT. ANN. tit. 12, § 1053(B) (West 1988); OR. REV. STAT. § 30.030(5) (1988).

18. This assumes that in a dependency-based standard a custodial parent can recover for the loss of the child's society and companionship and not just actual financial losses. Although this was not always the case, most jurisdictions do now allow parental recovery. *See* Lehrbaum-Weiss, *supra* note 13, at 804. *Cf. In re* Estate of Hines, 573 P.2d 1260 (Or. App. 1978) (abandoning parent was entitled to a share since the non-abandoning parent did not prove dependency).

19. It seems axiomatic that if there is no ongoing relationship, there is no loss of society or companionship. "Although surviving parents in a wrongful death action are entitled to a presumption of pecuniary injury in the loss of a child's society, that presumption may be rebutted by presenting evidence that a parent and child were estranged." Gabriel v. Illinois Farmers Ins. Co., 525 N.E.2d 864, 867 (Ill. App. Ct. 1988). *See also* Lovely v. Rahway Hosp., 548 A.2d 242 (N.J. Super. 1988) (court found mother was partially dependent on her minor son and therefore in distributing proceeds, court could by statute vary from the equal intestate distribution, giving father who had only minimal contacts with his son 20% of the award while mother received 80%); Glasco v. Fire Cas. Ins. Co., 709 S.W.2d 550 (Mo. Ct. App. 1986) (90-10 split between mother and father where father failed to support child).

In some states with a dependency-based standard, the statute provides that abandonment or lack of support bars that parent's interest. *E.g.*, VT. STAT. ANN. tit. 14, § 1492(c) (1989); IND. CODE § 34-1-1-8 (West Supp. 1992). *But cf.* Black v. Reynolds, 707 P.2d 388 (Idaho 1985) (interpreting statutory language of "but if either the father or mother. . . has abandoned his or her

Nevertheless, a significant number of jurisdictions provide for a distribution pursuant to or parallel to an intestate or estate distribution,[20] with some jurisdictions excluding an abandoning parent by statute.[21] In our hypothetical of a minor accident victim, most states with the intestate distribution would make no distinction between an abandoning parent and a caring parent. Thus, approximately one-quarter of the states ignore the voluntary abandonment.[22]

A traditional purpose of wrongful death statutes is to compensate survivors for their losses due to the decedent's death. The measure of a statute's success depends in the first instance on the class of beneficiaries designated as distributees therein.[23] To the extent the class is described by dependency, the

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family, the other is entitled to sue alone" not to deprive a sole abandoning parent from maintaining action). *See also* Emile F. Short, Annotation, *Parent's Desertion, Abandonment or Failure to Support Minor Child As Affecting Right or Measure of Recovery for Wrongful Death of Child*, 53 A.L.R.3D 566 (1973).

20. *See* ALA. CODE § 6-5-410 (1975) ("The damages recovered . . . must be distributed according to the statute of distributions"); COLO. REV. STAT. ANN. § 13-21-201(c) (West 1989) ("by the father and mother . . . each shall have an equal interest in the judgment"); CONN. GEN. STAT. ANN. § 45a-448 (West Supp. 1993) ("shall be distributed as personal estate in accordance with the last will and testament of the deceased if there is one or, if not, in accordance with the law concerning the distribution of intestate personal estate"); GA. CODE ANN. § 51-4-4, § 19-7-1(c) (1991) ("Unless a motion is filed . . . , judgment shall be divided equally between the parents"); IOWA CODE ANN. 633.336 (West 1992) ("shall be disposed of as personal property belonging to the estate of the deceased"); KY. REV. STAT. ANN. § 411.130 (Michie/Bobbs-Merrill 1992) ("to the mother and father of the deceased, one (1) moiety each, if both are living"); LA. CIV. CODE ANN. art. 2315.1 (West Supp. 1993); ME. REV. STAT. ANN. tit. 18A, § 2-804 (West Supp. 1992) ("to the deceased's heirs to be distributed as provided in section 2-106"); MASS. GEN. LAWS ANN. ch. 229, §§ 1, 2 (West 1986 & Supp. 1993) ("to the use of the next of kin"); MISS. CODE ANN. § 11-7-13 (Supp. 1992) ("the damages shall be distributed equally to the father, mother, brothers and sisters, or such of them as the deceased may have living at his or her death:); N.H. REV. STAT. ANN. § 556:14 (1974) ("damages recovered . . . shall become a part of the decedent's estate and be distributed in accordance with the applicable provisions of law"); N.M. STAT. ANN. § 41-2-3 (Michie 1989) ("if such deceased be a minor, childless and unmarried, then to the father and mother, who shall have on equal interest in the judgment"); N.C. GEN. STAT. § 28A-18-2 (1985) ("but shall be disposed of as provided in the Intestate Succession Act"); 42 PA. CONS. STAT. ANN. § 8301(b) (1982) ("The damages recovered shall be distributed to the beneficiaries in the proportion they would take the personal estate of the decedent in case of intestacy"); R.I. GEN. LAWS § 10-7-2 (Supp. 1992) ("to the next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate"); S.C. CODE ANN. § 15-51-40 (Law. Co-op. 1976) ("And the amount so recovered shall be divided among the before-mentioned parties in such shares as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate.").

This listing may be overstated as a practical matter. For example, Georgia now provides that with respect to cases involving children, the mother or father can petition the court to vary the otherwise equal distribution. GA. CODE ANN. § 19-7-1(c)(6) (1991).

21. *See, e.g.*, N.C. GEN. STAT. § 31A-2 (1984); CONN. GEN. STAT. ANN. § 45a-439(a)(1) (West Supp. 1993); 20 PA. CONS. STAT. ANN. § 2106(b) (Supp. 1993).

22. Those states would include those listed at *supra* note 20, other than those listed at *supra* note 21.

23. Virtually all jurisdictions base the core group of possible claimants on marriage or

subjective analysis greatly assists in achieving the statute's goal. To the extent that class is based strictly on the intestate statutes, the wrongful death distribution suffers the same systemic inflexibility as intestacy.

II. JUDICIAL INTERPRETATION: WHAT MAKES A "PARENT?"

Even if the intestate rules apply in our hypotheticals, it does not necessarily follow that an abandoning parent must inherit from the child or through the wrongful death statute. Judicial interpretation of statutes to effect their purpose is commonplace. Yet in the few reported cases dealing with an abandoning parent as an intestate distributee the courts have uniformly upheld that parent's interest.[24]

Recently, in *Hortarek v. Benson* (our second hypothetical), the Connecticut Supreme Court followed a predictable legal analysis: man and woman marry; they have a child; they divorce; no termination of parental rights occurs; the child dies; therefore the parents share equally in the child's estate. The Connecticut Supreme Court stated that in this "unique and tragic"[25] case "we have no power"[26] [to consider abandonment] since the "law governing descent and distribution . . . is purely statutory."[27] It agreed with the lower court that "there is neither common law nor statutory law upon which relief can be granted."[28]

This is a tragic case for the father who was the custodial parent. He has lost his child. It is also a tragic case for the legal system, since the legal system seems only to compound his grief and invites derision. While the court seemed to march reluctantly to this result, it nevertheless reached its

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blood relationships. *See, e.g.*, states listed in *supra* notes 17 and 20.

24. For this purpose I use "intestate distributee" to mean the parent receiving directly from the intestate estate as heir or pursuant to a wrongful death statute that uses an intestate distribution scheme. The cases include Heggie v. Barley, 5 Tenn. C.C.A. 78 (1914); *In re* Green's Estate, 196 N.W. 993 (Iowa 1924), discussed in Note, 10 VA. L. REV. 650 (1924); Avery v. Brantley, 131 S.E. 721 (N.C. 1926), discussed in J.C. Kesler, Note, 5 N.C. L. REV. 72 (1926); Murphy v. Duluth-Superior Bus Co., 274 N.W. 515 (Minn. 1937); Brady v. Fitzgerald, 90 So. 2d 182 (Miss. 1956); Anderson v. Anderson, 366 S.W.2d 755 (Tenn. 1963); Pogue v. Pogue, 434 So. 2d 262 (Ala. Civ. App. 1983); Estate of Rozet, 504 A.2d 145 (N.J. 1985); Crosby v. Corley, 528 So. 2d 1141 (Ala. 1988) (abandoning parent's share upheld even with evidence of mental, physical and sexual abuse by the parent); and Hotarek, *supra* note 2.

25. 557 A.2d at 1260.

26. *Id.* at 1263.

27. *Id.* at 1261.

28. *Id.*

conclusion unequivocally.[29] Despite this unanimity, it could have held differently.

It is the duty of judges in our tradition to interpret and apply the law based on the particular facts before them.[30] It is not sufficient to say the law is "purely statutory," even statutes need interpretation. One need look no further than the Internal Revenue Code to see the superficiality of that argument. A long line of cases exist—the "on-the-other-hand" analysis—that sanction a fresh look at statutory or traditional legal doctrine.[31] This analysis does not abandon or ignore a statute. Rather, it applies the statute to a new fact pattern consistent with the spirit of the statute and the aims of society. It is an especially common technique in "unique" cases.

This analysis seems particularly appropriate here, for two reasons. First, significant compensatory personal injury cases and wrongful death cases are relative newcomers to our legal system,[32] and hence there is little long-standing common law with respect to them. Second, the minor and incapacitated decedents in our hypotheticals are by definition locked into the intestate scheme; they cannot exit by signing wills.[33]

The "on-the-other-hand" analysis is simply a recognition of the dynamic nature of the common law.[34] Statutes as well as common law rules have

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29. BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 66 (1924): "Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity."

30. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 14 (1921): "It is true that code and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided." Also: "The judge as the interpreter for the community of its sense of law and order must supply omissions, correct uncertainties, and harmonize results with justice. . . ." *Id.* at 16. "[Interpretation] supplements the declaration, and fills the vacant spaces, by the same processes and methods that have built up the customary law." *Id.* at 17.

31. For true textbook applications, *see e.g.*, Lister v. Smith, Court of Probate 1863, 3 SW. & Tr. 282, 164 Eng. Rep. 1282; Eaton v. Brown, 193 U.S. 411 (1904); Pope v. Garrett, 211 S.W.2d 559 (Tex. 1948); cited in JOHN RITCHIE ET AL., DECEDENTS' ESTATES AND TRUSTS (8th ed. 1993) at 406, 409, and 438, respectively.

32. *See supra* notes 13-23 and accompanying text. For example, only in 1955 did Illinois remove the cap on wrongful death recoveries. *See* Kenneth Siegan, Comment, *Wrongful Death Recovery Limitations—R.I.P.*, 17 DEPAUL L. REV. 385 (1968); James T. Demos, *Measure of Damages—Wrongful Death*, 60 ILL. B.J. 518 (1972).

33. UNIFORM PROBATE CODE 36 (7th ed. 1987): "While the prescribed patterns may strike some as rules of law which may in some cases defeat intent of a decedent, this is true of every statute of this type. In assessing changes it must therefore be borne in mind that the decedent may always choose a different rule by executing a will."

34. For an excellent exposition of this view, *see* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989). For a more general presentation of the various theories of statutory interpretation, see Earl M. Maltz, *Rhetoric and Reality in the*

been interpreted for generations to embrace societal needs and desires.[35] When courts fail to interpret statutes consistent with those societal aims when clear legislative intent is lacking, they fail in their institutional duty to declare the common law.[36]

Following the on-the-other-hand approach, the Connecticut court could have interpreted the relevant statutory phrase "parent or parents of the intestate" to exclude those biological or adoptive parents who voluntarily abandon their children, by not participating in the care, nurture, guidance and support of their children. A court could interpret "parent" less biologically and more functionally based on a de facto definition that recognizes the duality inherent in "parent": the act of becoming a parent (birth or adoption) coupled with the acts of being a parent (care and nurturing of the child).[37] This would be more consistent with today's view of a functioning parent-child relationship[38] and would seek to promote "a view of parenthood based on responsibility and connection,"[39] rather than feudal notions of bloodlines and

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Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy, 71 B.U. L. REV. 767 (1991).

35. See Justice Holmes' classic statement: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918). Chief Justice Robert N. Wilentz of the New Jersey Supreme Court affirmed the principle: "Our court has been working to make sure the common law corresponds to present societal values." Joseph F. Sullivan, *New Jersey Seen as Leader on Rights*, N.Y. TIMES, July 18, 1990, at B1.

36. *See supra* note 29. "The true science of law does not consist mainly in a theological working out of dogma or a logical development as in mathematics, or only in a study of it as an anthropological document from the outside; an even more important part consists in the establishment of its postulates from within upon accurately measured social desires instead of tradition." Oliver W. Holmes, *Law in Science and Science in Law*, *in* COLLECTED LEGAL PAPERS 225-26 (1920).

37. At least one trial court has ventured into this arena to bar an unworthy parent ("the trial court *ex mero motu* entered an order finding that appellant had forfeited his rights as a parent because of his repeated acts of physical, mental, and sexual abuse against"[his daughter]), but its "novel effort to avoid what may be perceived as harsh inequities caused by the blind application of the distribution statute . . . " was reversed on appeal. Crosby v. Corley, 528 So.2d 1141, at 1142-44. In Lawson v. Atwood, 536 N.E.2d 1167 (Ohio 1989) a child's caregiver of 16 years was held to be a "parent" for purposes of the Ohio wrongful death act where (1) the natural parents had disclaimed or abandoned the child, (2) the caregiver had performed the obligations of parenthood for a substantial period of time, (3) the child and caregiver had held themselves out to be child and parent for a substantial period of time; and (4) the relationship between them had been publicly recognized. Although neither natural parent was before the court, the practical implication of the holding presumably is to bar the abandoning parent from participating in the recovery.

38. *See, e.g.*, JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 9-28 (1973) (discussing biological and psychological parents); Larry Rohter, *Natural vs. Adoptive: A Girl Tests the Limits*, N.Y. TIMES, July 30, 1993, at B10.

39. Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 295 (1988). An enormous pool of literature addressing basic questions on the changing notion of family law and

property rights. Thus unless a person fulfilled both aspects of the parent definition, he or she would not be considered a parent for purposes of inheritance from the child. Stated another way, "parent" in the context of this statute would be imbued with an equitable norm: unless a parent fulfills his or her parental duties and responsibilities, the parent loses the parental benefits of the relationship.[40] No less a historic common law authority than Blackstone acknowledged the duties of parents *with* a correlative diminution of rights in property if those duties were not fulfilled:

> It is a principle of law, that there is an obligation on every man to provide for those descended from his loins. . . . [A]nd if a parent runs away, and leaves his children, the churchwardens and overseers of the parish shall seize his rents, goods, and chattels, and dispose of them towards their relief.[41]

Judicial interpretation, of course, has the advantage of keeping the statutory language intact yet flexible. The judge is not engrafting a requirement or creating an exception, rather she is interpreting the words in the spirit of the legislature and society to the new fact pattern before her. Justice could be served immediately, and not only after the legislature enacts a statutory

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relationships is emerging. *E.g.*, MARY ANNE GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE (1989); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985). Notable in this regard is the decision of the New York Court of Appeals in Braschi v. Stahl Assoc., 74 N.Y.2d 201, 544 N.Y.S. 2d 784 (1989), where that Court determined the gay life partner of the deceased tenant was a member of the decedent's "family" for purposes of the New York rent control laws. The court determined that "it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control." *Id.* at 790.

40. *See* Lawson v. Atwood, 536 N.E.2d 1167 (Ohio 1989). Analogous reasoning was applied in Allen v. Allen, 738 P.2d 142 (Okla. 1987), where the Oklahoma Supreme Court held that a woman who was legally married to the decedent was equitably estopped from taking her spousal share since she had undertaken a common law marriage to another man. In other words, the act of becoming a wife was not sufficient when the acts of being a wife were absent. *See* Comment, 41 OKLA. L. REV. 128-32 (1988).

41. 1 WILLIAM BLACKSTONE, COMMENTARIES *436. For a more contemporary citation, consider Rose v. Rose, 481 U.S. 619 (1987) where the Court held that the federal anti-attachment provision did not insulate Veterans' Administration benefits from the claims of child support. See especially Justice O'Connor's concurrence: "Our Anglo-American tradition accords a special sanctity to the support obligation." 481 U.S. at 637. *See also* Eskridge, *supra* note 34 at 1058-60.

amendment.[42] As Judge Learned Hand observed, there is little justice served in making a "fortress out of a dictionary."[43]

A traditional argument against the on-the-other-hand analysis is the lack of certainty generated by its application. There are two responses to this argument. First, the on-the-other-hand analysis is not applied in routine cases; routine cases do require simple certain rules. Rather, the on-the-other-hand analysis should apply only to a narrow band of egregious cases, for example, that of the murdering heir. Judicial activism is not to be feared more than an acknowledged inequitable distribution. Second, the level of proof required to show abandonment should be fairly high. A clear and convincing standard would be appropriate, and the burden of proof would be on those asserting abandonment.[44] Some factors indicative of abandonment would be the voluntary change of residence, the lack of financial support, and few or no contacts with the child. Although the situation of an abandoning parent and a deceased intestate child is not unique,[45] it nevertheless is not so common that we need fear judicial overload.[46]

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42. An analogy to the abandoning parent is the murdering heir inheriting from his victim. Though no one deemed it just, when confronted with the dilemma many courts felt powerless to vary from the literal words of the intestate statute. *E.g.*, Bird v. Plunkett, 95 A.2d 71 (Conn. 1953). Other courts viewed their role differently. *E.g.*, DeZotel v. Mutual Life Ins. Co., 245 N.W. 58, 65 (S.D. 1932):

> We cannot persuade ourselves that there ever was any legislative intent that our statutes of descent and succession, general or special, however broad and unambiguous and lacking in exceptions in their terms, should operate in favor of a sane, felonious killer. We announce it as the law of this state that such statutes will not be permitted to so operate unless and until the Legislature shall specifically and affirmatively so enact.

Still other courts found a remedy in the constructive trust where technical title passed to the wrongdoer, but was immediately impressed with a trust for others' benefit. *E.g.*, Estate of Mahoney, 220 A.2d 475 (Vt. 1966). Today most jurisdictions have a statute barring the murdering heir from inheriting. Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 805 (1993).

43. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945), *aff'd*, 326 U.S. 404 (1945): "But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of a dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

44. *See, e.g.*, *In re* Estate of Clark, 501 N.Y.S. 2d 479 (1986), but consider Ohio's "by a preponderance of the evidence" standard. *See infra* note 90.

45. Interestingly, of the cases listed at *supra* note 24 only *Hotarek* and *Crosby* cited any of the other decisions.

46. "The legislature, by mandating that wrongful death proceeds be distributed according to the statute of intestate distribution, necessarily perceived that some beneficiaries would be totally unworthy of inheriting. . . . The distributions listed in the statute mandate who shall inherit, without exceptions. The probate process necessitates such mandates in order to simplify the process and avoid floods of litigation over who the deceased would have intended to inherit." Crosby v. Corley, 528 So. 2d 1141, 1143 (Ala. 1988).

III. COMMON LAW: IS INDIGNITAS A VIABLE THEORY?

When confronted with an issue of statutory interpretation, and in the absence of clear legislative intent and case precedent, courts often seek a common law rule or theory upon which to fashion a resolution. In the situation of an abandoning parent inheriting *from* an abandoned child, the traditional common law has no such readily engrafted rule. This is not because the common law favored abandonment[47] but, doubtless, due to the *descending* notion of inheritance. After all, Blackstone's first canon of descent provides: "The first rule is, that inheritances shall lineally descend to the issue of the person who last died actually seised, in infinitum; but shall never lineally ascend."[48] Thus, Blackstone's first canon of descent does provide support for a court's statement that "there is [no] common law . . . upon which relief can be granted. . . ."[49]

Yet, the common law rules of descent were restricted to real property; and feudalism, with military service tied to the feudal grant, was fundamental in their development.[50] With respect to personalty however, the rules of distribution that were followed were those of "customary law, which agreed with the civil law, as it existed before the time of Justinian. . . ."[51]

The ecclesiastical courts exercised jurisdiction over the distribution of personalty, following "the rules of the civil law."[52] This being so, an

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47. *See supra* note 41. Also consider the Statute of Westminster II, 1285, 13L.dw. I, ch. 34, which provided that if a woman left her husband and continued to live in adultery, she was barred of dower unless her husband voluntarily permitted her to return to his house. Atkinson, *supra* note 4, at 148-50. Some jurisdictions today have statutes barring inheritance of an abandoning or adulterous spouse. *E.g.*, N.C. GEN. STAT. § 31A-1 (1984).

48. 2 WILLIAM BLACKSTONE, COMMENTARIES *208.

49. *Hotarek*, 557 A.2d at 1261.

50. 2 WILLIAM BLACKSTONE, COMMENTARIES *210-12:

> But the negative branch, or total exclusion of parents and all lineal ancestors from succeeding to the inheritance of their offspring is peculiar to our own laws. . . . Hence this rule of our law has been censured and declaimed against, as absurd and derogating from the maxims of equity and natural justice. Yet that there is nothing unjust or absurd in it, . . . may appear from considering as well as the nature of the rule itself, as the occasion of introducing it into our laws. . . . [It] was introduced at the same time with, and in consequence of, the feodal tenures. . . . [Also] upon this consideration of military policy, that the decrepit grandsire of a vigorous vassal would be but indifferently qualified to succeed him in his feodal service.

See also Carole Shamas, *English Inheritance Law and Its Transfer to the Colonies*, 31 AM. J. LEGAL HIST. 145 (1987).

51. W. D. Rollison, *Principles of the Law of Succession to Intestate Property*, 11 NOTRE DAME L. REV. 14, 18 (1935-36). *See also* ALISON REPPY & LESLIE J. TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS: DESCENT AND DISTRIBUTION PROBATE AND ADMINISTRATION 7 (1928).

52. Rollison, *supra* note 51, at 19. For an overview of the historic development of the common law, *see* Franz Wieacker, *The Importance of Roman Law for Western Civilization and Western Legal Thought*, 4 B.C. INT'L & COMP. L. REV. 257 (1981).

investigation of potentially useful doctrine or theory in the civil law regime is appropriate.[53]

Ancient Roman law, a primary source of the civil law,[54] recognized a doctrine of *indignitas*, whereby one who would otherwise receive property from the deceased was prohibited from receiving it because he was deemed "unworthy to receive it."[55] For example, "a tutor by will [roughly a guardian of an estate] who excused himself lost any benefit under the will, as did anyone who attacked the will unsuccessfully, and one who accepted a legacy under a secret trust in favor of one who could not take" would be considered *indignus*.[56] Speaking more generally "any act in fraud of the law induced a forfeiture."[57] *Indignitas* as a doctrine is not confined to ancient history; there is evidence of the continued existence and viability of this doctrine in civil law regimes today.[58] In the American system, Louisiana continues this tradition: "They are called unworthy in matters of succession, who, by the failure in some duty towards a person, have not deserved to inherit from him, and are in consequence deprived of his succession."[59]

Research has not uncovered any reported instance in Roman law of an abandoning parent specifically being deemed *indignus* because of the abandonment. This is not surprising given the Roman law structure of *patria*

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53. William W. Bassett, *Canon Law and Common Law*, 29 HASTINGS L. REV. 1383 (1978). *But see* Alison Reppy, *The Slayer's Bounty - History of Problem in Anglo-American Law*, 19 N.Y.U. L. REV. 229, 266-67 (1942) for discrediting a similar attempt in the murderous heir situation:

> It is evident, therefore, that Justice Earl thought that no statute was necessary for the reason that the rule that a slayer could not profit from his crime could be taken from the civil law and engrafted upon the common law, or, failing this, the same result could be attained by finding that the rule of the civil law, or the rule of public policy, as the case may be, could be discovered in "the maxims of the common law." It seems clear, that in holding [against the murderous beneficiary, the judge] was greatly influenced by the civil law, and was determined to apply the so-called rule of public policy as founded upon the civil law, or extracted from "the Maxims of the common law," which, as one distinguished scholar once remarked, are "waste baskets for loose legal thinking."

54. *See, e.g.*, HENRY SUMNER MAINE, ANCIENT LAW 165-208 (1875); JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 7-14 (1969); Jacob Dolinger, *A Civil Lawyer Looks at a Common Law Lawyer's Views on Civil Law: John Henry Merryman's The Civil Law Tradition*, 17 BROOK. J. INT'L L. 557, 567 (1991); BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 235-270 (1962).

55. MAX RADIN, HANDBOOK OF ROMAN LAW 437-39 (1927); *see also* ADOLF BERGER, ENCYCLOPEDIC DICTIONARY OF ROMAN LAW 499 (43 Transactions of the American Philosophical Society, 1953).

56. WILLIAM W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW 317 (1921).

57. RADIN, *supra* note 55, at 438.

58. The concept of *indignitas* continues in many foreign civil law jurisdictions. *See, e.g.*, the ITALIAN CIVIL CODE, C.c. §§ 463-66 (Dell' indegnità).

59. LA. CIV. CODE ANN. art. 965 (West 1952).

potestas, which included the notion that property ownership was in the head of the family, *pater familias*, and not in an unemancipated child.[60]

Using fragments of legal history does not present a conclusive analysis, or an academically desirable and neat "if-then" equation.[61] Yet the statement "there is [no] common law . . . upon which relief can be granted"[62] is equally problematic. The modern day lack of understanding of the role of ecclesiastical courts (who were the losers in the battle for judicial preeminence in England),[63] the scant written records of those courts, the relative lack of personalty as wealth, and the descending nature of intestate succession, all contribute to a myopic view of the common law. By according "recognition to the intrinsic importance to the development of the law of England of the jurisdiction once exercised by the courts of the Church,"[64] we open up the possibility of a common law *theory* granting relief, fully recognizing there is no common law *rule* granting relief. Our legal system, which strives to recognize the pluralistic society in which we live today, could gain in public esteem by recognizing the pluralistic roots of its past.[65]

In fashioning a decision in a case today, a court must recognize a parent's legal duty to support a child.[66] This duty coupled with the ancient but

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60. BUCKLAND, *supra* note 56, at 102-04. Also until very recently, Louisiana specifically provided that a child could disinherit a parent for seven reasons, including if "a parent has refused sustenance to the child in necessity having the means of affording it." LA. CIV. CODE ANN. art 1632 (West 1987), repealed by Acts 1990 No. 147, § 3 (effective July 1, 1990). As only descendants are now forced heirs in Louisiana, the child's parental disinherison statute was presumably unnecessary. *See* LA. CIV. CODE ANN. arts. 1493, 1494 (West Supp. 1993). *See also* Leonard Oppenheim, *The Revocation of a Testamentary Disinherison*, 16 TUL. L. REV. 97 (1941) ("There is no reported instance of an attempt by a child to disinherit one or both of his parents.").

61. There is debate as to the degree of influence of Roman law, civil law, and canon law on the common law. For a somewhat irreverent linguistic dissection of traditional homage to Roman law, see DAVID DAUBE, ROMAN LAW: LINGUISTIC, SOCIAL AND PHILOSOPHICAL ASPECTS (1969).

62. Hotarek v. Benson, 557 A.2d 1259, 1261 (Conn. 1989).

63. R. H. HELMHOLZ, CANON LAW AND ENGLISH COMMON LAW 3 (1983) (Selden Society Lecture, July 5, 1982).

64. *Id. See also* Bassett, *supra* note 53, at 1412-13: "The canonists gave to our modern legal system the law of wills and probate administration. . . the law of family and domestic relations, and the law of trusts." "Neither the ancient feudal laws nor the Justinianean corpus focused upon the individual person. . . . The humanity in the laws today comes from the example set by the canonists within their own system, in the courts Christian, and in Chancery." *Id.* at 1414.

65. "The mere recognition of the truth that there are more methods to be applied than one, that there is more than one string to harp upon, is in itself a forward step. . . ." BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 64 (1924).

66. Not only is there a legal duty for parents to support a child, there is growing public awareness and insistence that parental support obligations be honored and that legal mechanisms for enforcement of that duty be strengthened. In responding to this concern, Representative Christopher Cox has recently proposed a rather innovative approach, requiring unpaid child support to be included in the delinquent parent's gross income for income tax purposes. H.R. 2355, 103rd

continuing doctrine of *indignitas* could lead a willing and bold court to declare that a parent's abandonment of a child is an "act in fraud of the law," making that parent unworthy to inherit from the child. More likely than this direct equitable application of *indignitas*, a willing but less bold court could cite the doctrine as support for interpreting "parent" in an equitable and functional fashion.

IV. Abandonment Statutes

A. Current Models for Abandonment Statutes

Given the general reluctance of courts to pursue either an interpretive or a civil law-common law model of analysis in circumstances of abandonment, statutory approaches provide a recognized and concrete remedy. Current statutory approaches with varying degrees of commonality and scope exist and will be examined.

At least six jurisdictions provide directly for a statutory forfeiture of an abandoning parent's interest in a child's intestate estate.[67] These statutes will be briefly discussed. Thereafter, an overall analysis of the statutory models will follow.

1. North Carolina.—In the 1926 case of *Avery v. Brantley*,[68] the North Carolina Supreme Court determined that a father who had abandoned his daughter was nevertheless entitled to inherit in the wrongful death action of his four-year old daughter. The North Carolina wrongful death statute provided that distribution was to be made as in the case of intestacy of personal property.[69] The legislative response was swift. In 1927, North Carolina enacted a straightforward proviso to its intestate rule of inheritance from a child who leaves no spouse or descendant: "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."[70]

Over time this statute has been modified. In 1961, North Carolina revised this enactment in two substantive respects.[71] First, a resumption of care and maintenance by the parent for at least one year prior to the child's death that

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Cong., 1st Sess. (1993). *See also* Roberts, *supra* note 1.

67. They are Connecticut, North Carolina, New York, Ohio, Pennsylvania and Virginia, cited *supra* note 11.

68. 131 S.E. 721 (N.C. 1926).

69. *Id.* at 722. A similar rule is in effect today. N.C. Gen. Stat. § 28A-18-2 (1984).

70. N.C. Publ. Laws ch. 231 (1927).

71. N.C. Gen. Stat. § 31A (1961). *See* W. Bryan Bolich, *Acts Barring Property Rights*, 40 N.C. L. Rev. 175, 182-85 (1962).

continues until the child's death provides an exception to the rule of forfeiture. The second modification provides that if a parent is deprived of the child's custody by a court and that parent substantially complies with the court ordered support, the parent may inherit from the child.[72] The North Carolina statute now reads as follows:

> 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.[73]

2. New York.—The New York statute[74] lacks the obviously reactive origins of the original North Carolina statute; yet as the New York legislation was recommended by the Surrogates' Association it may in fact be reactive.[75] Originally enacted in 1941, the New York statute's intent was "to deprive a parent of a distributive share in the estate of a child or of a share in the damages recovered for the wrongful death of a child where such parent has abandoned the child during infancy or has neglected or refused to provide for such child during infancy."[76]

It now provides:

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72. The necessity for this modification may not be readily apparent today, but at one time several jurisdictions provided that the custodial parent was the sole heir of the personal property of a deceased child. *See, e.g.*, TENN. CODE ANN. § 31-201(4) (1955), discussed in Ray v. Chandler, 482 S.W.2d 553 (Tenn. 1972); Douglas P. Quay, Note, *Intestate Succession in Tennessee*, 8 MEM. ST. U. L. REV. 63, 73-74 (1977-78). This may be the underlying reason for the modification.

73. N.C. GEN. STAT. § 31A-2 (1984).

74. N.Y. EST. POWERS & TRUSTS LAW § 4-1.4 (McKinney 1981).

75. Patrick J. Rohan & Samuel Hoffman, *Practice Commentary to N.Y. Est. Powers & Trusts Law* § 4-1.4, at 744 (McKinney 1981 & Supp. 1993).

76. 1941 N.Y. LAWS ch. 89, p. 173 fn. As enacted, the law provided, "No distributed share of the estate of a decedent shall be allowed under the provision of this article. . .

> (e) or in the estate of 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."

> 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.[77]

3. Pennsylvania.—In 1984, more than fifty years after the original North Carolina legislation, Pennsylvania included in its intestate forfeiture statute a provision regarding parents as follows:

> 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.[78]

4. Connecticut.—In May 1989, as part of its *Hotarek* decision, the Connecticut Supreme Court urged the legislature to revise the intestate rules.[79] The Connecticut legislature reacted quickly, as North Carolina's did sixty-three years previously. Unfortunately, its 1990 attempt to pass legislation "was lost at the tail end of the session," although there was no reason for "any objection to it whatsoever."[80] The second legislative attempt in 1991 was successful.[81] Like North Carolina's original 1927 enactment, the method chosen by Connecticut was a proviso to its intestate distribution scheme as follows: "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. . . ."[82]

5. Virginia.—In 1992, Virginia joined the ranks with its straightforward statute:

> 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

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77. N.Y. EST. POWERS & TRUST LAW § 4-1.4 (McKinney 1981).

78. 20 PA. CONS. STAT. ANN. § 2106(b) (Supp. 1993).

79. 557 A.2d, at 1263. "If the law is to be changed to make provision for the situation at hand, it is for the legislature to make the change, not the courts. We urge the legislature to consider doing so."

80. 1991 Conn. Joint Standing Comm. Hearings Judiciary 168, testimony of Ralph Lukens, on February 19, 1991.

81. *See* 34 Conn. Gen. Assembly - Senate Proceedings Part 3, 1044-45 (1991); 34 Conn. Gen. Assembly - House Proceedings Part 7, 2421-23 (1991).

82. CONN. GEN. STAT. ANN. § 45a-439(a)(1) (West Supp. 1993).

the parental relationship and duties and such parental relationship and duties continue until the death of the child.[83]

The Virginia statute reflects the older trilogy of the North Carolina-New York-Pennsylvania statutes rather than the Connecticut proviso version.

6. Ohio.—Also in 1992, Ohio enacted its version of a statutory forfeiture based on parental abandonment.[84] This "simple" legislation had "a clear

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83. VA. CODE. ANN. § 64.1-16.3(B) (Michie Supp. 1993).

84. OHIO REV. CODE ANN. § 2105.10 (Anderson Supp. 1992). Parent who abandons minor child barred from intestate succession from child; status as next of kin or heir at law.

(A) As used in this section:

(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 at 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 in parcenary, pursuant to section 2105.06 of the Revised Code as if the parent had predeceased the deceased child.

(C) Subject to divisions (D) and (E) of this section, a parent who is alleged to have abandoned a child who died as an intestate minor shall be considered as a next of kin or an heir at law of the deceased child only for the following purposes:

(1) To receive any notice required to be given to the heirs at law of a decedent in connection with an application for release of an estate from administration under section 2113.03 of the Revised Code;

(2) To be named as a next of kin in an application for the appointment of a person as the administrator of the estate of the deceased child, if the parent is known to the person filing the application pursuant to section 2113.07 of the Revised Code, and to receive a citation issued by the probate court pursuant to that section.

(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

purpose"—"to close a gap in Ohio law similar to the one which forced the Conneticut [sic] courts to render their inequitable decision."[85] It is unlike any of the previously discussed versions in its length and extensive definitional and procedural detail. There are five divisions to the statute. Division A defines "abandoned" and "minor."[86] Division B provides that "a parent who has abandoned his minor child who subsequently dies intestate as a minor shall not inherit" from the child.[87] Despite this forfeiture, an abandoning parent shall be considered as a next of kin for certain procedural and administrative purposes pursuant to Division C.[88]

Division D sets forth in three subdivisions the procedure for the court's adjudication of parental abandonment.[89] It specifically requires a formal adjudication by the court of the parental abandonment in order for the disinheritance to be effective. The administrator bears the burden of proof by a preponderance of the evidence.[90] Division E provides that the heirship determination proceedings of Division D must be commenced by the administrator within four months from his receipt of letters, otherwise it may not be commenced.[91]

7. Uniform Probate Code.—Although not a legislatively enacted statute as the six provisions just discussed, the Uniform Probate Code may offer additional insight into the crafting of an abandonment statute. There is no Uniform Probate Code parallel to the straight-forward abandonment provisions just discussed, yet a curious half measure of relief may exist. The most recent version of the Uniform Probate Code describes the parent and child relation-

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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.

85. Rep. Bergansky, Sponsor Testimony—H.B. 166, 119th Ohio General Assembly Regular Session (1991-1992) 1, undated, from bill file Ohio Legislative Service Commission.

86. *Id.* § 2105.10(A).

87. *Id.* § 2105.10(B).

88. *Id.* § 2105.10(C).

89. *Id.* § 2105.10(D).

90. *Id.* § 2105.10(D)(2) "In the heirship determination proceeding, the administrator has the burden of proving, by a preponderance of the evidence, that the parent abandoned the child."

91. *Id.* § 2105.10(E).

ship in three subsections for purposes of intestacy.[92] The subsections' language is neutral, but reminiscent of concerns about the intestate status of illegitimate children and adopted children. The first subsection provides that 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."[93] Subsection (b) then makes an adopted individual the child of his or her adopting parents.[94] Finally subsection (c) precludes "inheritance from or through a child by either natural parent or his (or her) kindred . . . unless that natural parent has openly treated the child as his (or hers), and has not refused to support the child."[95]

Subsection (a)'s use of neutral language ("child of his natural parents") is positive, as a step away from the term "illegitimate." When the neutral language is simply inserted in subsection (c), however, the results are questionable and presumably unintended. There is no basis for distinguishing between an abandonment by a natural parent and an abandonment by an adoptive parent. The child is harmed the same. The historical context and language of subsection (c) create an ambiguity as to its intent and scope when applied to our hypotheticals.

B. Analysis of Abandonment Statutes

A statute specifically excluding a willfully abandoning parent from participating in a deceased child's estate is undoubtedly a powerful and direct remedy to unfair distribution and it should be included in all jurisdictions' intestate provisions. This model statute should also be relatively noncontroversial.[96] In fashioning such a statute, five basic issues need to be addressed at the outset.

First, who are the parties? The apparent starting point is the legal relationship of a parent and child.[97] For the definitions of parent and child, an abandonment statute should use indefinite grammar ("any" or "a")[98] and should avoid limiting or qualifying adjectives (such as "natural" and "minor").[99] The primary focus of the statute should be on parental conduct, not on subcategories of a parent-child relationship.

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92. U.P.C. § 2-114 (10th ed. 1991).

93. *Id.* § 2-114(a).

94. *Id.* § 2-114(b).

95. *Id.* § 2-114(c).

96. No negative votes were cast in passing Connecticut's statute. *See* sources cited *supra* note 81.

97. Since an abandonment statute is basically a forfeiture statute, a person must first qualify as an heir under the jurisdiction's intestate rules. Thus a primary determination of parent-child relationship has been made.

98. *E.g.*, N.C. GEN. STAT. § 31A-2 (1984).

99. *E.g.*, UNIFORM PROBATE CODE § 2-114(c) (10th ed. 1991) ("natural parent"); 20 PA. CONS. STAT. ANN. § 2106(b) (Supp. 1993) ("minor or dependent child").

Moreover, with respect to the child, the use of limiting adjectives may raise questions concerning the timing of the child's death. For example, if a statute is framed in terms of a minor child, with the abandoning parent's inheritance barred from the estate of the "minor child" or "such child," one implication is that the child's death must occur before the child reaches majority.[100] This result is counterproductive. The burden should be on the abandoning parent to change conduct; it should not be on the abandoned child to execute a will, and certainly not on an incapacitated adult child to do the impossible. From this perspective, New York's "whether or not such child dies before having attained the age of twenty-one years"[101] is clear and vastly preferable to Ohio's "minor child who subsequently dies intestate as a minor."[102]

Second, what conduct precludes a parent's inheritance? Willful abandonment of a child to whom a parent owes duties of support is an obvious standard.[103] Whether additional grounds are necessary or advisable (such as desertion or a parent failing or refusing to provide)[104] will most likely depend on the jurisdiction's statutes and case law precedent in the family law arena. A statutory length of time, such as one year, for an abandonment to work a forfeiture seems unnecessary and inappropriate.[105] The workhorse here should be an equitable standard of abandonment; the length of the non-

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100. This seems especially so if "minor child" is used. *See, e.g.*, In re Estate of Teaschenko, 574 A.2d 649 (Pa. 1990) (interpreting "shall have no right . . . in the . . . estate of the minor or dependent child" as requiring that, in Pennsylvania, the decedent be a minor or dependent child). It seems less clear if "such child" is used. *See* CONN. GEN. STAT. ANN. § 45a-439(a)(1) (West Supp. 1993) ("in the estate of such child").

101. N.Y. EST. POWERS & TRUSTS LAW § 4-1.4 (McKinney 1981).

102. OHIO REV. CODE ANN. § 2105.10(B) (Anderson Supp. 1992).

103. Five of the six jurisdictions use abandonment (New York, North Carolina, Connecticut, Virginia and Ohio); only North Carolina and Virginia specifically use "willfully" in their statutes. Pennsylvania uses "willfully deserted." *See supra* notes 67-95 and accompanying text.

The determination as to what conduct actually constitutes abandonment is clearly fact specific, and beyond the scope of this Article. For focus and simplicity, our hypotheticals assumed the issue. The resolution of this factual inquiry inevitably will involve the drawing of lines that will vary among jurisdictions. Neither the factual nature of the inquiry nor the likely divergent determinations should be viewed as insurmountable obstacles.

104. *E.g.*, New York has alternate grounds for disqualifying a parent: "Failed or refused to provide for or has abandoned such child." N.Y. EST. POWERS & TRUSTS LAW § 4-14 (McKinney 1981). Commentary on the section states "The exact words, 'failed or refused to provide' carry, it would seem, the connotation of willfulness, and there would be no purpose in disqualifying a parent who tried but could not quite provide, either adequately or at all. . . . Failure to provide is just about self-explanatory. . . ." WEST'S MCKINNEY'S FORMS, ESTATES & SURROGATE PRACTICE § 8.14 (1982).

105. In defining "abandoned," Ohio uses a standard "of at least one year immediately prior" to the child's death. OHIO REV. CODE ANN. § 2105.10(A)(1) (Anderson Supp. 1992). Pennsylvania also uses a one year standard. 20 PA. CONS. STAT. ANN. § 2106(b) (Supp. 1993).

involvement is only one factor in determining whether or not abandonment has occurred.

Third, what action, if any, will rehabilitate an abandoning parent? As an initial matter, it is entirely appropriate for an intestate abandonment statute, based on equitable principles, to distinguish between abandoning parents who never return from those who do.[106] Resumption of the parental relationship and parental duties, if any, for a sustained period of time continuing until the death of the child seems to be an appropriate standard.

The question of determining an appropriate time frame, that is when the parent must return, involves two separate concerns. If the rehabilitative portion of the statute speaks in terms of a resumption of parental duties, one implication is that the parent must return while duties are in fact owed to the child, generally while the child is a minor.[107] This standard may be too narrow. The focus should be the quality of the returning parent's relationship to the child and the parent's discharge of duties to the child, if any.[108] The second concern involves the length of the parent's return before the child's death.[109] A parent's return (say after five years of abandonment) that is one week before the child's death seems insufficient. Thus, the standard should be as follows: the return of the abandoning parent to the parental relationship should be both continuous until the child's death and for a sustained period of time.

Fourth, what is the effect of the parent's abandonment on the distribution of intestate property and on the administration of the estate? Two methods for disposing of the intestate property come to mind. First, the property could be distributed as if the abandoning parent had predeceased the child.[110] This is

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106. The two oldest statutes, North Carolina and New York, provide for this rehabilitation directly. Connecticut and Ohio may accomplish the same result indirectly by requiring the abandonment to be continuous until the child's death. Pennsylvania's statutory language is ambiguous on this point—a one year willful desertion may work a complete forfeiture, regardless of the resumption of the parental duties. Virginia is somewhat confusing since a parent's abandonment of a child that continues until the death of the child bars the parent's interest, unless the parent resumes the parental relationship and duties until the death of the child. One of the "until the death of the child" clauses should be deleted from the Virginia statute.

107. *E.g.*, VA. CODE ANN. § 64.1-16.3(B) (Michie Supp. 1993); N.Y. EST. POWERS & TRUSTS LAW § 4-1.4 (McKinney 1981). *See also supra* note 3.

108. "The resumption of the parental relationship with the child may presumably occur after the period of infancy has passed and the parent is no longer obliged to provide for the child (citing in re Lascelles' Estate, 68 N.Y.S. 2d 70 (1947)), but it must be clear that the parent has undertaken his parental duty to promote the growth and development of the child with reasonable diligence. . . ." Patrick J. Rohan & Samuel Hoffman, *Practice Commentary to N.Y. Est. Powers & Trusts Law* § 4-1.4, at 744-45 (McKinney 1981 & Supp. 1993).

109. North Carolina requires the parent's return to be for at least one year and for it to continue until the child's death. N.C. GEN. STAT. § 31A-2 (1984). New York and Virginia only require a parent's return to continue until the child's death. N.Y. EST. POWERS & TRUSTS LAW § 4-1.4(b) (McKinney 1981); VA. CODE ANN. § 64.1-16.3(B) (Michie Supp. 1993).

110. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 4-1.4(b) (McKinney 1981) and OHIO

simple and straightforward. Thus, the non-abandoning, caring parent would inherit all in the majority of states that have the parents sharing equally.[111] This is as it should be. But in the states where parents and siblings (often including half-bloods) share equally, the issue is more difficult.[112] In this instance, the caring parent and the abandoning parent's two children from a new marriage (who are unknown to the decedent) may share the estate in thirds.[113] This distribution does not seem appropriate.

For these jurisdictions, an alternative is to extend the abandoning parent's exclusion to all those who claim through that parent.[114] This has a certain degree of appeal. After all, why should the unknown half-sister and half-brother participate in the estate? There are, however, two basic problems. First, this smacks of the common law doctrine of "corruption by blood," which has been generally repudiated by statute and constitution.[115] Second and more important, this automatic derivative exclusion is as offensive to our notions of fairness as the automatic inclusion of an abandoning parent. For example, the unknown half-sister and half-brother should not be in the same category as the caring half-sister. If the derivative exclusion method is used, it should not apply to those who can show the existence of an active and caring relationship with the child, which is independent of the abandoning parent.[116]

In addition to the actual distribution of property, an abandonment statute should also preclude that parent from serving as administrator and from participating in the process of selecting an administrator.[117]

Finally, the process for determining whether a parent has in fact abandoned a child should be considered. Of the six jurisdictions discussed, only Ohio includes within its statute a specific and detailed procedure for determining abandonment.[118] The remaining five apparently rely on the existing probate framework for adjudicating issues of heirship. There appears

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REV. CODE ANN. § 2105.10(B) (Anderson Supp. 1992).

111. *See supra* note 7; but note that Texas provides that if only one parent survives, the brothers and sisters will then share. TEX. PROB. CODE ANN. § 38(a)(2) (West 1980).

112. *See supra* notes 8 and 9 and accompanying text.

113. *Id.* Illinois is alone in providing that if one parent is deceased, the surviving parent then receives a "double portion"; thus in Illinois, the caring parent would receive one-half and the two half-blood siblings would each receive one-fourth. 755 ILL. COMP. STAT. § 5/2-1(d) (1993).

114. *See, e.g.*, U.P.C. § 2-114(c) (10th ed. 1991).

115. *See* Reppy, *supra* note 53, at 244.

116. The degree of latitude advocated here may seem extraordinary in the context of intestate rules, but the situation itself is extraordinary. In making a determination as to the relationship, a court may draw upon factors similar to those used in wrongful death cases for distributing proceeds in proportion to the survivor's losses.

117. *E.g.*, N.C. GEN. STAT. § 31A-2 (1984) (abandoning parent loses "all right to administer the estate of the child").

118. *See supra* notes 87 and 89 and accompanying text.

to be no reason for special procedural rules regarding this question; therefore, whether additional safeguards should be in place is a local question.

V. Other Statutory and Judicial Strategies

Since (1) a functional interpretation of parent has been resisted, (2) *indignitas* as a legal theory is not well known, and (3) only a handful of states have specific abandonment statutes, the existence of other statutory approaches to distribution should be explored. In both hypotheticals, the goal is to have the property of the child go exclusively, or as much as possible, to the caring parent.[119] Therefore, is there a legal mechanism outside of heirship for the child to give his property at death to the caring parent? Conversely, is there a legal mechanism outside of heirship for the caring parent to claim the child's property at death? The answer to both questions is generally no, but statutes concerning disabled persons are making inroads. Two recent examples will be briefly explored since they offer additional evidence of a growing frustration with the inflexibility of the intestate scheme.

A. Illinois Conditional Gift and Custodial Claim Statutes

On January 1, 1989, a statute concerning discretionary distributions from the estate of a disabled person became effective in Illinois.[120] The provision represents a sweeping grant of authority to the court to authorize conditional gifts as the court deems "just and reasonable":

> The court may authorize and direct the guardian of the estate to make conditional gifts from the estate of a disabled person to any spouse, parent, brother or sister of the disabled person who dedicates himself or herself to the care of the disabled person by living with and personally caring for the disabled person for at least 3 years. It shall be presumed that the disabled person intends to make such conditional gifts.[121]

By definition, a disabled person is eighteen years or older and one who suffers from a mental or physical incapacity or disability.[122] The statute specifically limits donees to a class of defined relatives who perform certain prescribed acts of caring. The court may impose "conditions on the gift" as

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119. This seems self-evident. *See* John H. Beckstrom, *Sociobiology and Intestate Wealth Transfers*, 76 NW. U. L. REV. 216 (1981) for a different and interesting genetic analysis as to why this is so.

120. 755 ILL. COMP. STAT. § 5/11a-18.1 (1993). Very little legislative history exists. H.B. 4116, 3 *Final Legis. Synopsis & Dig. 85th Ill. Gen. Assembly*, 2d Sess. (1988), 1932-34 (1989).

121. 755 ILL. COMP. STAT. § 5/11a-18.1(a) (1993).

122. 755 ILL. COMP. STAT. § 5/11a-2 (1993).

it "deems just and reasonable."[123] The gift may not be distributed to the donee until the disabled person's death.[124] The court may modify or revoke the gift at any time.[125]

At the same time that the Illinois Legislature enacted the conditional gift statute, Illinois also adopted a new provision entitling the caregiver to a statutory claim against the deceased disabled person's estate.[126] Just as in the conditional gift statute, the claim statute requires that the caregiver devote himself to caring for the disabled person. This statute, however, also permits a child to make a claim against the estate.[127] Unlike the conditional gift statute, however, this is a statutory entitlement to the caregiver. While prescribing that the amount of the claim depends upon the extent and nature of the disability[128] and is subject to the solvency of the estate, the statute lists stated minimums. It mandates $100,000 for a 100% disability, $75,000 if 75% disabled, $50,000 if 50% disabled and $25,000 if 25% disabled.[129] By providing concrete minimum amounts which are more than nominal values for the claims, as well as making these priority claims,[130] the legislative intent to reward caregivers seems clear.

In analyzing the Illinois conditional gift and the statutory custodial claim legislation, it is important to note the correctness of the legislative scheme: those who give important care to disabled persons have a claim of the highest priority. The provisions confirm that voluntary acts of responsibility and connection, and not mere bloodlines, should dictate the distribution of property. Although this legislation is a positive step, flaws exist in the legislation flowing primarily from the narrow band of participants—the statutes only apply to disabled adults and certain related caregivers. Again the quality of the caring relationship should be the critical inquiry, and not the age of the care-receiver or the blood or consanguinity connection of the caregiver. Applying these statutes in our hypotheticals, the mother of the disabled adult child will benefit from the Illinois statutes, but the father of the minor accident victim will not.

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123. 755 ILL. COMP. STAT. § 5/11a-18.1(b) (1993).

124. *Id.* "A conditional gift shall not be distributed to the donee until the death of the disabled person."

125. *Id.*

126. 755 ILL. COMP. STAT. § 5/18-1.1 (1993). *See supra* note 120 for legislative history.

127. 755 ILL. COMP. STAT. § 5/18-1.1 (1993) ("Any spouse, parent, brother, sister, or child of a disabled person . . .") "Child" was recently added by amendment effective August 14, 1992. Ill P.A. 87-908 § 1 (1992).

128. 755 ILL. COMP. STAT. § 5/18-1.1 (1993). The statute also states: "The claim shall take into consideration the claimant's lost employment opportunities, lost lifestyle opportunities, and emotional distress experienced as a result of personally caring for the disabled person."

129. *Id.* The statute does not indicate how one determines the percentage of disability.

130. 755 ILL. COMP. STAT. § 5/18-10 (1993).

B. New York Guardian's Powers

Finding that the needs of incapacitated persons are "as diverse and complex as they are unique to the individual" and that the system lacked the "necessary flexibility" to meet those needs,[131] New York recently enacted comprehensive legislation concerning the appointment and powers of a guardian for an incapacitated person.[132] Effective April 1993, New York joins a minority of jurisdictions[133] that have legislation specifically permitting a judge to authorize transfers of the incapacitated person's property to another "on the ground that the incapacitated person would have made the transfer if he or she had the capacity to act."[134] The transfer may be in any form other than a will or codicil.[135] Therefore, transfers by way of outright gifts as well as by revocable and irrevocable trusts are now statutorily authorized.[136] In approving a transfer petition, a New York court must consider the capacity and wishes of the person, the nature and duration of the disability, the financial needs of the person, any tax savings, whether the donees are the "natural objects of bounty of the incapacitated person," whether the transfers are "consistent with any known testamentary plan or pattern of gifts," and finally "such other factors as the court deems relevant."[137]

In order to authorize the transfer, the judge must make three findings by clear and convincing evidence.[138] First, the judge must find that the person lacks the requisite capacity to perform the acts and is unlikely to regain such capacity "within a reasonable period of time," or that the person does have the requisite capacity and consents to the transfer.[139] Second, the judge must find that "a competent, reasonable individual . . . would be likely to perform the act . . . under the same circumstances."[140] Finally, the judge must find that the incapacitated person has not in the past manifested a contrary intention, or if he has, that he or she "would be likely to have changed such intention under the circumstances."[141]

The focus of the New York legislation is on what a reasonable person would do under the circumstances,[142] and the mechanism is judicial flexi-

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131. N.Y. MENTAL HYG. LAW § 81.01 (McKinney Supp. 1993).

132. N.Y. MENTAL HYG. LAW § 81.01-.42 (McKinney Supp. 1993).

133. Other states include Massachusetts (MASS. GEN. L. ch. 201, § 38 (Supp. 1993)), Pennsylvania (20 PA. CONS. STAT. ANN. § 5536(b) (Supp. 1993)), California (CAL. PROB. CODE § 2580 (West 1993)).

134. N.Y. MENTAL HYG. LAW § 81.21(a) (McKinney Supp. 1993).

135. *Id.*

136. *Id.* § 81.21(a)(1) and (6).

137. *Id.* § 81.21(d).

138. *Id.* § 81.21(e).

139. *Id.* § 81.21(e)(1).

140. *Id.* § 81.21(e)(2).

141. *Id.* § 81.21(e)(3).

142. "Most particularly, the court should consider whether a competent reasonable person

bility to particularize the disposition of property.[143] It is comprehensive legislation that has the correct emphasis. When coupled with the New York abandonment statute[144] and applied to both hypotheticals, this legislation affords the greatest flexibility and protection to the caring parent.

C. Judicial Doctrine of Substituted Judgment

The Illinois gift and claim statutes and the New York guardian legislation can be seen as legislative manifestations of the judicial doctrine of substituted judgment.[145] This doctrine is traced to the 1816 case of *Ex parte Whitbread*, where Lord Eldon allowed a petition by the niece of an incompetent for a distribution from surplus income stating that "the Court, looking at what it is likely the Lunatic himself would do, if he were in a capacity to act, will make some provision. . . ."[146]

Without having special legislation,[147] some courts use this subjective doctrine today as the basis for making inter vivos distributions from the incapacitated person's property.[148] In doing so, courts have considered four

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in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances." Law Revision Commission, *Comments to N.Y. Mental Hyg. Law* § 81.21 (McKinney Supp. 1993).

143. *Id.* "This section sets forth the powers that the court may authorize. . . . The list is intended to be illustrative rather than exclusive."

144. *See supra* notes 74-77 and accompanying text.

145. "This section gives statutory recognition to the common law doctrine of substituted judgment recognized by the courts of this state and other jurisdictions." Law Revision Commission, *supra* note 142.

146. 2 Meriv. 99, 100, 35 Eng. Rep. 878, 879 (Ch. 1816). *See* William G. Thompson and Richard W. Hale, *The Surplus Income of a Lunatic*, 8 HARV. L. REV. 472 (1895).

147. All jurisdictions provide a statutory mechanism for handling an incapacitated person's financial affairs. Generally, and subject to court supervision, the guardian is under a duty to use the estate for the support of the incapacitated person and his or her dependents, or for other purposes as the court deems for the ward's best interest. SAMUEL JAN BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW 395-404 (3d ed. 1985); LEGAL COUNSEL FOR THE ELDERLY, DECISION-MAKING, INCAPACITY AND THE ELDERLY: A PROTECTIVE SERVICES MANUAL, CH. 6 (1987); JOHN J. REGAN, TAX, ESTATE AND FINANCIAL PLANNING FOR THE ELDERLY, ch. 16 (rev. ed. 1990).

148. The leading case adopting the substituted judgment doctrine for discretionary distributions in the United States is *In re* Guardianship of Christianson, 248 Cal. App. 2d 398, 56 Cal. Rptr. 505 (1967). California has since codified the doctrine. *See* CAL. PROB. CODE § 2580 (West 1991 & Supp. 1993). *See* Michael P. Kane, Comment, *The Application of the Substitution of Judgment Doctrine in Planning an Incompetent's Estate*, 16 VILL. L. REV. 132 (1970). *But see In re* Berger, 520 N.E.2d 690, 707 (Ill. App. Ct. 1987) ("Some jurisdictions authorize making allowances out of an incompetent's estate for the benefit of relatives on the basis of general application of this doctrine. . . . This doctrine has been neither rejected nor adopted by Illinois."); and the dissent by Justice Rizzi: "Although neither the Illinois Probate Act nor the Illinois Probate Act of 1975 has a provision which specifically concerns substituted judgment, I believe that the provisions of these Acts are . . . broad enough to encompass that concept." *Id.* at 712.

factors, namely: permanence of condition, needs of the disabled person, devolution of the property and donative intent.[149] These factors are among those generally included in the New York guardian legislation[150] and presumably operating *de facto* in the Illinois statutes.[151]

In the context of our hypotheticals, the doctrine of substituted judgment (found in the New York and Illinois acts) as currently developed does not apply to the teenage accident victim but could apply to the disabled adult child. Whether a particular court would apply the doctrine may depend on the fourth factor, donative intent. Since a child generally lacks capacity to make gifts of property, subjective donative intent has not been established by a tradition or a pattern of gift giving. For some courts, this may preclude the application of the doctrine; other courts presumably would surmise a probable donative intent on the facts and circumstances.[152] Nevertheless, the application of the substituted judgment doctrine does not mandate a particular result. A court must resolve the conflict raised by the third and fourth factors, that is, between a distribution based on bloodline status (devolution of the property) and a distribution based on acts (donative intent). Given the underlying rationale of the doctrine (to do what this disabled person would do if able), it stretches the imagination to think a court would find that an abandoned child would treat an unknown abandoning parent the same as a caring parent.

Even if a court applies the doctrine, judicial limits exist on the court's ability to make financial decisions.[153] The substituted judgment doctrine in financial matters, as developed by the courts, includes the power to make corpus distributions as well as income distributions,[154] to allow for the

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For an excellent discussion concerning the doctrine of substituted judgment and its deployment in the health care informed consent arena, *see* Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1 (1990).

149. *See, e.g., In re* Guardianship of Christianson, *supra* note 148.

150. N.Y. MENTAL HYG. LAW § 81.21(d) (McKinney Supp. 1993).

151. The Illinois conditional gift statute seems to anticipate the donative intent concern by stating: "It shall be presumed that the disabled person intends to make such conditional gifts." 755 ILL. COMP. STAT. § 5/11a-18.1(a) (1993).

152. *See, e.g., In re* Brennan C. Daly, 536 N.Y.S. 2d 393 (1988), where the Surrogate's court did authorize on a one year trial basis the making of annual exclusion gifts from the guardianship estate of an eleven-year-old brain damaged child to his siblings from the estate's excess income. The court indicated subjective intent is not required here especially as this would place a person disabled at birth at an unfair disadvantage: "In this day and in these circumstances, it would be inappropriate to cling in dogmatic fashion to rules which are incapable of satisfaction. Rather, the court in pursuit of its equitable powers is called upon to do justice." *Id.* at 395.

153. The substituted judgment doctrine in financial matters is separate and to be distinguished from the substituted judgment doctrine in personal care matters, such as health care decisions. *See, e.g.*, Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990). *See also* Harmon, *supra* note 148.

154. "If the quoted language was intended to suggest that the principle of substitution of judgment . . . can have no application to a disbursement from principal, it is not an acceptable statement of the Delaware law. I conclude that the substitution of judgment doctrine is not so

making of inter vivos gifts (generally for tax savings purposes)[155] and to provide for persons outside of the traditional family.[156] It has not been extended by the courts to the making of a will preferring one person over another. Until the eve of the new New York guardian legislation, there were no reported cases supporting a similar but non-testamentary arrangement, such as a inter vivos trust containing deathtime distributions differing from intestacy.[157] Despite its efficacy, this judicial doctrine has not evolved to include deathtime distributions in most jurisdictions in the absence of strong legislative support.[158] In those jurisdictions without other compensating judicial or legislative remedies, the doctrine is helpful and should not be ignored, but it is an incomplete remedy. The doctrine is not universally applied, and its narrow scope of donors (incapacitated persons) and transfers (inter vivos gifts) underscores its limitations.

VI. CONCLUSION

The tragic problem of parental abandonment of a child and the abandoning parent's subsequent inheritance from the child may seem largely anecdotal and not highly important to the legal system. Marginalizing the fact pattern misses the mark, however, as the proper target is the perceived fairness of the legal system. The intestate system developed centuries ago when the concerns expressed here did not exist. The system cannot be ignored, but the system properly viewed provides its own solutions. First, courts can perform their institutional duty to declare the ever-evolving common law by interpreting

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restricted. Rather, the fact that a disbursement of principal is involved in the request only requires the court to move with greater caution in exercising its discretion." *In re* DuPont, 194 A.2d 309, 317 (Del. 1963).

155. *Id.* at 317 (authorizing a gift of $36,000,000 and payment of $21,000,000 gift tax from an incompetent's estate, for a total depletion of $57,000,000). *See also In re* Carson, 241 N.Y.S.2d 288 (1962); *In re* Kenan, 138 S.E.2d 547 (N.C. 1964).

156. *E.g.*, *In re* Heeney, 2 Barb. Ch. 326 (N.Y. Ch. 1847) the court permitted the continuation of a gift program to three elderly friends of "the same allowance which Mr. Heeney was in the habit of making to them." *See also In re* Brice, 8 N.W.2d 576 (Iowa 1943) (grant to a nephew).

157. The Surrogate's Court for Kings County approved the creation of a trust by a conservator, stating: "At the outset, it is observed that under the existing laws of this state, no statute exists expressly empowering the court to authorize the creation of trusts on behalf of a person under a disability. However, effective April 1, 1993, the courts will have the statutory authority to create trusts and sanction other types of transfers on behalf of these persons. (L. 1992, ch. 698, § 81.21). Until such date, the judicial doctrine of substituted judgment provides the governing authority for assessing the propriety of a proposed transfer for the purpose of providing for the needs of one other than the ward/transferor." *In re* Bessie H. Grabow, 591 N.Y.S.2d 754, 756 (Nov. 12, 1992).

158. *See In re* Estate of Anderson, 671 P.2d 165, 169 (Utah 1983) ("Read in harmony, these sections specifically exclude from the power of the court all dispositions made by will, because a will is ambulatory and does not speak until death.").

"parent" functionally when one claims an inheritance from a child. Similarly, in contexts involving guardianships, courts should use and develop the substituted judgment doctrine in a manner that favors a caring parent over an abandoning parent during the child's lifetime as well as at the child's death. Second, courts could recognize the role of the ecclesiastical courts in the development of the common law and invoke the equitable doctrine of *indignitas* to work a forfeiture or, alternatively, to assist in its functional definition of parent. Third, and most concretely, legislatures could enact abandonment statutes directly into the intestate schemes to reflect societal wishes. They also could enact legislation similar to Illinois' conditional gift statute and custodial claim statute or New York's Article 81, aimed at rewarding positive conduct.

The root of the legal problem is intestacy's historic link to feudal life and to property rights based on inflexible bloodlines. It is time for the legal system to recognize that in certain compelling circumstances, positive acts of responsibility should prevail over willful displays of irresponsibility.