

We Are Family, Aren't We? Modern Families and Outdated Probate Laws

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Danaya C. Wright, [Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Nontraditional Families](#), 25 **Cornell J.L. & Pub. Pol'y** 1 (2015).

In her article, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Nontraditional Families*, [Professor Danaya C. Wright](#) examines the negative effect that outdated intestate succession statutes have on today's modern families. Even though a majority of children today do not live in a 1950s type nuclear family, the intestate succession statutes in each of the fifty states still only protect those children. Families have evolved; state probate codes have not. Step-children, children born out of wedlock, children raised by lesbian or gay couples, and children raised by relatives are just some of the children who are disadvantaged by out of date inheritance laws. If laws of inheritance are to effectuate the desires of decedents, then they are failing. Professor Wright advocates for change and provides us with a model statute.

Professor Wright's article begins a much-needed discussion about how probate codes and family law codes are not aligned. She states, and I agree, that an article such as this one could be written for each state. While family law has expanded the definition of family, probate codes remain rigid. Family law recognizes functional parents; probate law does not. Therefore, there are instances where a person may be responsible for child support while alive, but at his death the supported child is not entitled to an inheritance from him.

Professor Wright identifies two egregious situations where "the interplay of adoption and inheritance law" results in disadvantages to "millions of American children". In situations where a functional parent does not formally adopt a child, such child most likely will not inherit from the functional parent. In situations where a co-parent adopts a child, the child is typically disinherited from a biological parent, even if the parent continues to function as a parent. She also articulates why a will does not always solve the issues of inheritance.

Suppose a father has a child with a first wife. After the death of the first wife, father remarries. His new spouse raises his daughter as her own, but does not adopt her. The father and his new wife have wills where each leaves his or her estate to the other. Therefore, at the death of the father, his estate goes to his surviving spouse, the new wife. If the wife's will does not provide for contingent beneficiaries, at the wife's death, her collateral relatives would be her legal heirs rather than her step-daughter. Also, if other family members devise gifts to the wife, the step-daughter would not inherit through her deceased step-mother, even though such step-mother was her functional parent. Other family members would need to execute wills to include the step-daughter as a beneficiary. Alternatively, let's assume that the new wife adopts her step-daughter and her step-daughter's maternal grandmother (her deceased mother's mother) dies with a will devising her estate to her children, per stirpes. As a result of the step-parent adoption, that child is no longer her biological grandmother's grandchild. She would not inherit by representation her mother's share under her grandmother's will. In each of these examples, the intent of the decedent does not prevail. Antilapse statutes and class gifts are also affected by the current presumptions.

I agree with Professor Wright that the presumption should be in favor of inheritance in such relationships. She argues for a number of legal changes including judicial discretion to use equitable principles and technical revisions to state probate codes. She provides a model statute that includes a functional child provision and the evidence needed to show that an individual was functioning as a parent. The model statute proposes that the intent to disinherit such child should be in writing.

Efficient administration of an estate is necessary in probate law. Courts should be concerned about children (or adults) wrongfully claiming to be heirs because a decedent acted as a parent. However, Wright suggests that this is a rare issue in practice. Trusts and Estates scholars should accept Professor Wright's challenge and continue writing and discussing these issues. "When laws stop protecting the very population they seek to benefit, it is past the time for change."

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