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POCKETS OF POVERTY: THE SECOND WIVES CLUB—
EXAMINING THE FINANCIAL [IN]SECURITY OF WOMEN IN
REMMARRIAGES

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I. INTRODUCTION

A vast amount of literature shows that women are financially disadvantaged, relative to men, in marriage. The objective in this essay is to “follow the money” in stepfamilies in order to document the financial effects of existing laws and policies in two areas: stepparent’s financial responsibilities to stepchildren and inheri-

1. See generally GARY S. BECKER, A TREATISE ON THE FAMILY (1991) (describing family roles and how some roles are valued more than others); DAWN BRADLEY BERRY, EQUAL COMPENSATION FOR WOMEN: A GUIDE TO GETTING WHAT YOU'RE WORTH IN SALARY, BENEFITS, AND RESPECT (1994) (explaining the legal steps women can take to demand equal pay); JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE (1996) (viewing financial obstacles for certain family members when describing the political values of the family).
tance in steprelationships. In other words, this essay aims to begin a dialogue about important questions affecting stepfamily relationships—questions such as what is going on with stepfamily money and how these financial issues are currently addressed. This essay also provides suggestions to effectively address the difficult financial issues facing women. The following discussion is not about abstract economic theory. It is about women needing and having personal financial security in the real world.

Currently, little research specifically pertaining to remarriage and financial issues exists and this research is limited in scope. However, this preliminary look at the financial position of women offers compelling reasons why women in remarriages are becoming increasingly financially marginalized.

This essay initially surveys the financial consequences of laws and policies, as shown by appellate court cases and state statutes. The survey of cases and statutes will demonstrate that there is good reason for women to feel financially disadvantaged. In fact, some women consider themselves disadvantaged at a high enough level to leave their marriages, while many other women who are in ongoing marriages struggle to address current inequalities.

One critical area of family building that has not received much attention is the merging of finances—if, in fact, spouses in a stepfamily actually do merge their finances. This issue becomes even more murky when couples cohabit instead of remarrying. Little research has been done in the area of cohabitation and quasi-stepfamilies, and more research is certainly needed. Notwithstanding the lack of research, this essay focuses primarily on remarried couples. To date, few social scientists have undertaken the task of

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relating intra-family financial security with the various aspects of family law. 4

The economic perils associated with the changing composition of families have not yet been adequately studied. In general, society does not tell women what life is really like financially. Society provides limited economic education for women and rests upon the general assumption that there will always be a man to provide for a woman's needs. However, society appears to ignore the high divorce rate in this country, the generally recognized disproportionate custodial and financial burden that mothers assume for children, 5 the actuarial assumption that women live longer than men, and the fact that some women do not wish to be economically dependent upon men.

The faulty legal definition of modern marriage as being a "marital partnership" may conceal a married woman's poverty. 6 While the rhetoric of a partnership abounds in our culture today, a true legal partnership only exists if the husband allows it to exist. 7 Married women may assume that the rhetoric of partnership is enough, but research shows that this assumption is wrong. 8 Women cannot rely upon the spirit of generosity. By examining the laws and policies of divorce and inheritance, as articulated by appellate court cases and state statutes, Parts I and II of this essay will prove that marriage is not a partnership in the eyes of the law.

How many financially vulnerable women are there nationwide? In general, demographic, social and economic data comes from the census, which is taken every ten years. Current information is provisional, while "final and more detailed data are older." 9 This essay typically uses older and more detailed data because it provides a better overall picture of stepfamily relationships in the United States.

8. See id. at 1418.
9. CYNTHIA M. TAEUBER, STATISTICAL HANDBOOK ON WOMEN IN AMERICA i (2d ed. 1996).
Data indicates that a large percentage of our population is remarried and is therefore in a "step" relationship. One out of every three Americans is a stepparent, stepchild, stepsibling, or other member of a stepfamily.10 Using the 1990 census data, Sally Clarke found that 20% of remarriages were remarriages for both the husband and the wife,11 while 11% of remarriages were between a single woman and a divorced man,12 and another 1% of remarriages were between a single man and a divorced woman.13 This leaves a small percentage to account for widows and widowers who remarried. Put another way, approximately two-thirds of divorced women remarry.14 In addition, "most remarriages take place relatively soon after divorce."15 To complicate a woman's financial security even further, "redivorce is somewhat more likely than first divorce."16 This marital cycle has a generally recognized detrimental effect on child support and on a woman's ability to create personal financial security through job continuity, retirement benefits, and inheritance.

Because stepfamilies can no longer be considered a dramatic departure from the nuclear family,17 people assume that they know all they need to know about remarriage. Generally, society does not seem to have an awareness of the differences between first and second marriages18 or how laws and policies may be detrimental to second marriages. The fragility of second marriages,19 however, may have much to do with the agony adults and children encounter, feeling as if they may not be up to the tasks facing them in a step-family.20 A sampling of appellate cases and laws21 also indicates

10. See Paul C. Glick, Parents with Young Stepchildren and with Adult Stepchildren: A Demographic Profile 16, Paper presented to the Stepfamily Association of America (Oct. 4, 1991) (on file with author) [hereinafter Glick, A Demographic Profile]; see also Norton & Miller, supra note 5, at 5 (stating that “more than 4 out of 10 marriages in the United States involve a second or higher-order marriage for the bride, the groom, or both.”).


12. See id.

13. See id.

14. See Norton & Miller, supra note 5, at 5.

15. Id. at 8.

16. Id. at 6.

17. See Glick, A Demographic Profile, supra note 10, at 16.

18. See Betty Carter & Monica McGoldrick, Forming a Remarried Family, in THE CHANGING FAMILY LIFE CYCLE: A FRAMEWORK FOR FAMILY THERAPY 399, 402 (2d ed. 1989) (discussing the fact that most people, including therapists, do not recognize the complexities of a second marriage and therefore fail to recognize a distinction between first and second marriages).

19. See Norton & Miller, supra note 5, at 5.

20. See Carter & McGoldrick, supra note 18, at 405-06 (discussing potential emotional issues resulting from divorce and remarriage).

21. See infra Parts II, III.
that our laws and policies may be hostile to stepparents and stepchildren, augmenting the differences between first and second marriages.\textsuperscript{22}

Financial issues in remarriage are the cornerstone of a woman's personal financial security. The potential magnitude of these economic perils is extraordinarily large due to the restructuring of marriage.\textsuperscript{23} Given this restructuring of marriage, and longer life expectancies in our modern society, we can expect the number of remarriages to increase, even if divorces decline, making the issue very important at this time.

A. Structure of American Law Affecting Remarriage

There appears to be an enormous hole in current remarriage laws and policies. It is almost as if society decided that the remarriage issue is too complicated to address and, in an attempt to ignore existing and potential problems, it set up a "zone of privacy" around marital finances. To understand a remarried woman's financial situation, a study of the law's role in the problem is necessary. A preliminary look at the legal positions regarding adult financial responsibility for both children and inheritance indicates that the law reflects neither the psychological and financial positions of women, nor the needs of children.\textsuperscript{24} Many current laws were constructed at a time when women were systematically excluded from participating in their creation.\textsuperscript{25} Without an understanding of the real world of women, updated laws cannot reflect reality or seek viable solutions to women's financial problems. Additionally, social science research reveals very little about the financial world of remarried women.\textsuperscript{26}

A remarried woman's financial perils may be explained by society's insistence on keeping the private and the public spheres separate and distinct. A philosophy of "the personal is political" is at the core of most contemporary feminism.\textsuperscript{27} For women, the

\textsuperscript{22} See generally Carolyn R. Glick, The Spousal Share in Intestate Succession: Stepparents Are Getting Shortchanged, 74 MINN. L. REV. 631, 631-59 (1990) [hereinafter Glick, Stepparents Are Getting Shortchanged] (arguing that despite the adoption and revision of the Uniform Probate Code's spousal share provision, further revision is necessary to meet the needs of stepfamilies, a group the legal system has largely ignored).

\textsuperscript{23} See Norton & Miller, supra note 5, at 1.

\textsuperscript{24} See Glick, A Demographic Profile, supra note 10, at 15.

\textsuperscript{25} See MARTHA A. FINEMAN & ISABEL KARPIN, MOTHERS IN LAW 147 (1995).

\textsuperscript{26} For a useful summary of this literature, see generally Pasley & Futris, supra note 4.

\textsuperscript{27} See generally SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 110-33 (1989) (discussing the close relationship between the supposedly distinct public and domestic
public and domestic spheres are in many ways not distinct or separate realms at all. "[T]o the extent that a more private, domestic sphere does exist, its very existence, the limits that define it, and the types of behavior that are acceptable and not acceptable within it all result from political decisions."

The state may be to blame for these problems because the state is responsible for the background rules that affect people's domestic behaviors. After all, the legislatures and courts in individual states determine the laws and policies regarding marriage, divorce, and inheritance, and these laws affect women in a very real way. This is not feminist rhetoric—it is reality. Discussions throughout this essay will allude to the magnitude of the state's role in perpetuating the financial perils of women in stepfamilies and will give examples of how the state designs and reinforces financial decisions that have a negative effect on women in remarriages.

B. Income Disparity and Directional Inferences About Causality

An analysis of the conditions and variables that yield income disparity leads to some directional inferences about causality. At the very beginning of a marriage, sacrifice becomes an issue because many married women are resigned to a lack of personal fulfillment, unless they can successfully juggle family and career. Social custom has assigned women to the role of the unpaid primary care-giver in the domicile and for elderly or ill kin living elsewhere. In remarriages, this unpaid care-giving role also extends to stepchildren. Society knows that this unpaid caretaking role falls primarily on women, but most people have not given sufficient thought to what this responsibility means. Nonetheless, the unpaid care-giver role affects every aspect of a woman's life, including her personal financial security.

Taken as a whole, remarriage probably reduces some of the stresses associated with women's economic insecurity. However,

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28. Id. at 129.
30. See generally Stephanie Coontz, The Way We Never Were: American Families and the Nostalgia Trap (1992) (discussing research results indicating that women, in addition to taking on the demands of their careers, are more likely than their husbands to take on the responsibilities of housework and childcare).
married women's economic dependence in two-parent families has been described as, "perhaps, the most hidden dimension of inequality in contemporary society." Women often find themselves in perplexing financial conditions even though family income and net worth may be high. "Although married women have more family resources to invest in family members, they may be just as economically dependent as non-married mothers" if they do not have and maintain personal financial security.

The law fails women in the area of employment as well. For example, in too many instances, women are still paid lower wages than men for the same work. As a direct result of women's caretaking role assignment, mothers often find themselves on a "mommy track" for career development. In addition, the "marriage tax," while neutral in wording, disproportionately affects family decisions regarding the wife's work and the family's second income. Such inequalities work against a woman who is trying to create her own financial security.

C. Backdrop for This Modern Dilemma

The limited body of literature that addresses the modern financial dilemma in remarriage began in 1976. Thus, researchers have considered financial issues in remarriage for only the past twenty-three years. Even though earlier reports of finances as a primary source of stress in families existed, researchers had previously paid little attention to this aspect of stepfamily life.

34. See Berry, supra note 1, at xi.
35. See id. at 185.
36. See, e.g., U.S. MASTER TAX GUIDE 26-27 (C.C.H. 1999). Many couples, in assessing the value and costs associated with different sources of family income, tend to "simplify the tax code" by viewing the first dollar of the second spouse's income, usually the wife's, as taxed at the same rate as the last dollar of the first spouse's income, usually the husband's. While this is not quite the way the marginal rate of tax on incremental income works, this perception impacts the financial decisions a household makes. See generally Berry, supra note 1 (explaining how the tax system discourages two income marriages and thereby encourages women to stay at home).
37. See, e.g., Messinger, supra note 2, at 193-200.
1. Research on Stepfamilies and Money

Early researchers' investigations into the financial challenges of remarriage in North America indicated that the second largest source of difficulties in remarriage included financial problems. A number of years passed, however, before the recognition of financial difficulties in remarriage led to questions about how these families actually handled their money. Barbara Fishman addressed such issues in The Economic Behavior of Stepfamilies. Fishman identified two distinct methods for handling stepfamily finances. The first method, called "Common Pot Stepfamilies," is a method of pooling resources and distributing them according to need. The second method, based upon an exchange theory, is termed "Two Pot Stepfamilies." This method maintains that resources are kept separate and distribution is made to family members primarily according to biological identity. Fishman found that the "financial commitment to a new wife or new husband comes slowly; and still more slowly, if at all, comes financial commitment to step-children." As such, couples in stepfamilies need to develop a concept of the common good which is balanced by money management that encourages personal autonomy.

The discovery that remarriage economic behavior differed from first marriage behavior quickly led to questions about how the government assesses choices for meeting the financial needs of various children. Sarah Ramsey and Judith Masson addressed this topic in their journal article, Stepparent Support of Stepchildren: A Comparative Analysis of Policies and Problems in the American and English Experience. Ramsey and Masson focused on the United States and England because "their shared common law heritage simplifies comparison of family legal relations." They discovered that "[n]ot all countries have been as reticent as the United States to impose a support obligation on stepparents." In England, "stepparents have also been expected to support

39. See Messinger, supra note 2, at 197.
40. See Fishman, supra note 2.
41. See id. at 366.
42. The "exchange theory" used in this marital finances context presumes that a married couple will choose the financial behavior that gives each spouse her fair share. In this context, each married partner maintains control over personal resources.
43. See Fishman, supra note 2, at 366.
44. Id.
45. See id.
46. See Ramsey & Masson, supra note 2.
47. Id. at 680.
48. Id. at 663.
stepchildren living in the home during marriage and, since 1958, stepparents could be required to continue support after the termination of their marriage."\textsuperscript{49} Because of the large variety of stepfamilies,\textsuperscript{50} Ramsey and Masson concluded that "a general policy of non-interference with stepfamilies would seem to be the best approach."\textsuperscript{51}

Another team of researchers observed that "[t]he marital relationship has been complicated and family unity threatened when pre-existing financial strains and problems were carried into a subsequent marriage."\textsuperscript{52} They recommended "preparation for remarriage" programs in order to help these couples manage their financial problems.\textsuperscript{53} Shortly thereafter, another scholar explained that remarried couples have a double burden of managing the generic issues of family life, as well as the financial circumstances that are unique to remarriage.\textsuperscript{54}

As the number of stepfamilies increased, court cases addressing inheritance rights began to challenge the assumptions of blood-line inheritance.\textsuperscript{55} While individually written and properly executed wills often produced clear directives that considered step-relationships, most American intestacy laws continue not to recognize step-relationships.\textsuperscript{56} Margaret Mahoney criticized the laws of intestate succession and argued against any law that would base inheritance decisions on birth status alone because modern family life is too complex.\textsuperscript{57}

The next development in the research pertaining to stepfamilies occurred when Kay Pasley expanded Fishman's model,\textsuperscript{58} by putting couples into one of three financial management strategy groups: those having only joint accounts, those having only separate accounts, and those having a combination of joint and

\textsuperscript{49} Id.

\textsuperscript{50} For example, some stepfamilies consist of children brought into the family from both the remarried adults. Other stepfamilies consist of children brought into the family only by the wife or the husband. Moreover, disparate ages between adults and between children in the combined family may cause a great deal of variation between stepfamilies, in addition to differences caused by race, religion and culture.

\textsuperscript{51} Ramsey & Masson, supra note 2, at 714.

\textsuperscript{52} Lown & Dolan, supra note 2, at 73.

\textsuperscript{53} See id. at 85.

\textsuperscript{54} See Coleman & Ganong, supra note 2, at 217-18 (citing child support, debt from a previous marriage, and expenses associated with merging two households as problems unique to remarriage).

\textsuperscript{55} See, e.g., Chambers v. Warren, 657 S.W.2d 3 (Tex. Ct. App. 1983) (interpreting a will in favor of stepchildren and not the natural children).

\textsuperscript{56} See Mahoney, supra note 2, at 917-18.

\textsuperscript{57} See id. at 938.

\textsuperscript{58} See Fishman, supra note 2, at 359-66; see also supra text accompanying notes 40-45.
separate accounts. The study found a variety of reasons why a couple chooses one of these money management strategies. These reasons include the partners' attitudes toward financial management and decision making, a couple's ability to work out solutions that are mutually satisfactory, the structural complexity of the stepfamily, a couple's marital history, a couple's conflict over finances, and their attitudes toward power and control.

Finally, Lingxin Hao analyzed the distribution of family wealth and transfers through an analysis of the family structure, including remarriage. This analysis provides useful data on the effects that the family structure has on transfers, and their resulting impact on family wealth. However, it fails to provide data about the inheritance decision-making process that remarried couples undertake.

These above-mentioned studies encompass the extent of the existing research that primarily focuses on remarriage and money management. However, none of these works speak directly to the wife's personal financial security. Although the apparent purpose of each study was to gather information about the money management in remarriage, the effect of money management styles on family relationships was the underlying theme. Furthermore, each study recognized the need for additional information in order to support stepfamilies in their search for successful role models. Therefore, although remarriage is incredibly commonplace in the United States, gaps in the literature exist.

2. Growing Awareness of a Problem

Divorce, single parenting, living together, and remarriage are now common stages in American life. As a result, people need to reorganize their financial views of their world, especially since changing relations between men and women create a complicated financial picture. In the past, most women deferred to their

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59. See Pasley et al., supra note 2, at 56-57, 61-62.
60. See id. at 67-68.
61. See Hao, supra note 2.
62. See id. at 279-86.
63. See id.
64. See Glick, A Demographic Profile, supra note 10, at 15-16.
65. See id.
husbands as the primary money managers. Remarriage has altered this dynamic.

If the old rules that called for women to rear children and men to earn and manage the finances are not working well in first-marriage families, which they are not, they have absolutely no chance at all in a system where some of the children are strangers to the wife, and where the finances include sources of income and expenditure that are not in the husband's power to generate or control (e.g., alimony, child support, earnings of the ex-wife or current wife).

Thus, today, women who are gainfully employed and remarried may be more likely to make financial decisions for themselves and their children—a phenomenon which is accentuated in remarriage.

D. Conceptual Framework

The following sections review the financial experiences of wives. Part II analyzes stepparents' financial responsibilities for stepchildren. This research focuses upon existing laws and policies, as well as their implications for the stepparent, the biological parent, and the stepchild's financial security. It gives an overview of current policy and statutory law, discusses the doctrines of in loco parentis and equitable estoppel, and examines express oral and written agreements to support stepchildren. This essay then discusses case law related to AFDC benefits and its connection to stepparent financial liability.

66. See generally Viviana A. Zelizer, The Social Meaning of Money 36-69 (1994) (describing the historical role of men as money managers and how this role has changed over time).

67. Carter & McGoldrick, supra note 18, at 400.

68. Within the AFDC federal guidelines, welfare officials are required to "deem" a portion of the residential stepparent's income to be available for stepchild support. This stepparent support is taken into consideration when the welfare officials compute the child's level of need for AFDC assistance—even if the funds are not actually provided by the stepparent. The government reformed the Aid to Families with Dependent Children program (AFDC), by replacing it with a state block grant program called Temporary Assistance for Needy Families (TANF). See Temporary Assistance for Needy Families, 42 U.S.C.A. §§ 601-673 (West Supp. 1998) (replacing Aid to Families with Dependant Children with a program of block grants to the states for the purpose of giving the states greater flexibility). Sample appellate cases will show that having to submit to the various federal assistance programs' demands adversely affected some families. See, e.g., Shaffer v. Dept of Welfare, 485 A.2d 896 (Pa. Comm. 1985) (describing a situation wherein the custodial mother's remarriage ended her daughter's AFDC benefits). See also infra notes 185-94.
Because couples within peak childbearing and rearing years form many new stepfamilies, this essay next considers case law regarding the support of stepchildren and biological children from prior and current unions. Although many cases deal with stepparents married to custodial parents, this essay also reviews the financial position of a stepparent who is married to a noncustodial parent. This essay then presents several different proposals for change which have been advanced by legal, therapeutic, and academic professionals who work with and/or study families.

Part III discusses the impact that inheritance laws have on subsequent wives. This essay argues that the partnership theory of marriage cannot fully develop when existing laws and policies create artificial restrictions. This essay then discusses the need to remove such restrictions. Anecdotal evidence shows that inheritance issues cause discomfort for many stepfamilies and the common response may be to do nothing. However, this essay argues that the consequences of doing nothing surface as probate and intestacy problems. Moreover, this essay suggests that the issue of relatedness is central to the confusion that surrounds the connections between stepparent and stepchild. In addition, observations that professionals who work with and/or study families will be discussed.

As this essay will show in Parts II and III, it is clear that legal decisions are made on a case-by-case basis. This case-by-case formula provides no foundation for laws that will protect the personal financial security of second wives. As a result, the contemporary legal system still affords remarried women little or no control over many aspects of their financial lives. Parts IV and V of this essay will discuss the policy considerations behind women's needs for financial security, as well as recommendations and proposals for the future.

69. See infra notes 113-96 and accompanying text.
70. See infra notes 197-204 and accompanying text.
71. See infra notes 205-37 and accompanying text.
72. See infra notes 251-59 and accompanying text.
73. See infra notes 260-352 and accompanying text.
74. See infra notes 353-427 and accompanying text.
75. See infra notes 428-36 and accompanying text.
II. STEPPARENTS AND STEPCHILDREN: FINANCIAL RESPONSIBILITY AND THE LAW

Confusion about stepparent financial responsibility for stepchildren permeates American society. From political institutions, to legal codes, to the actions and attitudes of individual family members, questions abound with regard to the appropriate and necessary role a stepparent should play in the fiscal support of a stepchild. Most people do not have an accurate view of the obligations family law imposes, and most people pay little attention to the law as they form their relationships.76

At the same time, American law has no comprehensive definition of the stepfamily. The American Bar Association's Model Act Establishing Rights and Duties of Stepparents77 and the United States Census Bureau provide two examples. The American Bar Association tentatively defines stepparent as "a person who is married to the person who . . . has custody of a minor child."78 The Census Bureau, however, defines stepfamily as a "married-couple family" with at least one stepchild of the householder present, where the householder is the husband."79 How odd it is to use custody as the differentiator when society emphasizes a continued connection between a child and both of the biological parents, not only for minors, but for adult children as well. Adding to this confusion, researchers have found that the relationships between stepparents and their stepchildren vary widely from one family to the next, particularly relating to the degree of economic and custodial responsibility assumed by the stepparent.80

78. Id. In 1987, the Family Law Section of the American Bar Association began work on the Model Act Establishing Rights and Duties of Stepparents but the resolution has been tabled while awaiting more input. See id. at 138. Even with the increased focus on visitation rights and joint custody, the ABA has not yet recognized the stepparent status of the spouse of a non-custodial parent. See id. at 137-41. This is a major oversight.
What appears on the surface to be a lack of connection between stepfamilies and the legal system is more likely derived from assumptions regarding the social structure. It seems that many of the stepfamily financial difficulties result from structural issues relating to the institutions of marriage and the family. Indeed, the bias against stepfamilies has worked its way into laws and policies. Thus, the results, not surprisingly, confirm and reinforce existing biases. Family courts have been slow to accommodate people traditionally defined as outsiders, such as stepparents or stepchildren. As a result, the economic perils associated with the changing composition of families have not been adequately considered.

Some consensus does exist that marriage improves a woman's material well-being—at least to the extent of her husband's largesse within the marriage. This common consensus, however, does not consider whether remarriage improves the material well-being of stepchildren. Instead, it appears to have been taken for granted that some members of a family household cannot be rich while others are poor. However, "little is known about the flows of resources within households and what is known does not support the idea of intra-household equality." Therefore, assumptions about the equal or equitable distribution of income within stepfamilies are inevitably misguided and misleading.

Stepparents are already an important financial resource for children and more than one-half of today's young people in the United States will likely become stepsons or stepdaughters by the year 2000. With so many people involved, it seems likely that the states and the federal government will need to develop new and specific policies related to stepfamilies.

Courts have had difficulty accepting the possibility that it might be in the child's best interests to have two legal fathers. Due to high divorce rates, unwed parenthood, couples living together without the benefit of a legal document, and remarriages, it appears that all Americans are called upon to help rear each

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82. See generally Katharine Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Alternatives When the Premise of the Nuclear Family Has Failed, 70 VA. L. REv. 879 (1984) (criticizing the legal system's treatment of the nuclear family as an exclusive unit, when, in modern society, many children live in non-traditional family settings).
83. See Atkinson et al., supra note 32, at 426.
84. Engel, Pockets of Poverty, supra note 31, at 32.
85. See Bartlett, supra note 82, at 881.
86. See Paul C. Glick, Remarried Families, Stepfamilies, and Stepchildren: A Brief Demographic Profile, 38 FAM. REL. 24, 26 (1989) [hereinafter Glick, Remarried Families].
87. See Shapiro, supra note 81, at 118.
other's children. Now may be the time to consider the value of legally recognizing the fact that many children have more than two parents. The legal community might serve family values better if it recognizes that a child can, and often does, have two or more "mothers" and two or more "fathers."

With respect to the financial responsibility for children, no uniform treatment of the stepparent-child relationship exists among the states. Marriage to a child's parent would seem to create a legal relationship, but, this "step" relationship does not create rights and obligations between the parties and children. If this interpretation is correct, the illusion itself undoubtedly creates household friction. It would seem reasonable that the lack of clear legal obligations, rights, and privileges between stepparents and stepchildren would lessen their degree of commitment to each other, would weaken the marital bond, and would encourage the remarriage to fail.

Children look to parents for emotional care, food, and financial support. This parent is often a stepparent, and not a biological parent, yet courts are inconsistent about whether child support should be required in stepfamily relationships where a stepchild has developed a psychological or emotional bond—a parent-child relationship—with the stepparent.

The lack of legal recognition of these relationships may affect the stability and the individual sense of satisfaction within such relationships. For instance, legally married couples may be more likely to stay together because of the legal relationship than couples who are merely living together. In addition, a legal relationship with a child may create a stronger sense of responsibility to that child. Among other things, recognition of a legal relationship between the stepparent and the stepchild could open the way for a form of stepparent adoption of a stepchild, without the loss of the biological parent's rights or the loss of the child's inheritance rights from the biological parent. An adoption or inheritance of this type would recognize that biology is not the sole determining factor of whether someone is a parent.

88. See generally MARGARET M. MAHONEY, STEPFAMILIES AND THE LAW (1994) (hereinafter STEPFAMILIES AND THE LAW) (summarizing the different legal issues across the country which affect the stepparent-stepchild relationship).
It is commonly recognized that, in divorce by parental choice or by court order, courts award custody of children to mothers more often than fathers. Therefore, it is typically a custodial mother who forms a new family with a new husband and children from a prior relationship. The question then arises whether this change in the child's circumstances should be viewed as creating a child support obligation from the stepfather to the stepchild. Thus, this essay focuses on whether stepparents are legally obligated to support stepchildren.

A. Statutory Law: State Law of General Applicability

In this usage, "general applicability" refers to a stepparent's obligation to support stepchildren in a manner similar to a biological parent's obligation to support biological children; that is to say, support obligations of the stepparent and the biological parent would be coextensive. Some states include the residential stepparent as a source of support in specified situations. Some states may even impose criminal penalties upon stepparents who do not fulfill the statutory duty of supporting their stepchildren. Where states have a statute providing that a stepparent has a financial responsibility to support a stepchild, it appears to be a codification of the in loco parentis doctrine. Nevertheless, most stepchildren...


94. See ALASKA STAT. § 25.24.160 (Michie 1998) (imposing a financial obligation on the stepparent when there is an oral or written agreement to do so); IOWA CODE §§ 252A.2, 252B.1 (Supp. 1997) (defining a child as including a stepchild); KY. REV. STAT. ANN. § 205.310 (Michie 1995) (requiring any stepparent applying for public assistance to support a stepchild); MO. ANN. STAT. § 453.400 (West 1997) (requiring a stepparent to support a stepchild when living in the same home); N.J. STAT. ANN. § 9:6-2 (West 1998) (defining parent as including a stepparent); N.Y. SOC. SERV. LAW § 101 (Consol. 1998) (imposing liability on stepparents for their stepchildren); OR. REV. STAT. § 109.053 (1997) (imposing educational expenses on stepparents).

95. See NEB. REV. STAT. § 25.25.160 (Michie 1998) (imposing criminal penalties upon stepparents when they avoid a legal responsibility to support a stepchild).

96. See DEL. CODE ANN. tit. 13, § 505 (1993) (mandating a duty to support a stepchild by either marriage or cohabitation); HAW. REV. STAT. ANN. § 577-4 (Michie 1997) (stating that a stepparent acting in loco parentis is obligated to provide for the child if the child is in need); N.D. CENT. CODE § 14-09-09 (1997) (imposing responsibilities of parenting upon stepparents when stepparents stand in the place of biological parents); S.D. CODIFIED LAWS § 25-7-8 (Michie 1985) (stating that a stepparent is responsible for stepchildren in the same fashion as a natural parent); UTAH CODE ANN. § 78-45-4.1 (1998) (stating that a stepparent shall
cannot legally claim support from their residential stepparents because "[f]ew states have enacted statutes to enforce child support obligations on stepparents during their remarriages [to the child's biological parent]."\textsuperscript{97}

Exceptions to the aforementioned responsibilities are possible. For instance, in Massachusetts, stepparents are "not held responsible for anything"\textsuperscript{98} unless they adopt their stepchildren. However, custodial stepparents may have a financial responsibility if the stepchild thought the stepfather was the natural father.\textsuperscript{99} Thus, the law regarding stepparent financial responsibility to stepchildren varies from state to state and over time. Professor Mahoney points out that "an important generalization can be made about the current treatment of stepfamilies in the law. For the most part, the stepparent-child relationship is not regarded as a legal status."\textsuperscript{100}

\textbf{B. Current Federal Policy}

As with other family matters, such as marriage, divorce, adoption, and inheritance, the federal government has primarily left the responsibility of implementing child support obligations to the states. While laws governing personal relationships come from the states, federal law presides over a wide range of programs and policies that impact the lives of most Americans, including stepfamilies.\textsuperscript{101}

Because states make differing family laws, federal policymakers cannot rely on state legislatures to pursue a single clear direction regarding the rights and obligations of stepparents. For a transient population, this phenomenon creates difficulties—it is not easy for family members to always have a clear idea of their rights and responsibilities. Regardless, "[t]he federal government has already taken the lead, in support acts of 1984 and 1988, in making parents (usually divorced or unwed) more accountable for


\textsuperscript{98} Telephone Interview with Laura Kersner & Sharon Blocker, Attorneys in the Litigation Department of the Massachusetts Department of Revenue, Child Support Enforcement Division (Feb. 11, 1997).

\textsuperscript{99} See id.

\textsuperscript{100} \textit{Stepfamilies and the Law}, supra note 88, at 232.

\textsuperscript{101} See infra notes 176-83 and accompanying text (describing how the requirements of AFDC, and its successor TANF, affect the economic stability of stepfamilies).
the support of their children." Thus, federal benefit programs are "the most far-reaching aspect of the federal treatment of stepfamilies." As the provider of benefits through such programs as Aid to Families with Dependent Children (AFDC), and its successor TANF, the federal government appears to set eligibility standards that affect the economic well-being of many children and may overwrite state laws in the process.

Nevertheless, the federal government is inconsistent in its approach to the stepparent-stepchild relationship. For instance, federal programs define stepchildren differently from program to program and treat stepchildren differently from other children.

Consider the Internal Revenue Code's treatment of step-relatives. The Code points out that "[in computing taxable income, . . . 'dependent' [is defined] to potentially include stepchildren, stepparents, and stepsiblings." Also, the Code provides that a stepchild may enable a taxpayer to qualify as a "Head of Household." Finally, "[u]nder the rules for the Earned Income Tax Credit, "child" is defined to include stepchildren, provided that the stepparent's residence is the stepchild's principle place of abode."

Nevertheless, "[n]either the term stepparent nor the term stepchild is defined anywhere in the Internal Revenue Code or Treasury regulations." Without defining a stepparent or a stepchild, the Internal Revenue Code is bound to reveal inconsistencies in the income tax treatment of the step-relationship. To accord stepparents uniformity in their legal obligations to their stepchildren, consistent federal income tax recognition of the stepfamily is necessary.

Besides inconsistencies within the Internal Revenue Code, federal law is also inconsistent with respect to student loans.

103. Id. at 451.
104. See id. at 452.
105. Id. at 464 & n.103 (citing 26 C.F.R. § 1.152 (1995)).
106. See id. at 464.
107. Id.
College-bound stepchildren meet a roadblock in the first phase of application for financial aid. When applying for financial aid, all schools of higher education require applicants to complete a copy of the Free Application for Federal Student Aid (FAFSA).  

This form defines "family" as the student's custodial unit, the parent with whom the child lived the most for the past twelve months, and this custodial unit includes stepparents. As a result, the FAFSA requires financial information from both the custodial parent and the stepparent. "If the loan program can in any way characterize the student as a family dependent, it will look to the resources of other family members in calculating eligibility for and terms of the loan." Without a stepparent's legal obligation, which is currently lacking, this resource is really an illusion and makes needy stepchildren dependent upon the voluntary contributions of their stepparents.

C. In Loco Parentis

The legal phrase in loco parentis means literally "[i]n the place of the parent." In general, this relationship can apply to custodial relationships, such as between a university and its students. For the most part, the concept of in loco parentis arises during divorce proceedings between the biological parent and the stepparent—when the divorcing couple is debating financial support. Almost one-half of the children who live through their mother's first divorce are likely to experience the dissolution of their mother's second marriage as well. At issue is whether or not the stepfather has a financial support obligation to his stepchild[ren]. However, in family law usage, in loco parentis implies both


110. See id. at ¶ F.

111. See Margorie Engel, Steps Ahead with Daisy Petals: They Love Me, College Expenses, Address at the 12th Annual Stepfamily Conference (July 20, 1994) (on file with author) [hereinafter Engel, College Expenses].


113. BLACK'S LAW DICTIONARY, supra note 96, at 787.


115. See Larry L. Bumpass, Children and Marital Disruption: A Replication and Update, 21 DEMOGRAPHY 71, 80 (1984); see also Glick, A Demographic Profile, supra note 10, at 2 (explaining how the numbers of remarried families and stepchildren are determined).
custodial and financial responsibility—literally taking on the primary responsibilities of the absent parent.116

The in loco parentis doctrine does not adequately meet the needs of the modern stepfamily. Even when the stepparent intends to take the place of the missing noncustodial parent, the stepparent can voluntarily terminate the relationship.117 "Ordinarily, any in loco parentis relationship that existed during the marriage is seen as ending at divorce."118

Courts seem "reluctant to declare the existence of an in loco parentis relationship because they fear such determinations will dissuade stepparents from developing close relationships with their stepchildren."119 However, when a stepparent and stepchild live in the same home, declaring an intention not to stand in loco parentis could create tense household relationships and do little to support a sense of "family."120 Nonetheless, by agreeing—expressly or implicitly—to care for, raise, and educate a stepchild, it is possible for a stepparent to become financially and legally responsible for that stepchild.121 In addition, noncustodial fathers' refusals to provide any support for their children have led several states to require that residential stepparents provide support under the principle of in loco parentis, regardless of their agreement to do so.122 For example, in Mears v. Mears,123 the Iowa Supreme Court held that the

duty [of the stepfather] to support his wife's children while [they were] in his home should be limited to the extent their being in his home may have increased the cost of their maintenance by reason of a higher living scale than that experienced during the marriage of their mother and father.124

116. See text accompanying supra note 97.
117. See Ramsey & Masson, supra note 2, at 673.
119. Fine & Fine, supra note 97, at 52 & n.17 (referring to In re Marriage of Holcomb, 471 N.W.2d 76 (Iowa Ct. App. 1991)).
120. See id.
121. See id.
122. See id.
123. 213 N.W.2d 511 (Iowa 1973).
124. Id. at 518.
The primary criterion courts have used to find an *in loco parentis* relationship is financial support.\(^{125}\) Courts have also recognized other narrow exceptions when finding an *in loco parentis* relationship. In *Gustin v. Gustin*,\(^{126}\) the Ohio Court of Appeals reasoned that when “a man marries a woman whom he knows is pregnant by another man, he will be compelled to continue to support the child after his marriage is dissolved.”\(^{127}\) In *Clevenger v. Clevenger*,\(^{128}\) a California court held that if a stepfather accepted a child, conceived by his wife and another man during the marriage, as his own and acted as the child’s father, then he would be obligated to the child if he represented to the child that he was the father.\(^{129}\) Therefore, a stepfather could not subsequently assert the child’s illegitimacy in order to avoid support obligations.

Finally, some courts consider more than money when finding an *in loco parentis* relationship.\(^{130}\) The Court of Special Appeals of Maryland upheld an award of use and possession of the family home to the wife for a three-year period following a nine-month temporary alimony award.\(^{131}\) The reasoning behind the court’s decision was that the wife had custody of a minor child who needed to live in a home—even though the child was a stepchild of her husband.\(^{132}\) This judicial decision is unusual because courts generally rule that stepparents have no financial responsibility after a divorce for a stepchild, to the point that a custodial parent’s child-related expenses are not even considered in setting an alimony amount.\(^{133}\)

### D. Equitable Estoppel

Judges apply the equitable estoppel doctrine in order to avoid unfair results when one individual has relied, to her detriment,

\(^{125}\) See Fine & Fine, *supra* note 97, at 52 n.17; see also Loomis v. State, 39 Cal. Rptr. 820, 823 (1964) (holding that a stepmother’s provision of financial support could be a basis for the finding of an *in loco parentis* relationship).


\(^{127}\) See id. at 714.


\(^{129}\) See id. at 714.


\(^{131}\) See id.

\(^{132}\) See id.

upon the words or actions of another.\footnote{134} This doctrine requires proof of the stepparent's assumption of parental responsibility, reliance on the representations by the biological parent, and resulting detriment to the parent or child.\footnote{135} The third element, detriment, is the stumbling block for stepchildren.\footnote{136} The parent and stepchild may be unable to prove that the stepparent's role, even after years of altered financial and emotional aspects of their lives, had a detrimental effect on the stepchild.\footnote{137}

Many types of financial reliance exist in a stepfamily which cause financial detriment. For instance, custodial mothers may forgo career opportunities in order to make other contributions to the new family. This decision, made because of the stepparent's representations about present and future support, will most likely affect the economic welfare of the stepchild following divorce. Nonetheless, financial detriment has been narrowly defined to mean permanent lost access to the financial resources of the noncustodial parent\footnote{138}—the mother's first husband and the father of the child, resulting from the stepparent's, the mother's new husband and the stepfather to her child's, conduct.

\textit{Ross v. Ross}\footnote{139} established a basis for equitable estoppel in New Jersey. In \textit{Ross}, the husband and wife married eighteen months after the birth of the wife's child.\footnote{140} Throughout his parents' four year marriage, the child believed that Mr. Ross was his father.\footnote{141} In addition, the mother considered Mr. Ross her son's father because he filed a certification of admission of paternity and treated the child as his own.\footnote{142} The court enforced the continuing obligation of support and prevented the husband from denying his paternity in order to avoid "irreparable harm" to the child.\footnote{143}

The Michigan courts have also upheld the doctrine of equitable estoppel in this context. Recognizing that reasonable women form reasonable expectations about future support, the Michigan Court of Appeals determined that the stepfather's conduct caused financial detriment because "[the stepfather] should have been

\begin{footnotes}
\footnote{134} See id.
\footnote{135} See Miller v. Miller, 478 A.2d. 331, 358 (N.J. 1984).
\footnote{136} See Morgan, supra note 133, at 172.
\footnote{137} See id. at 173.
\footnote{138} See id.
\footnote{140} See id. at 624.
\footnote{141} See id.
\footnote{142} See id.
\footnote{143} Id. at 626.
\end{footnotes}
cognizant of the fact that he reduced the chances that either the natural father or mother of the child would begin a proceeding whereby the natural father's paternity could be established."144

However, in *Miller v. Miller*,145 the New Jersey Supreme Court remanded the case to the trial court to determine whether a stepfather prevented the biological father from supporting his child, thus requiring the stepfather to provide support.146 Despite the willingness of the court to apply the doctrine of equitable estoppel, the court cautioned against the widespread use of the doctrine so as not to discourage stepparents from supporting stepchildren during the marriage.147 Thus, the narrow definition of financial detriment found in the estoppel doctrine can result in fewer successful claims. In addition, in *Knill v. Knill*,148 the fact that the stepfather's role foreclosed the past participation by the father did not necessarily satisfy the detriment requirement.149

Another example of the narrow interpretation of the detriment requirement is evidenced by *Ulrich v. Cornell*.150 Upon marriage to the stepfather, the custodial mother dropped a paternity action against the noncustodial, biological father and began a lawsuit to terminate the biological father's parental rights.151 At the same time, the stepfather initiated an adoption proceeding that was never finalized due to financial problems.152 When the Ulrich marriage ended seven years later, the stepfather was awarded primary custody of his stepson.153 The mother appealed, and fifteen months after the divorce, she was awarded primary custody of her child and simultaneously requested child support from the stepfather.154 The trial court and intermediate appellate court determined that, due to the stepfather's conduct, he was equitably estopped from denying responsibility for the stepchild.155 The

146. See id.
147. See id.
148. 510 A.2d 546 (Md. 1986) (rejecting the equitable estoppel theory as a basis for ordering support from a stepfather who had resided with and supported his stepson for sixteen years). Additionally, the court stated that, "w[e] believe that [the stepfather] should not be penalized for his conduct." Id. at 552. This court ruled in such a way even though the child was born during the marriage and believed that the stepfather was his biological father. See id.
149. See id.
150. 484 N.W.2d 545 (Wis. 1992).
151. See id. at 546.
152. See id.
153. See id.
154. See id. at 547.
155. See id.
Wisconsin Supreme Court reversed, stating that “[t]he facts simply do not give rise to an unequivocal representation of intent to support the child, reliance on the representation by the natural parent or detriment . . . as a result of reliance.”

A Utah court reached a similar result in *Wiese v. Wiese*. When Carl and Christine Wiese married, Christine was pregnant with a son fathered by her previous husband. Although conceived out of wedlock by another man, the court found that the child was “issue of the marriage” with the second husband. The court held this way because the second husband signed the birth certificate as “father” and several years later agreed to let the divorce decree name him as the “father.” Subsequently, the divorce court awarded the “father” custody. At a future date, when the “father” was away for military training (having left the child with the “father’s” parents), the mother demanded the return of her child. The “father” complied, and the mother assumed custody. When she petitioned the “father” for child support, the trial court found that the “father” was not the biological father but held that his prior actions equitably estopped him from denying financial liability for the child.

The Utah Supreme Court overruled the trial court’s decision because the “[the mother] had not shown that [the father’s] actions had destroyed the possibility of obtaining support from the natural father.” Unspoken is the reality that while the trial court’s and the state supreme court’s due process takes place, the child is growing up with daily financial needs for housing, food, and clothing which, by default, have become the sole financial responsibility of the mother.

Thus, the equitable estoppel doctrine has accomplished little to change the traditional assumptions that biological parents are solely responsible for their children’s support. There is “little reason for a change in this rule, to the extent that the supporting and custodial parents each contribute their appropriate share of the

156. *Id.* at 549.
158. *See id.* at 701.
159. *Id.* (quoting the plaintiff husband’s decree of divorce).
160. *See id.*
161. *See id.* at 704-05.
162. *See id.* at 701.
163. *See id.* at 702.
cost of raising the child." Requiring proof that the stepparent's conduct permanently eliminated the noncustodial parent as a source of future support has drastically limited the number of successful support claims. This phenomenon reaffirms two compelling features of stepchild support law: "First, the duty of the natural parent is immutable; and second, the courts are extremely reluctant to impose financial responsibility upon unwilling stepparents."  

E. Express Oral or Written Agreements to Support a Stepchild

Stipulations, agreements and contracts are all legally binding, but different jurisdictions interpret these agreements in different ways. In Dewey v. Dewey, the Alaska Supreme Court determined that when a stepfather agrees to support a stepchild in a dissolution decree, a court may relieve him from the judgment for such reasons as "fraud, mistake, or . . . [another] valid reason for justifying relief from the operation of the judgment," thereby undermining the stability of a legally binding decree.

Maryland courts have followed the same premise of relieving a stepparent from a contractual obligation to support a stepchild, even when the stepparent entered into an agreement that was incorporated into the divorce decree. The case of Brown v. Brown turned on inconsistent definitions for familial relationships. Mr. Brown was sentenced to 179 days in jail for failure to pay child support under the divorce decree, and he appealed. The court of appeals determined that under the Maryland Constitution, which prohibits imprisonment for debt, but not for a failure to support a dependent child, a stepchild was not a "dependent child." The court held that unlike a dependent child, "the legal duty to support does not ordinarily encompass a stepchild," and thus Mr. Brown could not be punished under the Maryland Constitution.

166. STEPFAMILIES AND THE LAW, supra note 88, at 38.
168. Id. at 626.
170. See id. at 396.
171. See id.
172. See id. at 397-98; see also Md. CODE ANN., CONST. Art. III, § 38 (1981).
The *Mendoza* case, however, is one of the few in which the court entertained the concept of two fathers for a child. In 1992, the Nebraska Supreme Court held that a natural father was obligated to pay child support, despite another man’s written acknowledgement of paternity.175

**F. Aid to Families with Dependent Children (AFDC)**

AFDC provided supplemental income to children whose parents were unable to support them.176 In recent years, the federal government required states to comply with the federal regulations, in order to receive the financial benefits of participating in the AFDC program.177

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996178 (PRWORA or the “Act”) dramatically altered government support systems for American families. The Act ended the states’ entitlements to AFDC and replaced it with block grants to the states through a program called Temporary Assistance to Needy Families (TANF).179 Essentially, the TANF program maintains that the federal government no longer guarantees a cash assistance safety net for children.180 An immediate consequence of the block grants has been the proliferation of state-sponsored studies and research programs which address the problems of teen, unwed, divorced and otherwise missing fathers in this country.181

This switch from AFDC to block grants shifts the major responsibility for helping poor families from the federal government to state and local governments,182 creating even greater confusion in the arena of stepfamily financial responsibilities. While nothing is inherently wrong with allowing an individual state to handle

175. See id. at 170-74.
179. See id. at 2110.
180. See id. at 2113.
181. For example, the Governor’s Advisory Commission on Responsible Fatherhood and Family Support in Massachusetts convened to focus the attention of government and community leaders on father absence. This Commission developed Guiding Principles and explored responsible fatherhood and the needs of families and children. See GOVERNOR’S ADVISORY COMMISSION ON RESPONSIBLE FATHERHOOD AND FAMILY SUPPORT, DADS MAKE A DIFFERENCE: ACTION FOR RESPONSIBLE FATHERHOOD 6-7 (1998).
182. See id.
TANF funds as it sees fit, different laws and policies create havoc for families moving from state to state.\textsuperscript{183}

G. Yours, Mine, and Ours: Support of Biological Children and Stepchildren

A stepfather will likely be in the position of supporting both biological children and stepchildren.\textsuperscript{184} This phenomenon seems most likely to happen if the stepchildren do not receive adequate support payments from the non-custodial parent. Some scholars believe it is only common sense for a parent to give priority to the children with whom she lives, regardless of whether they are biological children or stepchildren.\textsuperscript{185} However, stretching dollars to pay for a new family might result in lower payments for children of a former family.\textsuperscript{186}

Noncustodial parents have often made unilateral decisions to "reduce their own child support obligations on the basis of the stepparent's duty to support the same child."\textsuperscript{187} Subsequently, several statutes expressly mandate that the responsibilities of the biological parents will continue despite the monetary aid coming from stepparents.\textsuperscript{188} In Iowa, in \textit{Mears v. Mears},\textsuperscript{189} the biological parents retained total responsibility for the child support based, in part, upon "the standard of living experienced by the children before their mother's remarriage."\textsuperscript{190} On the other hand, the Idaho Supreme Court reversed a trial court's ruling that had denied a woman's request for increased child support from her ex-husband.\textsuperscript{191} The court held that the trial court "erred in considering as paramount the needs of the husband's second family over those of his first family."\textsuperscript{192} Similarly, the Superior Court of New Jersey

\begin{thebibliography}{999}
\bibitem{183} See, e.g., Engel, Pockets of Poverty, \textit{supra} note 31, at 175-79.
\bibitem{187} \textit{STEPFAMILIES AND THE LAW}, \textit{supra} note 88, at 41.
\bibitem{188} See \textit{id.} (citing MO. \textit{ANN. STAT.} § 453.400 (West 1986); N.D. \textit{CENT. CODE} § 14-09-09 (Supp. 1989); OR. \textit{REV. STAT.} § 109.053 (1990); S.D. \textit{CODIFIED LAWS} § 25-7-8 (Michie 1992); \textit{UTAH CODE ANN.} §§ 78-45-4.1, -4.2 (1992)).
\bibitem{189} 213 N.W.2d 511 (Iowa 1973).
\bibitem{190} \textit{id.} at 519.
\bibitem{191} See Lewis v. Lewis, 248 P.2d 1061, 1061 (Idaho 1952).
\bibitem{192} \textit{id.}
\end{thebibliography}
held that an increase in a father's required child support payments was justified even though he was supporting a second wife and child.\textsuperscript{193} In another example, the natural father could not reduce his child support obligations because of his remarriage expenses, even though the mother's new husband's income was equivalent to the father's.\textsuperscript{194}

Conversely, some states determined that modification of child support was appropriate. The California District Court of Appeal held that a wife "by her second marriage ha[de] profited financially while [her husband's] remarriage ha[de] added considerable extra expenses."\textsuperscript{195} The divorced father was thus granted a downward modification on the grounds of his depleted income.\textsuperscript{196}

H. Stepparent Married to the Noncustodial Parent

Most cases pertaining to the issue of a stepparent married to a noncustodial parent arise in community property states. Perhaps these couples are more knowledgeable about, or more protective of, their financial status than their counterparts in equitable distribution domiciles. In the cases reviewed in this section, the courts were "kind" to stepparents and left financial care of the stepchild to chance.\textsuperscript{197}

In a 1981 case, the Washington Supreme Court held that a stepparent married to the noncustodial parent had no duty to support the stepchildren.\textsuperscript{198} In \textit{Van Dyke v. Thompson},\textsuperscript{199} "the court considered the support of a child in one's home as a community obligation and the support of a child by a parent without custody as a separate obligation that should not affect the earnings of the stepparent,"\textsuperscript{200} thereby eliminating their support obligation to the stepchildren.

Similarly, in \textit{Berger v. Berger},\textsuperscript{201} the Wisconsin Supreme Court evaluated stepparent child support liability in a marital property

\textsuperscript{196} See id. at 380.
\textsuperscript{197} See, e.g., Van Dyke v. Thompson, 630 P.2d 420 (Wash. 1981) (refusing to impose a financial responsibility on a stepparent).
\textsuperscript{198} See id. at 420.
\textsuperscript{199} 630 P.2d 420.
\textsuperscript{201} 424 N.W.2d 691, 693 (Wis. 1988).
This court determined that "a trial court was not to consider a remarried ex-spouse's one-half interest in the marital income" computation. "Though not explicitly stated, the court's rationale appears to be based on a desire to encourage remarriage by exempting new spouses from pre-marriage child-support obligations." Thus, biological parents, not stepparents, remain responsible for their children's support in Wisconsin.

I. Proposals for Change

Despite the two aforementioned cases, the trend indicates that the responsibility for child support will be extended to include custodial households. While the general trend is toward the extension of responsibility, it is interesting to note that no new creative solutions appear to exist. The options seem to be invariably grounded in the nuclear model. For example, Judge Redman of Idaho's Fifth Judicial District recently recommended that men should be solely financially responsible for the children living with them, whether the children are their own biological children or stepchildren. Judge Redman asks the question: "Who should support this child born to mom and dad, since divorced, who has lived with mom's new spouses Carl, David, and now Fred, where dad has just married a third time and has six other children and two new stepchildren?"

The judge pointed out that the conception of children is often unintentional and, "if we are not going to hold people to a marriage contract entered into freely, knowingly, and voluntarily with full intent, then why should we hold them financially responsible for a sexual act that may or may not have even intended the result? Thus, biological parents should

202. See id.
204. Id. at 895.
207. See Redman, supra note 185, at 87-88 (discussing the concepts of implied contract and equitable estoppel, with respect to the obligations of a psychological parent—a stepparent who has physically and financially supported a stepchild).
208. Id. at 89.
209. Id.
remain financially responsible for their children, only until the primary custodial parent marries again.\footnote{210}{See id.}

The current system makes no sense, and the only sense that can be made of it is by drastic legislative change. As a people, we have lost the will to adhere to great principles, and so I would encourage that we adhere to at least those that are utilitarian: simplicity, effectiveness, consistency, and logic.\footnote{211}{Id.}

Requiring all of the stepparents to support all of the stepchildren, as though they were their own children, is a tempting solution. Such an option certainly would provide an additional means for financial support for the stepchildren. However, both legal academics and a Washington state court have expressed fear that requiring stepparents to support stepchildren would discourage marriage and encourage informal cohabitation, contrary to public policy and lessening the strength of family units as the basis of society.\footnote{212}{Riley, supra note 200, at 1775.} Nonetheless, this “fear of discouraging marriage” explanation may be just a smokescreen. Indeed, well entrenched existing laws and social policies already discourage marriage. These include the IRS “marriage penalty,”\footnote{213}{See U.S. MASTER TAX GUIDE, supra note 36, at 26-27; see also U.S. SENATE JOINT ECONOMIC COMMITTEE, ENDING THE MARRIAGE PENALTY 1 (1998), available in United States Senate Joint Economic Committee, Ending the Marriage Penalty (last modified March, 1998) <http://www.senate.gov/-jec/newmarriage.html> (defining the marriage penalty as “the extra taxes a couple has to pay because they don’t get treated like partners, sharing their incomes equally for tax purposes.”).} as well as policies that encourage unequal responsibility for household management and child rearing.\footnote{214}{See Phyllis Schlafly, Defending Domestic Tranquility from Feminism’s Assault on Marriage and Motherhood, 2 TEX. REV. L. POL. 293, 299 (1998).} While neutral in terminology, in reality, those two examples have a negative outcome, primarily for women, while laws and policies requiring stepchild financial support would have a greater negative impact on men.

In response to the aforementioned concerns, the American Bar Association Model Act Establishing Rights and Duties of Stepparents would require stepparents to assume the duty of support during the duration of the remarriage, if the child was not adequately supported by the custodial and the noncustodial parent, while still permitting courts to retain discretion.\footnote{215}{See MODEL ACT ESTABLISHING RIGHTS AND DUTIES OF STEPPARENTS, in Tenenbaum, supra note 77, at 137-40.} The Model Act

\begin{itemize}
\item \footnote{210}{See id.}
\item \footnote{211}{Id.}
\item \footnote{212}{Riley, supra note 200, at 1775.}
\item \footnote{213}{See U.S. MASTER TAX GUIDE, supra note 36, at 26-27; see also U.S. SENATE JOINT ECONOMIC COMMITTEE, ENDING THE MARRIAGE PENALTY 1 (1998), available in United States Senate Joint Economic Committee, Ending the Marriage Penalty (last modified March, 1998) <http://www.senate.gov/-jec/newmarriage.html> (defining the marriage penalty as “the extra taxes a couple has to pay because they don’t get treated like partners, sharing their incomes equally for tax purposes.”).}
\item \footnote{214}{See Phyllis Schlafly, Defending Domestic Tranquility from Feminism’s Assault on Marriage and Motherhood, 2 TEX. REV. L. POL. 293, 299 (1998).}
\item \footnote{215}{See MODEL ACT ESTABLISHING RIGHTS AND DUTIES OF STEPPARENTS, in Tenenbaum, supra note 77, at 137-40.}
\end{itemize}
is a work-in-progress; the Family Law Section of the American Bar Association continues to consider such factors as: standards for the court; psychological bonds between the stepparent and the stepchild; and what the stepparent-stepchild relationship should be if the stepparent and custodial parent divorced. The underlying struggle appears to be maintaining the non-custodial parents' incentives to support their children if stepparents are also given support responsibilities.

Trends toward legislative reforms exist as well. Professor Margaret Mahoney, for example, has called for legislation along the lines of the British Matrimonial Causes Act. This Act protects "the child of the family" by having courts examine the length of the marriage, the earning potentials of the custodial parent and the stepparent, and the needs of the stepchild. This approach is flexible and case-specific, incorporating a type of estoppel, but without the limitations currently imposed in the United States. Such an approach seems to have the advantages of recognizing that each family is different and that general rules often are inappropriate.

Another proposal addressing the extension of child support responsibility revolves around the suggestion that support obligations ought to be based on the estoppel theory—both during and after marriages. Scholars suggesting this approach argue that the use of the estoppel theory would "both lessen role ambiguity and role conflict." This approach would help both stepparents and biological parents understand that each has a definite financial responsibility to the children. Additionally, this option would recognize the "uniqueness" factor in every stepfamily, as "the inherent flexibility [of the 'estoppel theory'] recognizes . . . that stepfamilies are not uniform and that different age and gender combinations among stepparents and stepchildren yield different relationships."

The division of stepparents into two classes is another proposed solution: "those who are 'de facto' parents and those who are not." A de facto parent is someone who is "legally married to a

216. See id.
218. See id. at 60.
219. See id.
220. See Fine & Fine, supra note 97, at 75.
221. Id.
222. Id.
223. Mason & Simon, supra note 102, at 468.
natural parent who primarily reside[s] with the stepchild or provides at least 50 percent of the stepchild's support." Under this definition, a *de facto* parent would function as a biological parent, with the same "rights, obligations, and presumptions" that a biological parent has, both in marriage and after the marriage, whether ended by either divorce or death. Non-residential stepparents, however, would basically disappear from federal policy.

While the *de facto* portion of the Mason and Simon proposal is appealing, the loss of recognition for stepparents who do not meet the *de facto* parent requirements is troubling. Many non *de facto* stepparents are loving and actively involved in their stepchildren's lives. These people may be the very stepparents who voluntarily give their time and financial resources to their stepchildren, and it would be detrimental to the stepparent-stepchild relationship for this stepparent to officially disappear.

A benefit behind this proposal, however, is the step toward the crystallization of the roles and obligations of stepparents. Recognizing that family law issues fall within states' jurisdictions, "a complete legal role for the stepparent as a *de facto* parent can only be established by encouraging reform in this confused arena." To set a *de facto* parent proposal into operation, the first step includes "insist[ing] that all states pass stepparent general support obligation laws which would require stepparents [to] act . . . as *de facto* parents to support their stepchildren as they do their natural children." The obligation imposed by such a law would need to contain clear guidelines delineating how child support would be divided between the noncustodial biological parent and the stepparent. Because of the current trend toward federalism in the political arena, obtaining approval from all of the states to create such a uniform statute would be a gargantuan task. After all, the states have not even agreed on a common definition of stepfamily terminology.

Assuming uniform state laws are currently a pipedream at best, "[t]he next logical . . . step would be to require states to impose child support obligations on stepparents following the death of the

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224. *Id.* at 469.
225. *Id.*
226. See *id.*
227. *Id.* at 477.
228. *Id.*
229. See *id.* at 478.
natural parent or his or her divorce from the stepparent. While it is a stretch to imagine imposing financial responsibility based upon someone else’s death, we already have the vehicles in place, with in loco parentis and equitable estoppel, to implement continuing financial responsibility following a divorce.

As stepparents are being given financial responsibility for stepchildren, they should also receive custodial rights. Using the doctrine of in loco parentis, this approach recognizes that the natural parent is typically alive, and sometimes active, as a parent—so a child could officially benefit from two moms and/or two dads who are involved in day-to-day parenting. In this respect, children can, and often do, have more than one mother or father. Whether by law or happenstance, stepparents already have some responsibility for stepchildren. What stepparents do not seem to have, however, are rights.

Mason and Simon would like federal policy to take the initiative when defining a parental status for residential stepparents. Because states presently make their own separate determinations about stepparent status, if the United States is to have a clearly defined position, it must come through a federal initiative. This proposal is beneficial because “[a] clear definition of stepparent as [a] de facto parent would eliminate the inconsistencies regarding stepparents which plague current federal policies.” In addition, this de facto relationship could provide a needed and important protective cushion for children.

“There can be no doubt that the variety of social practices poses new and pressing questions for legal definitions of family, family benefits, and family obligations.” This lack of consensus therefore reinforces the uncertainty in the status of stepparents. The financial struggles of stepfamilies, especially mothers, to meet the daily financial needs of growing children, occur in the face of a legal system trying to function with conflicting messages from laws and policies that do not serve either the children or the basic family values, regardless of the family’s form. At the present time, it seems that any reform that would make it easier for stepfamilies to

230. Id.
231. See supra notes 113-66 and accompanying text.
232. See Mason & Simon, supra note 102, at 479.
233. See id.
234. See id. at 481.
235. See id.
236. Id.
237. Minow, supra note 112, at 277.
function is suspect because it might remove "incentives" for people to get and stay married.

III. INHERITANCE AND THE GREAT ESTATE

It is difficult to discuss inheritance in a marriage. Not knowing what to say can lead to saying nothing at all—a phenomenon termed passive neglect. However, passive neglect in a stepfamily can lead to unwelcome surprises because inheritance and tax statutes are patterned after the traditional family. When a child's parent marries an individual who is not the child's other biological parent, a stepfamily is formed. Stepfamilies have become common households; in 1990, almost half of all marriages were remarriages. While not all of these marriages joined one or both partners with children from a prior relationship, "children living with two parents today are more likely to be living in a family that is not composed of two biological parents and only full biological siblings . . . . [t]hey are more likely to have stepparents and half brothers/sisters than ever before." When counting the number of stepfamily households in America, the Census Bureau defines stepfamily as "a 'married-couple family' with at least one stepchild of the householder present, where the householder is the husband." Notably, the Census Bureau's limited definition of a stepfamily does not include a stepfamily where an adult marries the noncustodial parent of minor children. Instead, the Census Bureau includes only the stepfamily where an adult marries the custodial parent of minor children. This definition does not recognize the current emphasis on visitation and joint parenting by both biological parents, and also does not recognize that families continue their emotional and financial relationships with both biological children and stepchildren, even after the children become adults.

This same narrow definition has, for the most part, been invoked in discussions about stepfamilies in the legal context. The legal system has not broadened its concept of family to include

239. See Glick, Stepparents Are Getting Shortchanged, supra note 22, at 631.
240. See Clarke, supra note 11, at 4.
241. Norton & Miller, supra note 5, at 12.
stepfamilies. Thus, traditional first-married family legal rights and obligations are not extended to stepfamily members.\textsuperscript{243}

It is important to be aware of the legal context regarding inheritance issues that face stepfamilies. The quality of stepparent-stepchild relationships may be adversely affected by the ambiguous nature of the legal relationship between stepparents and stepchildren.\textsuperscript{244} Studies have generally found that negative stereotypes of stepfamilies exist.\textsuperscript{245} In addition, stepparents and stepchildren may have less of a commitment to each other without clear legal obligations,\textsuperscript{246} as the law generally only requires temporary commitments in stepfamilies.\textsuperscript{247} Because changes in the laws reflect public views, social perceptions of stepfamilies may be reflected in American laws.\textsuperscript{248}

Thus, conflicts between the children from one marriage and the spouse of another also result from a growing number of multiple marriages.\textsuperscript{249} Splintered loyalties, additional responsibilities, and the changing needs of families exist in every stepfamily. In situations where relationships between adults and stepchildren are strained, inheritance pre-planning may be difficult to achieve. However, when decisions must be made in times of crisis, those tenuous legal relationships hold an even greater potential for family conflict and stress.\textsuperscript{250} Many individuals prefer to believe that the extended family members will do the right thing for each other—that inheritance decisions, if left alone, will take care of themselves. The fact is, inheritance decisions will not take care of themselves.

\textsuperscript{243} See Mahoney, supra note 2, at 918.
\textsuperscript{246} See Glick, Stepparents Are Getting Shortchanged, supra note 22, at 647.
\textsuperscript{247} See Fine, supra note 244, at 55.
\textsuperscript{248} Cf. Mark A. Fine & David Fine, Recent Changes in Laws Affecting Stepfamilies: Suggestions for Legal Reform, 41 Fam. Rel. 334, 339 (1992) [hereinafter Suggestions for Legal Reform] (discussing changes in stepfamily law and the possible influences that the changes may have on stepfamilies).
\textsuperscript{250} See Margorie Engel, Steps Ahead with Daisy Petals: They Love Me Not, Inheritance, Address at the 12th Annual Stepfamily Conference (July 20, 1994) (on file with author) [hereinafter Engel, Inheritance].
A. The Partnership Theory of Marriage

The partnership theory of marriage contends that marriage is an economic partnership, much like a joint venture or business partnership. The partnership theory of marriage can be traced back to a 1963 report issued by the Committee on Civil and Political Rights. The prefatory notes to the Uniform Marital Property Act articulate this partnership theory of marriage in the following way:

Marriage is a partnership to which each spouse makes a different but equally important contribution. This fact has become increasingly recognized in the realities of American family living. While the laws of other countries have reflected this trend, family laws in the United States have lagged behind.

The partnership theory brings economics in line with behavior, and as such, the partnership theory is sometimes called the "contribution" theory as it recognizes that each spouse contributes to the marital wealth by earning wages, as well as through activities that support wage earning. The partnership theory of marriage is also defined "as an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike."

The partnership theory promotes gender equality because a couple's total resources are shared, and gender-linked roles become less important. Some courts also note the state's interest in financially protecting the surviving spouse through this theory. Apparently, legislatures that enact a form of spousal protection

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251. See Waggoner, supra note 6, at 716.
252. See id. at n.96 ("One of earliest American expressions of the partnership theory of marriage appears in the 1963 Report of the Committee on Civil and Political Rights to the President's Commission on the Status of Women.").
253. Id.
254. Id.
255. See id. at 717-18 (quoting Deborah L. Rhode & Martha Minow, Reforming the Questions, Questioning the Reforms, in DIVORCE REFORM AT THE CROSSROADS 191, 198-99 (Stephen D. Sugarman & Herman H. Kay eds., 1990)).
256. See id. at 717.
257. MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 131 (1989); see also Waggoner, supra note 6, at 716-17.
258. See Deborah L. Rhode & Martha Minow, Reforming the Questions, Questioning the Reforms, in DIVORCE REFORM AT THE CROSSROADS 191, 199 (Stephen D. Sugarman & Herman Hill Kay eds., 1990).
have chosen to limit testamentary freedom of the couple in order to ensure an equal distribution of the couple's assets, thus furthering the public good.

B. Wills and Will Contracts

The United States Constitution does not protect an individual's right to make wills. Nevertheless, the right has extensive historical recognition. If the state legislature has not specifically disallowed a disposition, a decedent can leave her property to anyone she chooses. The state does, however, make rulings to protect a surviving spouse. Additionally, as Carolyn Dessin points out, "[s]ome mechanism ... exists in each state for protecting a surviving spouse from intentional or unintentional total disinheri-
tance." This mechanism may be "a result from the recognition ... that marriage is the most important family relationship." American probate law has traditionally barred the complete disinheri-
tance of the surviving spouse. The spouse, however, may voluntarily waive this protection in a prenuptial or antenuptial agreement. It has been recognized, though, that "spousal protection [can] not be waived by the unilateral act of a person other than the surviving spouse."

This position on waivers also applies in cases of qualified-plan spousal annuities. In Hurwitz v. Sher, Mr. Hurwitz owned a qualified retirement plan. He also had a prenuptial agreement with his third wife, waiving all rights to each other's property. The court ruled that a spouse can agree to waive the payment of the annuity, even though there is a requirement that qualified plans provide for payment of a spousal survivor annuity. The key word in this case

262. See Dessin, supra note 249, at 437.
263. See id. at 437 & n.13.
264. Id. at 436. For a sampling of several state statutes that have such protection mechanisms, see, e.g., ALA. CODE § 43-8-70 (1997); CAL. PROB. CODE § 21610 (West 1997); VA. CODE ANN. § 64.1-69.1 (Michie 1998).
265. Dessin, supra note 249, at 453 (citing GLENDON, supra note 257, at 238-40).
266. See id.
267. See id.
268. Id. at 454 (citing Shimp v. Huff, 556 A.2d 252, 263 (Md. 1989)).
270. 982 F.2d 778 (2d Cir. 1992).
271. See id. at 781; see also Prenuptial Agreement Can't Waive Qualified Plan Spousal
was "spouse." When Mr. Hurwitz died, the court ruled that the prenuptial agreement did not meet the requirements of the Internal Revenue Code § 417(a).\textsuperscript{272} The Code addresses waivers between married partners, and the Hurwitz's did not sign the agreement while they were married.\textsuperscript{273} Therefore, the Hurwitz's agreement and waiver failed to fall within the scope of the Internal Revenue Code and thus failed to be binding.

In another case, the husband's will gave property to his wife "during her life or for so long as she shall retain the name of Schwarzbarth."\textsuperscript{274} The remainder or contingent beneficiaries claimed that she forfeited the property when she began to use her new husband's name from time to time. The court, however, held that a periodic use of her new husband's name was not enough to "breach that condition."\textsuperscript{275} Therefore, the wife had not waived her right to spousal protection.\textsuperscript{276}

\textbf{C. The Second Wife and Will Contracts}

The idea of a will contract has most often been used as an estate planning device to ensure that the surviving spouse does not alter the agreed-upon plan after the first spouse's death. Will contracts have also been used in divorce agreements.\textsuperscript{277}

In a review of will contracts, case law is inconsistent—some decisions favor the contract beneficiary,\textsuperscript{278} while some favor the surviving spouse.\textsuperscript{279} In addition, some decisions apply the rules of contract law and property law, while others consider the circumstances of each particular case.\textsuperscript{280} One Arkansas court demonstrated the types of conflicts among family members that can result from a will contract when the surviving spouse remarries.\textsuperscript{281} In \textit{Gregory v. Gregory}, a husband and wife each signed a will providing that the estate of the first spouse to die would be held in trust for


\textsuperscript{272} See \textit{Hurwitz}, 982 F.2d at 781.

\textsuperscript{273} See id.

\textsuperscript{274} In re Estate of Schwarzbarth, 466 A.2d 1382, 1384 (Pa. 1983).


\textsuperscript{276} See Schwarzbarth, 466 A.2d at 1386-87.

\textsuperscript{277} See Dessin, \textit{supra} note 249, at 440.


\textsuperscript{280} See Dessin, \textit{supra} note 249, at 457.

\textsuperscript{281} See generally \textit{Gregory v. Estate of Gregory}, 866 S.W.2d 379 (Ark. 1993) (showing family conflicts that result from will contracts).
the surviving spouse and the couple's children.\textsuperscript{282} After the surviving spouse's death, his or her estate would be added to the trust.\textsuperscript{283} When Mrs. Gregory died, her property was placed in trust. Mr. Gregory later remarried.\textsuperscript{284} After his death, his second wife filed to claim her statutory allowance against the will.\textsuperscript{285} Her claim was denied by the probate court which held that the children's rights were more important than the second wife's rights.\textsuperscript{286} The Supreme Court of Arkansas agreed, holding that the will contract meant that the second wife had no legal claim to the husband's property.\textsuperscript{287}

Another case in the estate planning context, \textit{Runbenstein v. Mueller},\textsuperscript{288} also held that contract beneficiaries take precedence over surviving spouses.\textsuperscript{289} The court found that a joint will required that property received by the survivor under the joint will be held in trust for the named beneficiaries.\textsuperscript{290} Thus, when the husband remarried, the second wife had no elective share rights because the will contract meant that the husband held only a life estate.\textsuperscript{291} Because the husband did not actually have a personal estate, the second wife had no right of election with respect to the property,\textsuperscript{292} once again upholding the will contract to the detriment of the second wife.

Some courts base their determinations about the legality of a will contract upon whether the surviving spouse knew about the will contract. In \textit{Sonnickson v. Sonnickson},\textsuperscript{293} the court determined that the second wife could not claim a spousal share because she had full knowledge of the contract.\textsuperscript{294} On the other hand, in \textit{Tod v. Fuller},\textsuperscript{295} a Florida court found for the surviving spouse simply because she did not know about her deceased spouse's will contract.\textsuperscript{296} The importance of this holding is questionable, though,

\textsuperscript{282} See id. at 380-81.
\textsuperscript{283} See id.; see also Dessin, supra note 249, at 456 (commenting on \textit{Gregory v. Estate of Gregory}).
\textsuperscript{284} See \textit{Gregory}, 866 S.W.2d at 381.
\textsuperscript{285} See id.
\textsuperscript{286} See id.
\textsuperscript{287} See id.
\textsuperscript{288} 225 N.E.2d 540 (N.Y. 1967).
\textsuperscript{289} See id. at 543.
\textsuperscript{290} See id.
\textsuperscript{291} See id. at 542.
\textsuperscript{292} See id.
\textsuperscript{293} 113 P.2d 495 (Cal. Dist. Ct. App. 1941).
\textsuperscript{294} See id. at 500-01.
\textsuperscript{295} 78 So. 2d 713 (Fla. 1955).
\textsuperscript{296} See id. at 713-14.
POCKETS OF POVERTY

because it may be deemed as a restraint on marriage and therefore
unenforceable as violative of public policy.

A key issue involved with will contracts consists of determining
which property is covered by the agreement. This issue involves
determining whether property acquired after the death of one
spouse should be considered part of the contract. One method to
separate pre-remarriage and post-remarriage assets is to take a
financial “snapshot” at the time of the remarriage.297 Thus, assets
brought to the remarriage would be subject to the will contract and
the second spouse could only receive a spousal share of property
acquired after the remarriage.298 However, the courts have
proposed that a surviving spouse may be entitled to spousal share
rights “only if it is proven that the property did not derive from the
collective property of the parties to the contract.”299 This rule
makes separating assets before and after remarriage difficult
because meeting the terms of such a test requires impeccable
bookkeeping.

In addition, this rule raises the question as to whether an
earlier will contract should be permitted to deny a subsequent
spouse’s financial protection. Even though precedent exists for
recognizing the rights of any beneficiary under a will, including the
spouse and the children, those beneficiary rights are subject to the
prior depletion of assets and regulated limits.300 However, in In re
Estate of Mullin, a Kansas court determined that a spouse could not
be deprived of financial protection through either disinheritance or
a will contract.301 Indeed, the court’s holding in Mullin is congruent
with the argument that “a testator should not be permitted to
contract to do that which he cannot otherwise do—completely
disinherit his spouse.”302

Some scholars have asserted that “the inheritance rights of the
surviving spouses have steadily improved.”303 If this observation is
correct, why have courts allowed subsequent surviving wives to be
stripped of financial protection as the result of an earlier will
contract?304 This observation may be based upon the equitable
assumption that favors couples who have been married for a longer

297. See Orley R. Lilly, Jr., Will Contracts: Contract Rights in Conflict with Spousal

298. See id.

299. Dessin, supra note 249, at 463.

300. See, e.g., In re Nicholson’s Will, 267 N.Y.S.2d 719, 725 (Misc. 2d 1966).


302. Dessin, supra note 249, at 479.

303. GLENDON, supra note 257, at 238.

period of time. This equitable assumption is incorrect, however, because second marriages often last longer than first marriages.306

D. The Probate Codes

"Every estate plan consists of basically three elements: property ownership, beneficiary designations, and the probate code."306 Even though "[p]roperty ownership and beneficiary designations are not affected by the non-traditional family, . . . probate codes . . . are generally designed to protect the traditional marriage family."307 Because of this emphasis on the first or traditional families, a step-family "faces . . . some very special estate planning problems."308

The first problem stepfamilies encounter is the distribution of the property to the appropriate beneficiaries,309 a process made more difficult when inheritance statutes and probate codes do not recognize the stepfamily as a valid family unit.310 Another estate planning problem for stepfamilies consists of "minimizing death taxes[,]"311 especially since "[t]ax codes . . . often penalize the non-traditional family."312 Finally, "planning for the family's personal needs"313 is yet another difficulty stepfamilies face because laws based on traditional families do not work well for stepfamilies.314

A number of studies indicate that the majority of people die intestate—without a valid will.315 Clearly, it is important to have comprehensive information for making rules about intestate succession.316 In 1969, efforts began to reform intestate succession statutes with the proposal of the Uniform Probate Code (UPC).317

305. See Engel, Pockets of Poverty, supra note 31, at 70. But see Clarke, supra note 11, at 4.
306. Lovas, supra note 238, at 354.
307. Id.
308. Id.
309. See id.
310. See id.
311. Id.
312. Id.
313. Id.
314. See id.
317. See id. at 63.
Hereinafter, the National Conference of Commissioners on Uniform State Laws began the reforming process with the approval of the House of Delegates of the American Bar Association. Sixteen states later adopted the UPC or portions of it.

E. Revised Uniform Probate Code (RUPC)

By 1990, the Commissioners drafted a newer version of the UPC. The Revised Uniform Probate Code (RUPC) ostensibly reflects the lessons learned from years of operating under the Uniform Probate Code, as well as studies indicating the large numbers of people who die intestate. In addition, the Joint Editorial Board for the UPC considered the American multiple-marriage society in which individuals who marry more than once have stepchildren, as well as biological children. Thus, the revisions were designed to "be adopted without the procedural and other provisions of the full UPC." One section of the Revised Uniform Probate Code gives the surviving spouse a larger share of assets than the original Uniform Probate Code. The RUPC combines the spouses' assets to compute the augmented estate when determining both the surviving spouse's share and the incremental vesting scheme, a device which was developed to reduce the incidents of windfall that

318. See id.
320. See Fisher & Curnutte, supra note 316, at 63.
321. See id.
322. See id. at 67-68.
323. Waggoner, supra note 6, at 689.
325. In layman's terms, the "augmented estate" means the sum of the value of the decedent's probate estate (reduced by expenses such as funeral, administration, exemptions, enforceable claims), the value of the decedent's reclaimable estate (real or personal property not included in the probate estate), the value of property the surviving spouse receives by reason of the decedent's death (life insurance and retirement plan), and the value of property owned by the surviving spouse at the decedent's death. All property is valued as of the date of the decedent's death. See Fisher & Curnutte, supra note 316, at 110 (citing the REVISED UNIF. PROBATE CODE § 2-202, 8 U.L.A. 102 (1985)).
might be a problem for short term, late-in-life second marriages under the Uniform Probate Code. The incremental vesting scheme contained in the RUPC merges the decedent’s and the surviving spouse’s augmented estates, following the single partnership theory. This incremental vesting scheme therefore avoids the need for tracing joint and separate money. Moreover, the surviving spouse’s share is calculated from the combined augmented estate. While the surviving spouse is entitled to one-half of the combined augmented estate, this share vests incrementally over time.

The major advantage of this approach is that it accomplishes the dual purposes of forced share law—support for the surviving spouse and recognition of the contribution which the spouse

326. See id. at 108-09.
328. See Fisher & Curnette, supra note 316, at 108.
329. See id. at 108-11; see also Whitebread, supra note 327, at 129 (describing the way that the “elective share entitlement for a surviving spouse” is calculated).
330. See Fisher & Curnette, supra note 316, at 108; Whitebread, supra note 327, at 129-32; UNIF. PROBATE CODE § 2-202, 8 U.L.A. 102 (1998). This section of the Uniform Probate Code provides:

(a) Elective share amount. The surviving spouse of a decedent who dies domiciled in this State has a right of election, under the limitations and conditions stated in this Part, to take an elective share amount equal to the value of the elective share %age of the augmented estate, determined by the length of time the spouse and the decedent were married to each other, in accordance with the following schedule:

<table>
<thead>
<tr>
<th>Length of Marriage</th>
<th>Elective Share Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 1 year</td>
<td>3% of the augmented estate</td>
</tr>
<tr>
<td>1 year but less than 2 years</td>
<td>6% of the augmented estate</td>
</tr>
<tr>
<td>2 years but less than 3 years</td>
<td>9% of the augmented estate</td>
</tr>
<tr>
<td>3 years but less than 4 years</td>
<td>12% of the augmented estate</td>
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<tr>
<td>4 years but less than 5 years</td>
<td>15% of the augmented estate</td>
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<tr>
<td>5 years but less than 6 years</td>
<td>18% of the augmented estate</td>
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<tr>
<td>6 years but less than 7 years</td>
<td>21% of the augmented estate</td>
</tr>
<tr>
<td>7 years but less than 8 years</td>
<td>24% of the augmented estate</td>
</tr>
<tr>
<td>8 years but less than 9 years</td>
<td>27% of the augmented estate</td>
</tr>
<tr>
<td>9 years but less than 10 years</td>
<td>30% of the augmented estate</td>
</tr>
<tr>
<td>10 years but less than 11 years</td>
<td>34% of the augmented estate</td>
</tr>
<tr>
<td>11 years but less than 12 years</td>
<td>38% of the augmented estate</td>
</tr>
<tr>
<td>12 years but less than 13 years</td>
<td>42% of the augmented estate</td>
</tr>
<tr>
<td>13 years but less than 14 years</td>
<td>46% of the augmented estate</td>
</tr>
<tr>
<td>14 years but less than 15 years</td>
<td>50% of the augmented estate</td>
</tr>
<tr>
<td>15 years or more</td>
<td>54% of the augmented estate</td>
</tr>
</tbody>
</table>

Id.
made to the decedent’s estate—in a mechanical fashion which
does not require judicial intervention to reach an equitable result.\textsuperscript{331}

The “incremental vesting” scheme supports the contemporary view
of marriage as an economic partnership, but only for the duration
of the marriage.\textsuperscript{332}

\textbf{F. Problems in the RUPC for Stepfamilies}

The 1990 revisions to the UPC have created potential problems.\textsuperscript{333} “[I]t is nearly impossible for a spouse to maintain
separate property without opting out of the entire elective share
system through a premarital or postmarital agreement.”\textsuperscript{334} In
addition, “[i]f the surviving spouse already has over half of the
augmented estate titled in his or her name, the revised UPC does
not entitle [the spouse] to receive additional property.”\textsuperscript{335} It is
important, however, to remember that this rule applies only in
cases of intestacy. Bequests made in a will are not affected by this
provision in the RUPC.

Under the intestacy rules, when the spouse with the smaller
share of the marital property dies first, that spouse could only
devise assets titled in her name.\textsuperscript{336} Thus, the “decedent’s estate
[has] no rights to assets in the surviving spouse’s estate.”\textsuperscript{337} There
are two possible explanations for this phenomenon. The first is that
“an assumption exists that the surviving spouse will devise the
property in a manner consistent with the decedent’s wishes.”\textsuperscript{338} A
second possible explanation is that “an assumption exists that a
more financially dependent spouse has no legitimate claim to
accumulations during the marriage.”\textsuperscript{339} This explanation, however,
does not fit with the partnership theory of marriage. “If America is
really looking for a uniform system of marital property rights that
completely incorporates the partnership theory of marriage,

\begin{itemize}
\item \textsuperscript{331} Fisher & Curnutte, \textit{supra} note 316, at 108.
\item \textsuperscript{332} See \textit{id.} at 109.
\item \textsuperscript{333} See \textit{Whitebread, supra} note 327, at 129-32.
\item \textsuperscript{334} \textit{Id.} at 136.
\item \textsuperscript{335} \textit{Id.}
\item \textsuperscript{336} \textit{See id.}
\item \textsuperscript{337} \textit{Id.}
\item \textsuperscript{338} \textit{Id.}
\item \textsuperscript{339} \textit{Id.}
\end{itemize}
eventually all states will have to abandon elective or forced share law and adopt some sort of community property system."\(^{340}\)

The RUPC is also problematic for long-term, later-in-life marriages. Consider the hypothetical case of an elderly couple who decide to remarry. They both have children and assets from a prior marriage. This second marriage is a childless marriage, and they make modest contributions to the growth of each other's assets. Under the RUPC, their testamentary freedom is significantly limited. Hence, they cannot devise most of their respective estates to their own children and grandchildren. A reasonable statute of intestate succession, however, requires compromise. While it cannot adequately meet unique and specific needs, knowledge of the RUPC may "encourage older people not to marry or to enter [into] premarital agreements."\(^{341}\) A will or appropriate will substitute must be viewed as the solution.

G. Probate Code, State Code, and Stepchildren

A potential complication arises for stepfamily relationships when inheritance rights, almost without exception, are granted only to the "'issue' or 'descendants' of the decedent and the decedent's ancestors."\(^{342}\) The Probate Code requires a chain of parent-child relationships at each generation in order to grant inheritance rights and generally does not consider a stepchild eligible for inheritance from the stepparent.\(^{343}\)

Some exceptions to the preceding rule exist. For instance, some state statutes recognize a decedent's stepchildren when no other relatives are alive and the property would otherwise revert to the state.\(^{344}\) However, even when a stepparent has a will referring to stepchildren as "children," a court may still focus on the bloodline. Bloodline was the primary consideration in a Washington case where a stepfather left a small bequest to five "children," four of whom were his stepchildren.\(^{345}\) Even though the five children were expressly named in the will, the court ignored the will bequests for the four named stepchildren, despite the fact that the biological child had predeceased his father.\(^{346}\) Nonetheless, when the estate

\(^{340}\) Id. at 142.
\(^{341}\) Id. at 139.
\(^{342}\) Lovas, supra note 238, at 367.
\(^{343}\) See id. See, e.g., WYO. STAT. ANN. § 2-4-104 (1997) (providing specifically that stepchildren do not inherit).
\(^{344}\) See Lovas, supra note 238, at 377.
\(^{345}\) See In re Estate of Smith, 299 P.2d 550 (Wash. 1956).
\(^{346}\) See id. at 553; see also Thomas M. Hanson, Intestate Succession for Stepchildren:
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passed through intestate succession, the stepchildren inherited from their stepfather under the applicable statute that "provided for inheritance from a stepparent in order to avoid escheat of the property to the state."[347]

Despite the proceeding exceptions, it is not an easy task to align public policy and intestacy laws to provide stepchildren with the same rights as biological children. While California recognizes the inheritance rights of stepchildren more than most states, it still fails to recognize them at the same level as biological children.[346]

Even though stepchildren are "in line for inheritance ahead of [some] relatives," they come "after grandparents and issue of grandparents."[349] In addition, half-blood siblings may "inherit from and through each other, . . . [thus allowing] a stepchild to inherit through a predeceased half-brother or half-sister."[350]

The RUPC assumes that "the decedent would want to favor a biological child."[351] Thus, the intestacy codes continue to ignore families in remarriage situations, and the societal bias against stepfamilies and stepchildren is encouraged in the laws. The unequal treatment of a stepchild and a biological child sends the legal message that the stepchild is the more marginal child. More states should follow California's lead to allow stepfamily members to inherit from each other whenever a relationship developed between a child and a stepparent.[352]

H. Adoption, "Legal Barrier to Adoption," and "Equitable Adoption"

"An adoption formalizes the stepparent-child relationship and guarantees its recognition for virtually all legal purposes."[353] Regulated by state statutes, the "best interests of the child" is the legal standard used in adoption cases.[354] Stepparent adoption does not fit the classic model of adoption where the state places the child with two adults, neither of whom is related to the child. Rather, in

347. Hanson, supra note 346, at 264.
349. Lovas, supra note 238, at 377; see also CAL. PROB. CODE § 6454 (West 1998).
350. Lovas, supra note 238, at 378; see also CAL. PROB. CODE § 6406 (West 1998).
351. Glick, Stepparents Are Getting Shortchanged, supra note 22, at 649-50 (citation omitted).
352. See CAL. PROB. CODE § 21115(b) (West 1991).
353. STEPFAMILIES AND THE LAW, supra note 88, at 177.
354. See id. at 162.
a stepparent adoption, the adoptive parent is married to the custodial parent. Stepparent adoption has led to the "reconsideration of adoption as an all-or-nothing proposition for both the biological parent and the adoptive stepparent." Specific considerations for stepparent adoptions include continuing visitation rights for the non-custodial parent and inheritance rights for the stepchild from both biological parents and the adoptive stepparent.

Traditionally, adoption of a child ended all connections, legal and personal, with any biological parent. The Alaska Supreme Court expressly questioned the wisdom of this policy.

[The] very problem now before us is an increasingly common occurrence, given the increase in divorce and remarriage in our society. . . . Well-known commentators have proposed "incomplete adoption" as a middle approach that would better accommodate the interests of both the stepparent and the noncustodial natural parent by giving . . . rights to each. However, the Alaska legislature apparently has not yet considered this modern approach that would allow the courts a more reasonable choice in deciding stepfamily cases. . . . We are therefore left with the harsh choices inherent in deciding between adoption or no adoption at all.

Between 1986 and 1991, the Alaska Legislature revised its statute, which now reads: "Nothing in this chapter prohibits an adoption that allows visitation between the adopted person and that person's natural parents or other relatives." Other states also have similar provisions.

As previously stated, in the traditional model of adoption, an adoption decree terminates financial rights and duties, including mutual rights of inheritance and parental support responsibilities. While adoptive parents typically assume child support responsibility, states do not have uniform laws regulating the status of intestacy inheritance rights from an adopted child's biological relatives, once the adoption has been completed. Without a will specifically naming the child, most states "com-

355. Id. at 163.
356. See id. at 179.
358. ALASKA STAT. § 25.23.130(c) (Michie 1991).
359. See, e.g., MD. CODE ANN., FAM. LAW § 5-312(e) (1991) (allowing for continuing connections between an adopted child and the biological parent).
360. See STEPFAMILIES AND THE LAW, supra note 88, at 179.
361. See id.
pletely sever all rights between an adopted child and [the biological parent] who gave the child up for adoption to the stepparent. According to the RUPC:

An adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on . . . the relationship between the child and that natural parent or . . . the right of the child . . . to inherit from or through the other natural parent.

The continuance of biological inheritance rights after a stepparent adoption undoubtedly reflects the expectation of bloodline testamentary desires. "The Uniform Probate Code drafters assumed that most family members would wish to benefit adopted children in these circumstances."

In one Minnesota case, the court denied inheritance rights to unadopted stepdaughters, failing to uphold an equitable adoption which would allow the stepdaughters to inherit from their stepfather despite his failure to adopt them officially. The girls were seven and eight years old when they became Mr. Berge's stepdaughters and began using his name. He provided educational and financial support for the remainder of their childhood, referred to his stepdaughters as his girls, and continued to rear them after their mother died. Mr. Berge had made verbal statements that he intended to disinherit his blood relatives and to leave all of his property to the girls. When Mr. Berge died without a will, the Minnesota Supreme Court held that the relationship between stepfather and stepdaughters did not meet its criteria of an equitable adoption, and thereby prohibited the girls from inheriting anything.

362. Id.
363. See id.
366. See In re Estate of Berge, 47 N.W.2d 428 (Minn. 1951); see also Steffamilies and the Law, supra note 88, at 62 (commenting on In re Estate of Berge).
367. See In re Estate of Berge, 47 N.W.2d at 429.
368. See id.
369. See id.
370. See id.
371. See id.
372. See id.
Courts almost always find insufficient proof for equitable adoption because "the conduct of the parties was as consistent with a normal stepparent-stepchild relationship as with a contract to adopt." Thus, if stepchildren are to inherit from stepparents, they must be named beneficiaries in the stepparent's will.

However, occasionally courts have employed a liberal interpretation of the stepparent-stepchild relationship. For example, in Foster v. Cheek, the court recognized the stepchild's claim for equitable adoption because the custodial grandparents had been promised that the adoption would occur. Nevertheless, emphatic limitations of the equitable adoption doctrine for stepchildren exist, and the relationship is better served if the will contract is put in writing.

I. Stepparent Wills and Stepchildren Beneficiaries

Although courts typically enforce express gifts to stepfamily members, the law of wills generally assumes that testators do not view stepfamily members as family members. Thus, "[e]ven in the law of wills, stepfamily members may face procedural difficulties in becoming beneficiaries of inheritance." For example, Reed Hunt's validly executed will demonstrates the need for clear language when drafting a will. Mr. Hunt's will recited the names of his stepchildren, bequeathed five dollars to any person "established by a court of law to be a child of mine," and specifically noted intentional disinheritance of any heirs not mentioned in the will. Claiming that the will did not expressly provide a bequest to any person, the Utah Supreme Court ruled that the Hunt estate passed to his heirs under the intestacy

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373. See id.; see also STEFFAMILIES AND THE LAW, supra note 88, at 62 (examining In re Estate of Berge).
375. See STEFFAMILIES AND THE LAW, supra note 88, at 62.
376. 96 S.E.2d 545 (Ga. 1957).
377. See id. at 549.
379. See id. at 53.
380. See id.
381. Suggestions for Legal Reform, supra note 248, at 336.
383. Id. at 873.
384. See id.
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statutes.385 Pointing to legal confusion concerning relationships between stepparents and stepchildren, this Court had two dissenting judges who viewed the stepchildren as beneficiaries under the doctrine of gift by implication.386

When the language of a will bequeaths the entire estate to one’s spouse, with no reference demonstrating an intent to bequeath a life estate, and subsequent bequests to include both biological children and stepchildren, the surviving spouse is entitled to make a new will when stepchildren are not specifically mentioned.387 For example, in Larison v. Record,388 two stepsisters did not receive inheritances from their stepmother when she died six years after their father died, even though the stepmother’s combined estate included their father’s entire estate.389 When the will revealed that their stepmother’s biological daughter was her sole beneficiary, the stepdaughters filed a lawsuit.390 The circuit court held that the biological daughter of the decedent was entitled to the estate.391 Demonstrating typical confusion over the status of inheritance rights of biological children and stepchildren, the appellate court reversed the decision.392 Mrs. Berge’s biological daughter filed a further appeal and, by unanimous opinion, the high court ruled that the surviving wife had been free to make a new will.393 Because the biological parent and the stepparent failed to specify in their jointly written will whether or not all three children would inherit the combined estate from each of them, the stepchildren were not viewed as full family members entitled to inheritance.394

Despite the general belief that stepfamily relationships are not viewed as true family relationships, in Chambers v. Warren,395 a stepmother willed all of her property to her husband, and in the event that she and her husband died simultaneously, her property would go to her stepchildren.396 The stepmother also provided that if any of her property remained in her husband’s hands at the time

385. See id. at 875.
386. See id. at 875-76.
387. See Yosh Golden, Stepsisters Not Entitled to Inheritance: Supreme Court, 133 CHIC.
388. 512 N.E.2d 1251 (111. 1987).
389. See id. at 1252.
390. See id. at 1252-53.
391. See id. at 1252.
392. See id.
393. See id. at 1255.
394. See Golden, supra note 387, at 10.
395. 657 S.W.2d 3 (Tex. C. App. 1983).
396. See id. at 5.
of his death, it would go to her stepchildren. Because the husband died over a year before the stepmother, the stepmother's blood relatives, who were heirs at law, claimed her estate. The court recognized that the stepmother "clearly express[ed her] intention [to] devise all of her estate to her stepchildren," and thus the stepchildren benefited under the will.

### J. Protecting the Child from Disinheritance

In one Idaho case, the court noted that biological parents seldom disinherit a child when the family remains together. However, "noncustodial parents appear particularly likely to disinherit their children." Because many children are "not part of a nuclear family at their parent's death," those children most likely to bear the brunt of disinheritance are children of divorce. Moreover, even when custodial mothers remarry, stepfathers have no legal financial responsibility for their stepchildren, and stepchildren have minimal standing as their heirs through intestacy statutes. Thus, stepchildren face financial concerns on both sides.

One primary parental obligation involves supporting minor children. If parents do not meet this obligation, "society has an obligation to see that the child is provided for through charitable or governmental acts." Thus, the societal burden is likely to increase with the testamentary freedom the parent possesses because when a minor child's parent dies, the child's needs continue. For non-nuclear stepfamilies with minor children, a support agreement specifically imposing a continuing obligation on the parent's estate would be helpful and would help protect the child in cases of disinheritance. These financial obligations might be met and might protect stepchildren through ongoing support.

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397. See id.
398. See id.
399. Id. at 6.
402. Id.
403. See id. at 11.
404. See id.
405. Id. at 4-5.
406. See id. at 7.
407. See id. at 15.
payments or an acceptable substitute, such as life insurance or a specific bequest.\footnote{408}

K. Wrongful Death Statutes

Under the Massachusetts Wrongful Death Act, damages for the statutory beneficiaries are based upon loss of future earnings and loss of consortium and marital society.\footnote{409} Those beneficiaries may also receive damages for conscious pain and suffering, as well as out-of-pocket expenses relating to the death.\footnote{410} However, a majority of jurisdictions\footnote{411} have held that remarriage is not relevant to wrongful death damages.\footnote{412} Notwithstanding this fact, remarriage is financially relevant wherever courts may rule that remarriage allowed the plaintiff to recover the economic loss. This logic assumes that the same financial arrangements exist in a second marriage as in a first marriage.

Wrongful death statutes are classified into three categories when evaluating the rights of surviving stepfamily members.\footnote{413} A handful of states include stepchildren in the list of wrongful death claimants,\footnote{414} such as California, Idaho, and Washington.\footnote{415} Michigan authorizes claims made by “the children of the deceased’s spouse[,]”\footnote{416} thereby also including stepchildren. In addition, when stepchildren are financially dependent upon the stepparent, Alaska, Arkansas, and Hawaii permit wrongful death awards to the stepchildren.\footnote{417} Delaware and Maryland, however, recognize a stepchild’s standing only if no primary beneficiaries exist.\footnote{418}

The remaining statutes make no reference to either stepfamily members or to “relatives by marriage” as wrongful death beneficiaries. When state laws exclude stepfamily members from wrongful

\footnotesize{408. See id.}  
\footnotesize{409. See MASS. GEN. LAWS ch. 229, § 2 (1998).}  
\footnotesize{410. See id.}  
\footnotesize{411. See Annotation, Admissibility of Evidence of, or Propriety of Comment as to Plaintiff Spouse's Remarriage, or Possibility Thereof, in Action for Damages for Death of a Spouse, 88 A.L.R. 3d 926, 928-31 (1978).}  
\footnotesize{412. See Marcia Mobilia Boumil, The Effect of Remarriage on Wrongful Death Damages, 72 MASS. L. REV. 113, 115 (1987).}  
\footnotesize{413. See STEPFAMILIES AND THE LAW, supra note 88, at 102.}  
\footnotesize{414. See id.}  
\footnotesize{415. See CAL. CIV. PROC. CODE § 377.60 (West 1991); IDAHO CODE § 5-311 (1997); WASH. REV. CODE ANN. § 4.20.020 (West 1988).}  
\footnotesize{416. MICH. COMP. LAWS ANN. § 600.2922 (West 1986).}  
\footnotesize{417. See ALASKA STAT. § 09.55.580 (Michie 1998); ARK. CODE ANN. § 16-62-102(d) (Michie 1987); HAW. REV. STAT. § 663-3 (1993).}  
\footnotesize{418. See DEL. CODE ANN. tit. 10, § 3724 (1989); MD. CODE ANN., CTS. & JUD. PROC. § 3-904 (1998).}
death recovery, the laws "have survived constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment" because refusing to compensate survivors of wrongful death victims "has not been regarded as unreasonable in the constitutional sense."

However, the evaluation of a child's rights to survivorship benefits should be based on the best interests of the child, step or not, and not based on some outdated conception of family relations which fails to account for step-relations. "[A] stepchild's rights under intestate succession and wrongful death statutes ... [should] be determined by the actual relationship between stepparent and stepchild and the best interests of the child, rather than by rules based on stepfamily status."

L. Death and Taxes

Stepfamilies face a financial burden because the laws of inheritance and estate taxation do not acknowledge the prevalence of stepfamilies. As a result of the tax law's failure to adequately account for stepfamilies, stepchildren often face "higher inheritance tax rates."

Margaret Mahoney examined the tax issue, but she reached a different conclusion. Mahoney sees the courts as being more willing to recognize stepfamilies for inheritance taxation purposes than in other areas of inheritance. This phenomenon results because "preferential tax treatment for steprelatives does not interfere with the rights of any other beneficiary or heir." However, even where stepchildren may be recognized, no guarantee of that same recognition for stepgrandchildren exists.

Despite the differing views regarding the role taxation plays in stepfamilies, one thing is clear: careful planning is necessary to begin resolving the problem of stepfamily inheritance. The "impact of the tax incidents [on stepfamily members] can be controlled by

419. STEPFAMILIES AND THE LAW, supra note 88, at 110-11.
420. Id. at 111.
422. See Lovas, supra note 238, at 382.
423. Id. at 385.
424. See STEPFAMILIES AND THE LAW, supra note 88, at 73.
425. Id.
426. See id.
providing adequate liquidity and by specially apportioning the burden of paying the tax. 427

M. Observations

Probate statutes for intestate decedents require developing presumptions. 428 It is reasonable to make decisions based upon the wishes of property-owning individuals who are family members. However, the family has become a complex institution. Indeed, in 1990, "5.3 million married couple family households contained at least one stepchild under age 18." 429 This constituted 20.8% of all married couple family households with children. 430 Notwithstanding these changes, intestacy laws for the most part appear to be based upon a dated and incorrect assumption about family relationships.

The fact is that the testamentary wishes of the majority of stepfamily members are unknown. This phenomenon is likely because no studies exist to indicate that stepfamilies have been queried. However, even when strong evidence of a loving family relationships exists, the blood relationship may be the sole consideration under the intestacy statutes. 431 Steprelations are designated beneficiaries in wills and even when the testator's intent to devise gifts to the stepchildren is "clear to the layman," courts will often find loopholes to deny the stepchildren any inheritance. 432

During a time when many individuals do not live in nuclear families, 433 a shift away from fixed laws premised on the traditional first marriage family would be a good solution. While recognition of steprelations would require movement from the predictability that inheritance through bloodlines provides, society needs to develop and adopt an inheritance evaluation mechanism that promotes greater fairness toward stepfamilies. By using biology to

427. Lovas, supra note 238, at 393.
428. See id.
430. See id.
431. See In re Estate of Berge, 47 N.W.2d 428, 429-31 (Minn. 1951); see also Suggestions for Legal Reform, supra note 248, at 336 (analyzing In re Estate of Berge in the context of stepfamily inheritance).
432. See generally In re Estate of Crossman, 377 N.W.2d 850 (Mich. Ct. App. 1985) (stating that a deceased's lack of action in an adoption cannot lead to a finding of "equitable adoption," even if the deceased had an express intent to have his stepchildren inherit); Defoeldvar v. Defoeldvar, 666 S.W.2d 668 (Tex. Ct. App. 1984) (stating that an equitable adoption requires more than just a desire or an intent to adopt).
433. See Norton & Miller, supra note 5, at 11.
deny intestacy inheritance rights between stepfamily members, the intestacy statutes ignore the reality of modern family life.

The laws that protected the traditional family in the past fail to provide adequate protection to members of a stepfamily. The existing protection is not adequate for the adult stepfamily partner who relies on the financial marriage partnership. Neither is the existing protection adequate for the stepchild who is dependent upon the care and financial support of the stepparent. At the present time, the best financial protection available to stepfamilies is found through thoughtful and careful advance planning for the stepfamily members. The consequences of a failure to plan can be financially devastating.

IV. LAW AND POLICY CONSIDERATIONS RELATED TO THE FINANCIAL SECURITY OF WOMEN IN REMARRIAGES

Marriage is a civil and economic contract, but it is also viewed as an emotional relationship and a financial partnership. However, such impressions can be misleading. “Partnership” is a faulty description of marriage because nothing in an active marriage assures financial equality between the husband and the wife, and the courts do not always support a partnership theory at divorce. Financial inequalities in a first marriage have been generally documented and accepted by professionals. What has not been done, to date, is a documentation of the degree of financial inequality between husbands and wives in remarriages.

Anecdotal evidence and appellate cases indicate that remarriage financial inequalities are great if children are involved, and many remarriages do include children. Depending upon the practices of the husband, the children of a woman in a second marriage may be truly impoverished. This is especially true when the children reach college age. Remarried women may also become impoverished after their spouses die because of social

434. See supra Part II.
435. See supra text accompanying notes 184-96.
436. See generally Chambers v. Warren, 657 S.W.2d 3 (Tex. Ct. App. 1983) (holding that a deceased's intentions, as expressed by her will, were to be followed).
437. See DIVORCE DECISIONS WORKBOOK, supra note 269, at 35.
439. See id. at 2-5.
440. See Glick, A Demographic Profile, supra note 10, at 24-26.
441. See Engel, College Expenses, supra note 111, at 5-8.
practices and the laws of inheritance which are not designed to help them.\textsuperscript{442}

The assumption that the law provides for marital partnerships is misguided. The divorce and inheritance cases discussed in Parts II and III provide ample evidence that the idea of a legal partnership is still a myth for most couples.\textsuperscript{443} Of course, the laws on which these cases are based could change. The biggest problem, though, is that family law is traditionally controlled by states. Therefore, an equitable judgment in one state will not be binding in another.

When entering a marriage, women generally face an extraordinary financial disparity vis-à-vis their partners.\textsuperscript{444} A recent survey of women's pre-existing financial conditions clearly indicates that true marital equality does not generally exist at the outset of a remarriage.\textsuperscript{445} A woman enters a second marriage with the same social and financial constraints she encountered with her first marriage, in addition to other constraints that are unique to a second marriage.\textsuperscript{446} These inequalities are even more apparent when women experience a second marriage dissolution—due to divorce or the husband's death.\textsuperscript{447} The United States' legal system applies laws that favor wives and children from the original marriage,\textsuperscript{448} in spite of the fact that the situation for subsequent spouses is generically more complicated. Thus, the inequalities that may be hidden by a woman’s remarriage become exposed when that relationship ends.

A. Financial Myth and Financial Reality

Most commentators currently believe that marriage and family income will solve the social problems of financially dependent

\textsuperscript{443} See supra Parts II-III.
\textsuperscript{444} See generally Jan B. Singer, \textit{Divorce Reform and Gender Justice}, 67 N.C. L. Rev. 1103 (1989) (describing the financial problems which women encounter in marriage).
\textsuperscript{446} Additional financial constraints include: ongoing expenses related to obtaining a divorce, outgoing child and spousal support payments, the possibility that retirement income has been divided by a mediated divorce agreement or by a court order, potential encumbrances on life insurance policies if they are used as collateral for financial obligations to prior family members, a division of assets in the divorce financial settlement, etc.
\textsuperscript{447} See supra text accompanying notes 277-305.
\textsuperscript{448} See, e.g., Waggoner, supra note 6, at 716 (discussing the inadequacy of probate laws when addressing the unique problems inherent in multiple marriages).
women and children.\textsuperscript{449} It will not. Marriage is a temporary solution, at best, because nothing in the typical marital scheme supports the development and growth of a wife's personal and independent financial security. A strong focus on "family" income as an all-encompassing measurement technique creates a form of adult female dependency and effectively denies and hides a wife's financial reality.

The existence of children from a remarried husband's previous marriage can also have a negative impact upon a remarried woman, regardless of whether the husband has a custodial relationship with his children.\textsuperscript{450} If the husband is a custodial father, women report encountering a worsened financial position as compared to those women whose husbands do not have custody.\textsuperscript{451} Because a mother's financial plight operates in tandem with that of her biological children, it is likely that the addition of stepchildren to her family will weaken a woman's personal financial security. This phenomenon is unjust because women should not be penalized for having children and accepting the care-taking responsibility for new ones.

Regardless of what a woman's husband might say about treating his stepchildren and his biological children equally, he has no legal obligation to do so.\textsuperscript{452} This legal position, however, does not prevent some government agencies and public institutions from assuming that "family" funds are readily available to all members of the household.\textsuperscript{453} A primary example is the issue of college tuition.\textsuperscript{454} Educational institutions typically assume a stepfather's funds are available for use by his stepchildren and deny financial aid on the basis of that assumption.\textsuperscript{455}

If a stepfather chooses not to provide information or financial help, the poverty imposed by an external entity against a child can impact advancement opportunities for the rest of that child's life. This second track of poverty, arising from being the progeny of a remarried woman, occurs because the law does not mandate that her children be treated equally with her husband's children.\textsuperscript{456}

\textsuperscript{449} See Stephanie Coontz, \textit{The Way We Really Are} 137 (1997) [hereinafter \textit{The Way We Really Are}].
\textsuperscript{450} See Lown & Dolan, supra note 2, at 76-77 (noting that remarried men are also adversely affected when their wives bring children to the marriage).
\textsuperscript{451} See Engel, Pockets of Poverty, supra note 31, at Chapter 4.
\textsuperscript{452} See Steffamilies and the Law, supra note 88, at 10.
\textsuperscript{453} See Engel, College Expenses, supra note 111, at 6.
\textsuperscript{454} See id.
\textsuperscript{455} See FAFSA, supra note 109.
\textsuperscript{456} See generally Homer H. Clark, Jr., \textit{The Law of Domestic Relations in the United States} (2d ed. 1988).
Equal financial treatment of stepchildren and biological children is voluntary on the stepfather’s part. Moreover, the powerful legal position of the remarried man makes it unlikely that he will establish financial equality in a prenuptial agreement or in his will. Consequently, his wife’s children are automatically disadvantaged. This disadvantage provides another example of the dysfunction of a presumption of “marital partnership.” Existing law firmly favors a man’s children in a remarriage. Thus, the children of remarried women are vulnerable to financial insecurity unless properly executed documents are provided for them.

B. Policy Evolution

Remarriage has an ancient history. Families have continuously reformed themselves after the death of a spouse, most likely due to poor health, war, famine, pestilence, and childbirth. However, remarriages are a different experience today. Most remarriages follow divorce, not death. Moreover, remarriage after divorce does not close the family circle and reconstitute the former family. Instead, stepparents create new levels of kin and new interaction patterns. Unfortunately, the financial issues created by this familial evolution have been ignored. As a result, law and policy have lagged behind social change.

1. The State and Marriage Contracts

Typically, couples do not consider the ramifications that the third party to their marriage contract—the state—has on their union. State law builds a framework of benefits and responsibilities that define the relationships between husbands and wives, parents and children. In a country with a mobile populace but a federally structured government, the lack of consistency from state to state in family-related matters creates surprise and confusion. Even a carefully planned marriage contract can be undercut if the

457. See supra Part II.G.
458. See supra text accompanying notes 260-305.
459. See supra text accompanying notes 251-59.
460. See STACEY, supra note 1, at 41.
couple moves to a state with a different set of marital benefits and responsibilities. Domicile is relevant, and a change may require a renegotiation of financial presumptions. Most women do not realize this inconsistency and need to be aware of ways to protect their interests.

2. **The Most Vulnerable Years**

Within a remarriage, women's financial security slowly evolves as stepfamily relationship issues are addressed and resolved. Between the fifth and tenth year of remarriage, the incidence of joint asset ownership increases, as does the beneficiary status of wives. Additionally, spousal social security retirement benefits are available after ten years of marriage.

Unfortunately, statistics suggest that redivorce is most likely to occur in the early, and most financially vulnerable years, of a remarriage. Existing divorce law reflects a societal presumption that the wife can start again financially as a single woman or with another marriage. This possibility only truly exists for the young ex-wife. The second wife, who is typically older, may not have enough time to accumulate an adequate amount of her own financial wealth and security if she has not begun that process already.

V. **CONCLUSIONS AND RECOMMENDATIONS**

Confusion about the role of women's financial security, especially in second marriages, seems to permeate American society, from our political institutions, to our legal codes, to the actions and attitudes of individual family members. There appears to be tremendous social and personal pressures on women that

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465. See DIVORCE DECISIONS WORKBOOK, supra note 269, at 15 (providing a discussion of the states' positions characterized as equitable distribution, marital or community property, or common law).


467. See id. at 170-73, 275-96.

468. See id. at 206.

469. See Norton & Miller, supra note 5, at 6 (asserting that redivorce occurs sooner than first divorce).

470. See WILSON, supra note 438, at 2-5.
discourage them from articulating their own financial experiences and opinions.

A preliminary tour of social science articles and legal opinions suggests a disconnect between family law, policy, private ordering, and the equitable allocation of assets in stepfamilies. The limited research on stepfamily money management and the adjudication of family financial conflicts begins to explain why the small imbalances grow into large discriminatory effects. Thus, well-meaning men and women unintentionally devalue the growth of a wife’s personal financial security through a series of small and not-so-small slights.

Some sectors of society insist that the answer to most social ills, including the financial insecurity of women, is the strengthening of the “traditional” nuclear family, with dad in the workplace as the head of the family and mom in the home caring for the children and submitting to her husband’s authority. However, this “solution” ignores the historical and sociological trends that have produced the modern family diversity, as well as the modern financial stance of women in marriage. It is not hard to imagine that all kinds of families want the same things, a loving and supportive adult relationship and happy, successful, and well-adjusted children. However, by looking so longingly and lovingly at the short-lived 50’s model of a “perfect” family, society fails to realize that many stepfamilies have opened the door to successful family life in modern times.

These modern stepfamilies come in many permutations. Stepfamilies include couples in which both the man and the woman have been married before, or only the man or the woman has a prior marital history. Both the husband and the wife may bring children to the new marriage or only one member of the couple may be a parent. Stepfamilies may include minor children, adult children, or a combination of the two. The aforementioned stepfamily combinations may be further complicated by differences in social, racial, religious, or cultural environments.

471. See generally BLANKENHORN, supra note 463 (describing how the changing roles of fathers have negatively affected society).
472. See Tracy Longo, Alone Again, 10 FIN. PLAN. 130, 130 (1998) (“Eighty percent of widows who now live in poverty were not considered poor when their husbands were alive.”).
473. See Bartlett, supra note 82, at 912.
A. Where Does Society Go Wrong?

Some deeply-held assumptions in the social structure, such as "financial partnership" and "shared income," have emerged as culprits which create havoc in the development of stable stepfamilies as they produce barriers to women's personal financial security. Society should recognize that stepfamilies supplement the great strengths of the traditional family while also rewriting the script. It is therefore important that society normalizes family variations, especially stepfamily variations.

B. A Five-Point Strategy

The following five-point strategy would maximize the value of steprelationships. First, women in remarriages must realize that acting for the common good of their marriage may not be the equivalent of acting for their personal good. Second, couples must obtain pre-remarriage counseling regarding the unique financial issues related to their stepfamily. Third, the financial community must reach out to the under-served population of women in remarriages. Fourth, policies must be developed which play an active role in promoting the welfare of stepfamily members. Fifth and finally, laws and legal judgments on stepfamily matters must be reviewed by an un-biased, interdisciplinary authority who is empowered to hold the legal system accountable for its decisions.

1. Women in Stepfamilies

Predictable financial issues arise in stepfamilies without regard to the length of the marriage, the extent of the finances, or the stage in stepfamily development. For a married or remarried woman to have financial support when she grows older, it is necessary to master the facts of financial life in a stepfamily, along with maintaining a comfortable and realistic set of attitudes to guide her behavior.

Because marriage involves a financial relationship that is based on personal affection, women typically do not exercise enough caution, and consistently lose financial security when they fail to negotiate an agreement that properly reflects the financial conditions of their second marriage. Women routinely sacrifice opportunities to increase their own wealth by accepting the unpaid
positions of caretaker or household manager.\footnote{474} Women should begin to document such decisions. In this way, they will be able to account for their contributions in the event that the marriage ends. In the meantime, women need to educate themselves about the laws that affect them and voice their financial concerns with their husbands so that they both can work toward solutions.

2. \textit{Couples in Stepfamilies}

When couples are contemplating marriage, they should, at the very least, have conversations about money management.\footnote{475} These conversations should address the following issues: whether or not to have children together; moving away from the area in which they live; quitting or starting a job; regular and irregular income sources; income tax liability changes; current and pending liabilities (child/spousal support, tax liabilities, pending lawsuits); ongoing and future financial assistance to family members (children and aging parents); money management styles (casual versus bean-counting) on how to handle family finances (joint/separate accounts, who pays which bills, etc.); insurance coverage (health, life, property, umbrella); diagnosed health or emotional problems; inheritance money; retirement security; and finally, health care proxies and wills. If a couple talks seriously about these issues \textit{before} they enter into marriage, then perhaps women will be better off in the end.

3. \textit{The Financial Community}

It is imperative that society educates service providers about the similarities and differences in family needs in first and subsequent marriages. This essay suggests that women are dissatisfied with the solutions and resources currently available to them. Even when limited information is available, women say they do not feel that the professionals understand their divorce and remarriage experiences or how to help them prioritize their needs.\footnote{476} In short, women need both relevant financial information and professionals who understand their financial reality.

\footnote{474} See, e.g., \textsc{The Way We Really Are}, supra note 449, at 80-81; see also \textsc{Coontz}, supra note 30 at 42-67 (discussing Individualism, Gender Myths, and the Problem of Love).
\footnote{475} See \textsc{Margorie Engel}, \textsc{Weddings A Family Affair: The New Etiquette for Second Marriages and Couples with Divorced Parents} 149 (1998).
The perception that professionals are uninformed about remarriage issues provides a need for professionals to obtain training about stepfamily financial dynamics as part of their mandatory recertification process or through the development of marketing and sales skills. Service providers to the remarriage market need an overview of the stepfamily experience, as well as detailed knowledge about how procedures within their specialty field affect these families. This training should also include an overview of the issues that are different from first families, along with questions that remarried couples hesitate to bring up themselves.

A large number of women indicated that they would be more likely to use an advisor from a company that has trained its sales force in stepfamily dynamics and developed products designed for remarried couples.477 For instance, a market exists for life insurance providers who recognize the need for additional policies for second, or higher order, families. Because these policies are obtained at later ages and at less favorable premium rates than those obtained in first marriages, insurance providers will have incentives to sell these policies. Other types of insurance may also offer solutions to stepfamily problems. Among these other types of insurance include: life insurance policies as a "back up" to inheritance security; divorce insurance policies; arrangements for continued medical coverage of children of divorce/remarriage in the event of death, disability, or the change of employment of the legally responsible parent; and a child support payment assurance banking program, including interim payments when a parent is in noncompliance with a divorce agreement.

The financial industry also needs to provide clear explanations for investment products in a non-accusatory manner. Women desperately want financial facts, but even basic subjects can be touchy when speaking with remarried men and women. It is important for professionals to gingerly approach financial faultlines in remarriages, rather than avoiding them altogether. The financial equality, stepchild support, and beneficiary status issues are some of the very areas in which women need help. However, it is not enough to simply reach a woman on the verge of remarriage or as a newlywed. She requires the independent capacity to insist upon having her own financial counselors involved in the development of a marital partnership plan. A woman's counselor must be

477. See id. at 219.
prepared with the correct documentation to support her position and to develop a product that is specific to her financial needs.

The financial and legal communities are also remiss for not championing marriage contracts that support both equality and the renewal of those contracts. Lawyers and financial advisors can heighten the awareness of women, and reduce their financial insecurity, by providing a professional forum for developing marital partnership contracts without divisive discussions about money. For instance, this process could point out how women’s money is often dissipated by family consumables (food, clothing, home and yard care, family gifts, etc.) while men’s money is put toward tangible assets (mortgage, stocks, retirement plans, etc.).\textsuperscript{478} Perhaps it should be common practice for compensation and retirement benefits to accrue to both the husband and the wife from the household pool of income.

In order to provide services to stepfamilies, financial companies are dealing with a marketing strategy that is both “push” and “pull.” For some women, they should use “push” in order to create awareness and demand development. For others, they are in a “pull” situation whereby they can simply take orders for a pre-recognized need. Thus, each company’s primary job is to distinguish their products and services from their competitors. It is possible that the creativity of the marketplace will result in new products and the training of financial professionals so that husbands and wives are both in a position to make more equitable financial choices in their personal family money management.

A market solution pilot program could be based upon: policy issues; recognition in schools; preventive measures when couples obtain their marriage license at city hall;\textsuperscript{479} professional counseling about money; and targeted financial products. Continuing financial education programs could also include: course development for girls’ and women’s financial studies; Life Planning prenuptial financial counseling “valuing” all forms of family contributions made by the husband and wife so that equity may be appropriately  

\textsuperscript{478} When the outcome of the husband’s money is visible and the outcome of the wife’s money is not, the stage is set for money hassles at the time of divorce or drafting of inheritance documents. See Elizabeth De Armond, \textit{It Takes Two: Remodeling the Management and Control Provisions of Community Property Law}, 30 GONZ. L. REV. 235, 253 (1994-95).

\textsuperscript{479} In addition to the typical requirement such as blood tests, states could require couples to submit to financial equity reviews. Such a requirement would encourage people to begin their marriages as financial partners. Furthermore, the federal or state governments could urge couples to review their respective financial standing each year at tax time and to reestablish parity when necessary.
apportioned; and retirement planning programs for remarried couples to take into consideration accumulated funds diminished by QDRO's [Qualified Domestic Relations Orders] that divide these assets in a divorce agreement.

Regardless, service providers in the financial industry need a clear understanding that, through no fault of their own, bad financial events can happen to women due to society's marriage customs and court decisions. These service providers need to tailor their services accordingly.

4. Our Government and Policy-Makers

A definite need for more information about families and money management exists, but America is going in the wrong direction. Closing the government offices that collect and tabulate data on divorce and marriage, including remarriage, is short-sighted. The government is limiting the availability of reliable data at a time when such data is critical for the development of appropriate financial policies for stepfamilies. Society needs statistical data that is independent and more comprehensive than data collected by insurance companies and academic researchers. One simple way to gain important information about stepfamilies is to ask questions about the age and sex of children from prior unions on marriage license forms. This questioning will give researchers and policymakers access to more accurate information about the types of stepfamilies being formed, as well as information about the number of children living in remarriage households.

Financial issues within a family have been traditionally seen as private matters. However, because society is negatively affected by the consequences of financial divorce agreements breaking down, society pays the price when parents are unable to meet the financial needs of their children. Society targets other family social issues, such as drug abuse and spousal abuse, with commissions and research funding but the enormous and growing social issue of stepfamily finances is being neglected. Groups are

480. See generally Clarke, supra note 11 (stating that the system whereby the federal government obtains information about marriages and divorces is being discontinued due to budget cuts. The Branch does not know what will become of raw data collected between 1991 and 1995 due to the ongoing downsizing of staff.).

481. See generally supra notes 27-36 and accompanying text (discussing the relationship between women's finances and the private, domestic sphere).

482. See Linda J. Lacey, Mandatory Marriage "For the Sake of the Children": A Feminist Reply to Elizabeth Scott, 66 Tul. L. Rev. 1435, 1452 (1992) (citation omitted).

483. See Lown & Dolan, supra note 2, at 80.
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needed to finance research in the areas of stepfamily realities: the
effect of child support payments and how they are made; the ways
that college financial aid policies undermine stepfamilies; and the
dual rubric requiring no legal financial responsibility for step-
children, but counting the stepparent’s funds as if there were such
a requirement.

The federal government should address inconsistencies within
and between its branches. At the core, the United States needs a
uniform and consistent definition of “family” and “family members”
which includes stepfamily relationships—a definition of “family”
that supersedes all prior interpretations in law, policy, or prece-
dent.

Inconsistencies between state and federal policies must also be
resolved. These differences arise in the course of on-going mar-
rriages when federal policies presume that stepparent income is
available for stepchild support. This phenomenon is especially
true in situations of the stepchild’s need for financial aid for college
expenses, since the stepchildren are eligible for lower or no
benefits because of a stepparent’s income, even though the state
places no legal financial obligation on the stepparent. This
maneuver preserves federal funds, leaves the stepchild dependent
upon the voluntary contributions of stepparents, and does much to
create household friction.

Stepfamily relationships are legally recognized, primarily when
it is financially advantageous to the public coffers to do so. As a
result of these mixed messages, court cases are a hodgepodge of
individual rulings without consistent guidance to other litigious and
non-litigious stepfamilies. Most family law and policy points to
the stepchild as the marginal child in spite of the “best interests of
the child” rhetoric. These referenced court battles pertaining to
the responsibility for children support the notion that the lack of
clear obligations, rights, and privileges between stepparents and

484. See supra text accompanying notes 101-112.
485. The starting point is a federal form requiring financial information from the
residential stepparent. The stepparent’s financial position is used in calculating monies
assumed to be available to the college student. Using the “no legal financial responsibility
for stepchild” determination, a stepparent can refuse to provide the information—and the
application will not be processed. If a stepparent refuses to provide funds, the student is
simply out of luck. See Engel, College Expenses, supra note 111, at 6.
486. See id. at 8.
487. See supra notes 113-75 and accompanying text.
488. See id.
489. Cf. Mason & Simon, supra note 102, at 452 (discussing different treatment of children
under federal law).
stepchildren lessens the degree of commitment to family members and to the second marriage.\textsuperscript{490} When referring to family finances, problematic generalities exist. The consistent use, in government, financial, and research reports, of family income levels as a measure of a wife’s financial security is misleading and erroneous. The concept of family income being truly available to all family members is not supported by the court cases described in this essay.\textsuperscript{491} In spite of significant evidence to the contrary, the “official word” remains an all-inclusive family income as a measure of a wife’s financial security.\textsuperscript{492}

Along the same lines as the family income issue, some court cases revolving around stepfamilies and money point to gender neutral language in laws and policies, as if this language assures gender neutral outcomes.\textsuperscript{493} In reality, however, the gender neutral language in laws and policies does nothing to assure gender neutral outcomes.\textsuperscript{494} Indeed, the case may be made that the language often legally supports the opposite outcome.

5. Our Legal System

Litigation has its limits as a policy-making tool, especially when the law is not reflective of the reality of stepfamily life. The popular presumption of “financial partnership” masks financial inequality in remarriages.\textsuperscript{495} Courts need to become less passive and more sophisticated with respect to the value of a woman’s contribution to the family. For instance, in one Connecticut case, the judge ruled that Lorna Wendt had a valid claim to significant portions of her husband’s employment compensation, investments, and family assets by virtue of her nonmonetary contributions to their marriage.\textsuperscript{496}

\textsuperscript{490} See supra notes 184-96 and accompanying text.

\textsuperscript{491} See, e.g., Mears v. Mears, 213 N.W.2d 511, 511 (Iowa 1973) (discussing the limits of a stepparent’s duty to support stepchildren); Gregory v. Estate of Gregory, 866 S.W.2d 379 (Ark. 1993) (discussing the superiority of children’s rights over the surviving spouse’s rights in a will contract dispute).

\textsuperscript{492} See supra Part IV.A.


\textsuperscript{494} Cf. Wendt v. Wendt, No. FA96-0149562-5, 1998 WL 161165, at *85 (Conn. Super. Mar. 31, 1998) (stating that nonmonetary contribution criteria using “gender favorable” language violates the state’s Equal Rights Amendment and that such criteria should apply to wage earners and non-wage earners alike).

\textsuperscript{495} See supra text accompanying notes 205-37, 379-99.

\textsuperscript{496} See Wendt, No. FA96-0149562-5, 1998 WL 161165, at *42, *228-29 (holding that nonmonetary contributions of both spouses must be considered in asset disposition following
One way to avoid expanding this gap between the law and the reality of stepfamily life would be to mandate a determination of assets and debts at the outset of the marriage. At the present time, no state demands a prenuptial agreement.497 Unfortunately, prenuptial agreements tend to have negative connotations. Many people view them as a means to limit, rather than to enable, access to asset ownership.498 Despite their tainted image, prenuptial agreements could provide an excellent vehicle for women to establish the value of their contributions to the household at the outset of their marriage and to ensure their financial protection at the dissolution of their marriage. Another option could entail having laws patterned after affirmative action legislation, designed to reinforce appropriate financial behavior in marriage. At present, society represents marriage as a partnership,499 but nothing protects women who believe that is an accurate representation.

Stepparent adoption policies also need to be based on the realities of stepfamilies. It is generally recognized that the lack of legal ties lessens the commitment to children.500 The lack of balance between the interests of the stepchild versus the adopted child is a case in point. Under traditional adoption procedures, adoption severs the adopted child's connection to the biological parents for social and legal purposes.501 However, in stepfamilies, most stepchildren continue to have at least some limited connection with the non-custodial parent, as well as relatives on that parent's side of the family.

Though the state recognizes that no practical purpose exists for severing the connection to the biological parent, however tenuous it may be, it has put unnecessary legal barriers into place for stepparent adoption.502 A new form of adoption would untangle the quagmire of obligations, rights, and privileges between stepparent and stepchild. This new type of adoption could occur automatically upon marriage to the child's biological parent but would not create divorce, even though the wife's contributions in this case did not even entitle her to a fifty-fifty split of the assets).


498. See generally Ralph C. Brasher, Disinheritance and the Modern Family, 45 CASE W. RES. L. REV. 84, 144 n.200 (1994) [hereinafter Disinheritance] (discussing the foreboding image of prenuptial agreements).

499. See Waggoner, supra note 6, at 716.

500. See supra note 353 and accompanying text.

501. See STEPFAMILIES AND THE LAW, supra note 88, at 163.

502. See, e.g., supra text accompanying notes 360-64 for a discussion of barriers to adoption.
a loss of the other biological parent's rights, obligations, or inheritance eligibility. It would legitimize the stepparent/stepchild relationship, recognize that biology is not the sole determining factor of whether someone is a parent, and publicly acknowledge an important source of care-taking and support for the child.

The law of wills embodies a general assumption that testators do not regard stepfamily members as family members—another legal impediment to stepfamily equality. The states' unwillingness to include stepfamily members in class gifts to the testator's relatives disadvantages stepchildren. Unless the statutes in question specifically provide a preferred classification for stepchildren—most do not—they are strangers to the blood relatives and are subject to the higher inheritance tax rates.

The recent revisions in the UPC were designed to bring the law in line with the contemporary view of marriage as an economic partnership. The economic partnership, however, exists in language only—with this matter, no laws with teeth exist. As a result, if a man refuses to make a will and instead relies upon the new intestacy laws, he can severely limit his wife's financial beneficiary status. An interim step, on the way to a true marital partnership and financial equality between spouses, would be to abandon the "forced share" concept and work on the basis of "community property."

C. The Future

It is vital that we approach the financial insecurity of women in remarriages specifically and concisely, not as a secondary issue. Without having the family laws relating to how people live and who cares for them, American laws and policies are simply a statement of the types of behaviors that lawmakers do and do not endorse. When a legal system that supposedly exists to redress harm refuses to recognize many of the financial difficulties that women suffer, it appears to be a legal system for sustaining patriarchy. While the most egregious abuses have been eradicated from the books, a horrible legacy remains in our laws and policies, even though the actual words are not present. Egalitarian values for women are not yet reflected in the laws or policies for stepfamilies.

503. See Whitebread, supra note 327, at 125.
504. See id. at 139.
In order to "fix" existing problems, we need further research to determine which laws and policies promote wives' financial security and which ones create barriers. We need a professional, interdisciplinary forum to address ways to promote a new understanding of the problem and to achieve policy initiatives in the midst of traditional and moral arguments. How the debate is framed and what options are put before the public will define the breadth of our country's support for true marital partnerships.

This groundwork has opened the way for more detailed studies in a number of financial areas. For instance, society needs to examine the importance of "types" of money—operating expenses and capital formation—regardless of income source—as well as the ramifications of the asset mix when providing liquidity or lack of liquidity. In the family finance scheme, society needs to ask whether the second wife's money is dismissed because expense items—groceries, children's clothing, family gifts—do not hold the same financial value as her husband's purchase of stocks and retirement benefits. We also need to question how stepfamilies arrange their long-range financial planning, including inheritance. This information is relevant for updating intestacy laws that impact a large proportion of the American population. Moreover, society should examine the financial, legal, and social impact of the existing laws and policies on a sample population of stepchildren. A closer look at the financial impact mothers encounter while courts continue to debate when and if fathers and stepfathers have a financial responsibility to their children is necessary. Expanded studies about how stepfamilies actually manage their money would be invaluable in making more detailed proposals for the development of laws, policies, and financial products.

A permanent vehicle to make serious headway on the interdisciplinary project of shoring up American families is clearly needed. This vehicle requires credibility and visibility and I recommend the creation of The Permanent Commission on the Status of the Family. This Commission should determine, in a comprehensive way, how the divorce and remarriage process could be made less destructive for the women and children who live in divorced, single-parent, or step families. The fundamental solutions to fragile stepfamilies lie in the reform of the ground rules for marriage and for the responsibility for children. Because neither culture, nor structure, are

506. This is an extension of the basic dilemma about how to value a woman's contribution—a contribution usually thought of as "unpaid work" and used here to include actual monetary contributions.
necessarily immutable, the Permanent Commission on the Status of the Family should also be charged with recommendations to the legal and judicial systems with new ideas and new approaches to restore the integrity of the divorce and remarriage process.

It is clear that we do not live in a world where the majority of people are compelled to stay married “until death do us part.”

Some couples are not willing to go through the hard work of renegotiating traditional gender roles and expectations. Some individuals choose personal autonomy over family commitments. Some marriages fail for other reasons, such as abuse, personal betrayals, or chronic conflict, and often it is in no one’s interest that such marriages be saved. My proposals are additional cogs in the wheel to “institutionalize” divorce and remarriage by surrounding them with clear obligations and rights, supported by law, customs, and social expectations. If society eradicates the idea that every divorce and remarriage case is a new contest in which no accepted ground rules exist, we will minimize the temptation for parents to use divorce and remarriage to escape obligations to each other and to their children.

The goal is to “make the invisible visible” and, by so doing, encourage the public and private policy changes that are needed to better apportion stepfamily resources. This piece of research is a beginning for looking at the economic consequences of existing laws and policies, not in order to help women in remarriages to adapt individually to the status quo, but to criticize, and ultimately change it, via market, government, and society.

D. Role for the Stepfamily Association of America

Stepfamilies are a primary family form in the United States, and yet they have no effective lobbying group to represent their interests. People in stepfamilies should begin to think of themselves as a class because the problems they face are public problems, not solely individual problems. The same socially patterned issues repeatedly come up and yet, in spite of the numbers of stepfamilies and the awareness of problems, there remains isolating behavior.

This essay proposes and defends the financial reality that social structural reasons exist as to why some women are at odds with men and some stepparents are at odds with stepchildren: namely the marriage-based inequitable distribution of resources within

507. See Norton & Miller, supra note 5, at 5 (discussing recent trends in divorce).
many stepfamilies. Financial plans that are made on both the foundation of inconsistent legal rulings and the financial support that is made at the discretion of the wealthier spouse are not built on a firm foundation. The entire plan is subject to destruction on a whim. Many women find that their financial imbalance negatively affects their feelings about both their spouse and their marriage. This essay suggests that these interrelationships are not examined because they are often uncomfortable for a particular group of people. Addressing these stepfamily realities is a logical objective for the Stepfamily Association of America.508

The board of the Stepfamily Association of America recently approved an expanded purpose and vision in order to provide information, support, and advocacy for stepfamilies and those who work with them.509 The Association's purpose is to develop and disseminate research-based information and materials; design, implement, and evaluate opportunities for support and education; evaluate and recommend programs, materials, and standards of practice; and advocate for financial, institutional, political, and social changes that support stepfamilies.510 Society cannot and should not rest until it reaches the Stepfamily Association of America's vision that stepfamilies become accepted, supported, and successful.511

508. See Kay Pasley, Divorce and Remarriage in Later Adulthood, 18 Stepfamilies 1, 3 (Spring 1998).
509. Telephone Interview with Claudia Dougherty, General Staff member for the Stepfamily Association of America (March 15, 1999).
510. See id.
511. See id.