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Protecting the Child From Disinheritance: Must Louisiana Stand Alone?

Ralph C. Brashier*

I. INTRODUCTION

Louisiana provides young children of its testators with direct protection from disinheritance.¹ It is the *only* state to do so.² Although Louisiana's protective scheme is unique within the United States, provisions protecting children from disinheritance are in place in most modern nations throughout the world.³ Louisiana's legitime, like the majority of protective schemes currently used outside the United States,⁴ traditionally protected all children from parental

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1. See La. Civ. Code art. 1493(A) (providing that decedent's children 23 years of age or younger, as well as other descendants who through mental incapacity or physical infirmity are incapable of taking care of themselves, are forced heirs); *id.* at art. 1494 (providing that a forced heir cannot be deprived of his portion of the testator's estate—the legitime—without cause); *id.* at art. 1495 (providing method for calculating portion to which forced heirs are entitled, typically either 1/4 or 1/2, depending upon the number of forced heirs).

2. See Eugene F. Scoles & Edward C. Halbach, Jr., *Decedents' Estates and Trusts* 112 (5th ed. 1993) (noting that "[i]n but one state is there a form of forced heirship for descendants" and citing a Louisiana statute).

3. Among the countries (or their subdivisions) that protect children from disinheritance by their parents are Argentina, *Martindale-Hubbell International Law Digest* Arg-6 (1996); Austria, *id.* at Aut-4-5; Belgium, *id.* at Blg-12; Bolivia, *id.* at Bol-3; Brazil, *id.* at Brz-6; Bulgaria, *id.* at Bul-7; Chile, *id.* at Chl-3; Columbia, *id.* at Col-5; Costa Rica, *id.* at Cr-10; Czech Republic, *id.* at Cze-15; Denmark, *id.* at Dk-5; Dominican Republic, *id.* at Dr-8; Ecuador, *id.* at Ecu-9; El Salvador, *id.* at Es-9; Finland, *id.* at Fin-9; France, *id.* at Fra-14-15; Germany, *id.* at Ger-21; Greece, *id.* at Grc-9; Guatemala, *id.* at Gua-9; Honduras, *id.* at Hon-8; Hungary, *id.* at Hgy-14; India, *id.* at Ind-35; Ireland, *id.* at Ire-5; Italy, *id.* at Itl-6-7; Japan, *id.* at Jpn-14; Republic of Korea, *id.* at Kor-6, 17; Lebanon, *id.* at Leb-12-13; Liechtenstein, *id.* at Lch-5; Malta, *id.* at Mlt-8; Mexico, *id.* at Mex-18; Mongolia, *id.* at Mon-4; Netherlands, *id.* at Nth-23; Nicaragua, *id.* at Nic-7; Norway, *id.* at Nor-7; Panama, *id.* at Pan-14; Paraguay, *id.* at Par-3; Peru, *id.* at Per-12; Poland, *id.* at Pol-27; Portugal, *id.* at Por-3; Romania, *id.* at Rom-22; Russian Federation, *id.* at RF-19; Scotland, *id.* at Sco-4; Spain, *id.* at Spn-7; Sweden, *id.* at Swd-11; Switzerland, *id.* at Swz-18; Turkey, *id.* at Tur-9; Ukraine, *id.* at Ukr-24; Uruguay, *id.* at Uru-10; Venezuela, *id.* at Ven-11. See also *infra* notes 116-117 and accompanying text (discussing means of protection afforded under testator's family maintenance system adopted in England, Malaysia, New Zealand, Northern Ireland, Singapore, and parts of Australia and Canada, and in commonwealth colonies such as Hong Kong).

4. The most commonly encountered forms of protection are derived either from civil law concepts of a fixed, fractional forced inheritance (such as Louisiana's original legitime) or from a discretionary judicial award of maintenance. The latter approach is a twentieth-century development. See *supra* note 3 (providing list of some countries with protective schemes). See also *infra* notes 115-117 and accompanying text (comparing and contrasting the two schemes).

disinheritance. After acrimonious struggles, however, the state recently reduced the class of children eligible for such protection. Today, the protection in Louisiana is no longer afforded to able children over twenty-three years of age at the testator's death.⁵ Importantly, however, Louisiana chose to retain its protection of the testator's children who are most likely to need it—children in the early part of their lives.⁶

In this symposium concerning Louisiana's forced heirship provisions, it seems appropriate that one article examine the extraordinary lack of protection from disinheritance provided to a testator's young children⁷ in the rest of the United States.⁸ This "mysterious absence," as one well-known scholar has

5. See *supra* note 1 (discussing Louisiana statutes protecting certain children from disinheritance).

6. See *supra* note 1 (discussing Louisiana statute providing protection for children who are 23 or younger). The statute also protects the testator's older disabled children.

7. This article focuses in particular on lack of protection from disinheritance afforded to minor children. Although the article does not discuss the adult disabled child, many of the same arguments favoring protective schemes for minor children apply with equal force to the adult disabled child. The parent's moral obligation to the adult disabled child is legally recognized in the *inter vivos* support statutes of some states. See also *infra* note 23 (listing sample statutes imposing parental obligation of support); cf. *supra* note 1 (indicating that Louisiana's limited forced heirship principles include the adult disabled child of the testator).

8. American probate and family law scholars have, by and large, simply ignored the disinherited minor child. As a result of the change in modern family structures, the plight of this child merits serious assessment. During the past decades, a few articles have been devoted to the topic of child disinheritance. Several larger works discuss the topic incidentally. Among the principal works concerning disinheritance of children, directly or incidentally, see Harry D. Krause, *Child Support in America: The Legal Perspective* 38-44 (1981) (proposing extension of child support obligation beyond death); W. D. MacDonald, *Fraud on the Widow's Share* 35-36, 307-08 (1960) (proposing maintenance scheme for testator's minor and disabled children); Lewis M. Simes, *Public Policy and the Dead Hand* 24, 29-30 (1955) (finding that a child who cannot provide his own education and maintenance should be able to claim against testator-parent's will); Deborah A. Batts, *I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 *Hastings L.J.* 1197, 1253-69 (1990) (proposing forced system of inheritance for testator's children); Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 *Case W. Res. L. Rev.* 83, 163-80 (1994) (advocating recognition of testator's posthumous support obligation to his minor children); Edmond N. Cahn, *Restraints on Disinheritance*, 85 *U. Pa. L. Rev.* 139, 147 (1936) (suggesting that dependent children be given protection based on determination of court); Paul G. Haskell, *Restraints Upon the Disinheritance of Family Members*, in *Death, Taxes and Family Property* 105, 114-16 (Edward C. Halbach, Jr., ed., 1977) [hereinafter Haskell, *Restraints*] (advocating protection at least for testator's needy minor children); Paul G. Haskell, *The Power of Disinheritance: Proposal for Reform*, 52 *Geo. L.J.* 499, 519-20 (1964) [hereinafter Haskell, *Power*] (proposing limited forced share for children with possibility of supplement tied to minority or educational need); Herbert D. Laube, *The Right of a Testator to Pauperize His Helpless Dependents*, 13 *Cornell L.Q.* 559, 594 (1928) (noting, in the earliest important article on child disinheritance, that potential results of disinheritance are contrary to humanity, social interest, and policy); Jan E. Rein, *A More Rational System for the Protection of Family Members Against Disinheritance: A Critique of Washington's Pretermitted Child Statute and Other Matters*, 15 *Gonz. L. Rev.* 11, 44-56 (1979) (proposing use of testator's family maintenance system).

termed the child's lack of protection from disinheritance,⁹ is particularly disconcerting in a country that pays great lip service to ensuring the well-being of its youth. Nonetheless, under the probate laws of forty-nine states, even a wealthy parent is permitted to leave his needy children penniless.¹⁰ When the disinherited child is a minor, unable to provide for himself, society often must bear the cost of the parent's disinheriting act. Disheartening evidence indicates that large numbers of parents—particularly noncustodial parents—seek to avoid their inter vivos obligation to support their minor children.¹¹ Such parents are unlikely to provide for those minor children by will when disinheritance is perfectly permissible. Thus, in this era of fractured families and multiple marriages, the societal burden is likely to increase under the testamentary freedom the parent possesses.¹²

The basic question this article poses is straightforward: Should a parent's universally recognized moral and societal obligation to support his minor children terminate upon death? If the answer is yes, then the protection provided by the majority of countries in the world and Louisiana is perhaps a relic. If the answer is no, then other states should recognize that their probate and child protection laws are out of step with the principal legal systems of the world and are likely to produce harsh results in light of modern family structures. Moreover, protective schemes such as that of Louisiana and those of modern nations throughout the world become highly relevant as potential models from which the rest of us can learn.¹³

Part II of this Article examines the parent's moral obligation to support his minor children and the importance of that obligation to society. Part II also discusses the legal obligation of inter vivos support that developed from the moral obligation. Part III explains why American inheritance law regarding young children is inadequate. In particular, Part III demonstrates that inheritance statutes acknowledge the support obligation only in limited ways. Moreover, these statutes improperly elevate the adult parent's autonomy over the infant

9. See Haskell, *Restraints*, *supra* note 8, at 114-15 (finding the "mysterious absence of protection for children" inexplicable).

10. See Krause, *supra* note 8, at 38-44 (explaining that in forty-nine states, "if a wealthy father whose wife has predeceased him dies with a will that disinherits his small children, they will not receive a cent"); Scoles & Halbach, *supra* note 2, at 112 (noting lack of protection for disinherited children in states other than Louisiana); see also Laube, *supra* note 8 (indicating in title of early article on child disinheritance in America the unpardonable state of laws that permits a parent to "pauperize" his children by will).

11. See Joseph I. Lieberman, *Child Support in America* ix (1986) (noting that more than half of fathers ordered to pay disobey such orders and referring to "national disgrace" of child support in America).

12. See *infra* notes 41-52 and accompanying text (discussing how change in family structure is likely to increase instances of child disinheritance, in many instances forcing society to step in through charity or welfare).

13. A third answer to the question posed by this article is "maybe." If "maybe" is the answer, then state legislatures and others interested in probate laws and child protection should at least engage in further study of the disinheritance problem.

child's need and, remarkably, provide the parent with greater inheritance protections against the minor child than those afforded to the child against the parent. This Article concludes that minor children should be protected from disinheritance. Reasons asserted for permitting disinheritance are unpersuasive when viewed in light of the moral obligation running from a parent to his young child. Standing alone among the states, Louisiana should be applauded for the protection from disinheritance it affords to children of its testators.

II. MORAL, SOCIETAL, AND LEGAL OBLIGATIONS OF PARENTAL SUPPORT

Our collective moral sense informs us that each parent has an obligation to nurture his children until they reach adulthood.¹⁴ This nurturing obligation includes the provision of adequate support or, at least, support to the best of the parent's ability.¹⁵ The obligation is so universally recognized as a part of the natural law that for centuries there was little positive law imposing civil or criminal penalties for its violation.¹⁶ In a perfect world, a parent's moral sense would largely ensure adequate protections for his minor children.¹⁷

Fulfillment of the support obligation is first and foremost the obligation of the parents of the minor child. If that obligation goes unfulfilled,¹⁸ however, society has an obligation to see that the child is provided for through charitable

14. See Scott E. Friedman, *The Law of Parent-Child Relationships: A Handbook* 101-02 (1992) (discussing moral obligation of support).

15. Cf. 1 William Blackstone, *Commentaries on the Laws of England* *435 (1966) (noting that the duty of parents to provide for the maintenance of their children is a principle of natural law).

16. See Krause, *supra* note 8, at 3 (noting early common law's seeming failure to impose civil obligation of child support on father).

17. See 1 Blackstone, *supra* note 15, at *435. In Blackstone's words, [t]he municipal laws of all well-regulated states have taken care to enforce this duty [of parents to provide for the maintenance of their children]: though providence has done it more effectually than any laws, by implanting in the breast of every parent that natural copy, or insuperable degree of affection, which not even the deformity of person or mind, nor even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish.

Blackstone's belief that every parent feels duty-bound to maintain his child cannot be squared with scenarios increasingly encountered in modern case law. See *infra* notes 41-52 and accompanying text (discussing instances in which parents refuse to support minor child).

18. Occasionally statutes have imposed "subsidiary" support obligations within the family for the protection of children. For example, such a statute could require a grandparent to support his indigent grandchildren in some circumstances. These statutes were seldom used and have been in decline for a number of years. See, e.g., Cal. Fam. Code § 3930 (West 1994) (providing specifically that a grandparent does *not* have the duty to support his grandchild). See generally Krause, *supra* note 8, at 7-8 (noting in 1981 that relative responsibility statutes were on the decline). On the other hand, statutes in some states now impose under certain circumstances a duty of support upon a stepparent or a person cohabiting with the child's parent. See, e.g., Del. Code Ann. tit. 13, § 501(b) (West 1994) (imposing support duty upon stepparent or person who cohabits in relationship of husband and wife with child's parent when parents are unable to provide for child's minimum needs and when child makes its residence with such stepparent or cohabitant).

or governmental acts.¹⁹ When the parent is unable to provide for his child or when the parent simply refuses to provide for his child, the burden shifts to society, thereby reducing the resources that other parents have to expend upon their own young children. Parental inability and parental refusal to support a child are completely different from one another, however, when viewed from the standpoint of moral obligation, even though in the absence of positive law both shift the burden of providing support to society. In the former instance, society steps in to assist the incapable parent, recognizing that it is in society's best interest to ensure that all of its young are provided with the opportunity to become contributing members. In the latter instance, society must require by law that the capable parent support his children despite his abnegation of moral responsibility.

The need to protect the child and the state²⁰ by imposing personal responsibility for the decision to procreate²¹ supports the recognition of a parent's *legal* duty to maintain his child during the child's minority.²² Not surprisingly, today

19. For a discussion of the degree to which society continues to rely on the family unity to provide for its young, old, sick, disabled, and needy see Mary Ann Glendon, *The Transformation of Family Law* 306-11 (1989) (concluding that "no complete substitute has been devised for the voluntary provision of care, services, and income by family members—nor does one appear to be on the horizon").

20. See Donna Schuele, *Origins and Development of the Law of Parental Child Support*, 27 J. Fam. L. 807, 840 (1988-89) (noting that it was imperative to recognize the legal duty of support to prevent a drain on state coffers).

21. In considering moral obligation and the natural law that requires a parent to support his minor child, Blackstone reminds us that we should never forget the progenitor's choice that ultimately led to the child's existence:

The duty of parents to provide for the maintenance of their children is a principle of natural law; an obligation, says Puffendorf, laid on them not only by nature herself, but by their own proper act, in bringing them into the world; for they would be in the highest manner injurious to their issue, if they only gave the children life, that they might afterwards see them perish. By begetting them therefore they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life they have bestowed shall be supported and preserved.

1 Blackstone, *supra* note 15, at *435.

Ironically, in areas outside of child support, a testator's personal responsibility for actions does not disappear by the fact of his death. Thus, for example, the testator's creditors may make their claims against his estate. Surely a parent is just as responsible for his child's existence as he is for the debts he incurs.

This obligation should be no less recognized when it is minors themselves who are procreating. With large numbers of teenagers parenting, we might expect more legislatures to state explicitly that the parental support obligation extends to parents of all ages. See, e.g., Ill. Ann. Stat. ch. 750, para. 45/3.1 (Smith-Hurd 1993) (providing specifically that minority of a parent does not relieve that parent of support and maintenance obligations to the child).

22. On the value of having family laws that enforce a widely-shared, intuitively-felt obligation, see Glendon, *supra* note 19, at 311-13. Professor Glendon states that "the notion that family law can be completely neutral" is "illusory and somewhat dangerous."

[J]ust as we must guard against having exaggerated expectations of what law can accomplish on its own, we must also take care not to fall into the opposite error of unduly minimizing its potential to influence social trends. . . .

states have statutes to ensure that the able parent fulfill the support obligation while living.²³ Because the state is reluctant to inquire into the realm of the nuclear family, however, it is difficult to ensure that a parent in such a family is in fact adequately providing for the child. Ensuring fulfillment of the support obligation is also difficult in non-nuclear families, even when the state is directly involved—for example, in the vast and increasing number of cases in which a custodial parent sues the noncustodial parent to collect support.²⁴ Nonetheless, legal recognition of the inter vivos duty of support is not superfluous. Support statutes provide civil and criminal penalties for violation of the support obliga-

It seems likely that when the law is in harmony with other social forces, it will synergistically produce a greater effect in combination with them than it could on its own.

Id. at 311-12.

23. See, e.g., Ala. Code § 13A-13-4 (1975) (making it a misdemeanor for any able parent to intentionally fail to provide support to his child who is less than nineteen years of age); Alaska Stat. § 11.51.120 (1962) (stating that person charged with support of child under eighteen commits criminal nonsupport if he fails to do so without lawful excuse); *id.* at § 25.20.030 (imposing obligation upon parent to support his children); Ariz. Rev. Stat. Ann. § 12-2451 (1994 & Supp. 1995) (imposing upon parent duty of reasonable support for his minor, unemancipated natural or adopted children); Ark. Code Ann. § 5-26-401(a)(2), (3) (Michie 1987) (providing that person commits offense of nonsupport if he fails to provide support to his minor child); Cal. Fam. Code § 3900, 3901 (West 1994) (providing that father and mother have equal responsibility to support their minor child); Colo. Rev. Stat. § 14-6-101 (1987 & Supp. 1995) (making it a felony for a parent to willfully neglect, fail, or refuse to provide reasonable support and maintenance for his children under eighteen years of age); Conn. Gen. Stat. Ann. § 53-304 (West 1958 & Supp. 1996) (providing that parent who neglects or refuses to furnish reasonable necessary support to his child under eighteen is guilty of nonsupport and shall be imprisoned not more than one year); Del. Code Ann. tit. 13, § 501 (1974) (imposing primary duty of support of minor children upon its parents); Fla. Stat. Ann. § 856.04 (West 1994) (stating that parent who willfully withholds means of support from child is guilty of a third degree felony); Ga. Code Ann. § 19-7-2 (Michie 1991 & Supp. 1996) (providing that parents have joint and several duty to provide for maintenance, protection, and education of minor children); Haw. Rev. Stat. § 709-903 (1985) (stating that person who is able and who knows he is legally obliged to provide for his child commits offense of persistent nonsupport if he knowingly and persistently fails to provide support); Idaho Code §§ 18-401 (1987) (stating that every person who willfully omits without excuse to furnish necessary food, clothing, shelter, or medical attendance for his child is guilty of a felony punishable by imprisonment not to exceed 14 years); Ill. Ann. Stat. ch. 750, para. 45/1.1 (Smith-Hurd 1993) (recognizing right of every child to physical, mental, emotional and monetary support of his or her parents); Ind. Code Ann. §§ 35-46-1-4, -5 (Burns 1994) (providing that parent who knowingly or intentionally deprives his dependent of necessary support commits felony); Iowa Code Ann. § 726.5 (West 1993) (providing that a parent who refuses to support child under eighteen commits nonsupport); Kan. Stat. Ann. § 21-3605(a)(1), (7) (1995) (providing that nonsupport of a child without lawful excuse is a level 10, nonperson felony); Ky. Rev. Stat. Ann. § 405.020 (Michie/Bobbs-Merrill 1984 & Supp. 1994) (imposing upon father and mother joint custody and duty of nurture and education of their children who are under eighteen); La. R.S. 14:74 (1986) (establishing duty for either parent to support minor child and providing that failure to do so may result in criminal neglect).

One commentator has noted that some state statutes do not explicitly state the support obligation, but rather assume its existence. See Krause, *supra* note 8, at 3.

24. See *supra* note 11 and accompanying text (discussing difficulty of collecting child support).

tion.²⁵ The potential application of these sanctions undoubtedly causes some parents who would not otherwise do so to support their children.

When a minor child's parent dies, the child's need does not suddenly disappear.²⁶ If the disinherited minor child does not receive adequate support from others, the state must provide for the child. Assuming that moral obligation to the needy child and societal protection are among the principles underlying the modern parental support statute, what justifications exist for permitting a parent to disinherit his minor children?

III. WHY PERMIT THE DISINHERITANCE OF MINOR CHILDREN?

There are several possible explanations for the current state of American probate law concerning child disinheritance. Six of these reasons are explored in the following discussion.

Reason One: Parents generally accept personal responsibility for, and fulfill their moral obligations to, the minor child. Most parents sense their moral obligations to their children and seek to fulfill those obligations to the best of their abilities. Further, most parents are particularly likely to provide care and protection for their minor children.²⁷ In contrast, adult children, if disinherited, are competent to provide for themselves.²⁸ Therefore, one might argue, laws protecting children from disinheritance by their parents are superfluous.²⁹

Parents disinherit their children for various reasons. For example, some parents hold an altruistic belief that total disinheritance of one's child forces that child to become a more fully self-actualized individual and contributing member of society.³⁰ Disinheritance in these instances, however, typically is that of the

25. See *supra* note 23 (providing sample listing of state statutes concerning obligation of maintaining one's minor child).

26. See Krause, *supra* note 8, at 38 (noting that parents' support obligation traditionally and still typically ends at death).

27. See *infra* note 50 (discussing surveys in which respondents indicated that parents should not be able to disinherit their minor children).

28. See, e.g., Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 Mich. L. Rev. 1303, 1307 (1969) (finding that there has been almost no inclination to provide children with protection from disinheritance because disinheritance occurs rarely and typically only when there is cause). Commentators have also suggested that timing factors thus make the disinheritance problem an illusory one, since disinherited children are likely to be competent adults. See, e.g., Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. Chi. L. Rev. 241, 256-57 (1963) (concluding that disinheritance of minor children is a problem that "does not really exist in modern society given the longevity of the average adult together with the early marriage and the early time of having children"). But cf. *infra* note 50 (noting one survey in which almost two-thirds of respondents indicated that parent should not be able to disinherit his minor or adult children).

29. See, e.g., Dunham, *supra* note 28 (writing in 1963 that disinheritance problem "does not really exist").

30. Commentators and parents have noted that "[t]he very knowledge of the certainty of the inheritance to come" may often deprive children "of any motive to lead a useful life." Alex

adult child and frequently involves testators who are at least moderately wealthy.³¹ These disinheriting testators have supported the child throughout his minority and have provided him with the education and opportunities needed to be successful in his own right. Further, these testator parents are convinced that both their child and society will be better off if the child is not allowed to ride the coattails of inherited wealth.³² Whether disinheritance of the adult child actually accomplishes the desired beneficial results is open to debate. Nonetheless, disinheritance of one's adult children is much less objectionable than disinheritance of one's minor children who are as yet incompetent to provide for themselves.

In addition to altruistic reasons for disinheriting one's children, the realities of modern life may make disinheritance a practical necessity. For example, it would not be surprising to learn that older testators are increasingly providing for their surviving spouses at the expense of children.³³ With life expectancies and costs of elder care increasing, the testator spouse may feel that most, if not all, of his estate³⁴ should be devised to the surviving spouse.³⁵ When the couple is elderly, providing for the spouse to the exclusion of adult children is perhaps both practical and altruistic. The propriety of providing solely for one's spouse is questionable, however, when the testator has minor children. Most parents with minor children are young or middle-aged adults. Presumably these parents are competent to provide for themselves and are not necessarily constrained by the homemaker-mother/breadwinner-husband roles once taken for granted. In

Shoumatoff, *The Mountain of Names* 103-05 (1985) (discussing primogeniture in England).

31. It may be the wealth of the testator that brings notoriety to the disinheriting act. In recent years, pop media has enjoyed reporting such cases. See, e.g., Kristin McMurren, *The Band-Aid Heir Left All He Owned to His Widow, But His Children Claim It Was Just Seward's Folly*, *People*, May 26, 1986, at 99 (noting that J. Seward Johnson, son of the founder of Johnson & Johnson, disinherited his children in his 1966 will "explaining that while he was pleased to have given the children what he had, he now believed they were financially secure"). For an entertaining book that includes cases of disinheritance, see Herbert E. Nass, *Wills of the Rich & Famous* (1991). The book notes, for example, that Henry Fonda's will included a clause disinheriting children Jane and Peter because they were financially independent. The clause specifically indicated, however, that the father's decision was "not in any sense a measure of my deep affection for them." *Id.* at 55. Perhaps the most infamous case in recent decades was Joan Crawford's disinheritance of her daughter Christina. When Christina learned of the disinheritance following her mother's death, she wrote *Mommie Dearest*, an exposé that sold over three million copies and that may represent the disinherited child's ultimate revenge. See *id.* at 22 (discussing will of Joan Crawford).

32. See Shoumatoff, *supra* note 30 (discussing primogeniture).

33. Cf. Marvin B. Sussman et al., *The Family and Inheritance* 86-95 (1970) (discussing surveys indicating that typical testator provided for surviving spouse, even to the exclusion of his own children).

34. Women comprise a substantial majority of surviving spouses. See Lawrence A. Frolik & Alison P. Barnes, *Elderlaw* 25 (1992) (stating that 85% of surviving spouses are women). Thus, in this article the female gender is used when referring to the surviving spouse.

35. Numerous states by statute impose maintenance of one's spouse as an inter vivos obligation. See, e.g., Idaho Code § 18-401(3) (1987) (making it a felony for able husband to refuse or neglect to provide wife with necessary food, clothing, shelter, or medical attendance).

contrast, the young couple's minor children are generally unable to provide for themselves.

Occasionally, minor children are inadvertently disinherited. States afford protection from inadvertent disinheritance through pretermitted child statutes.³⁶ The protection varies significantly from state to state.³⁷ Typically, to claim a part of the parent's estate the child must be born after the execution of the will and must demonstrate that the testator did not intentionally seek to disinherit his children.³⁸ It seems unlikely that in executing his will a testator could forget the existence of his known children,³⁹ but inadvertent omission does happen.⁴⁰

Finally, there are parents who disinherit their children neither for altruistic or practical reasons nor through inadvertence, but for reasons that most adults view as unquestionably wrong. Disinheritance of minor children appears to be an increasing problem, for example, for the vast numbers of children who are not in a nuclear family at the parent's death. Approximately one-half of all marriages now end in divorce, and noncustodial parents appear particularly likely to disinherit their minor children. The difficulty of collecting child support from noncustodial fathers is well documented. Can we really expect fathers who shirk their inter vivos obligation to provide for the child voluntarily by will? At least with failure to pay the inter vivos child support obligation, the parent faces the possibility of judicial sanctions for the violation of the legally recognized moral obligation. In contrast, it is impossible to impose sanctions on a dead parent who has disinherited his minor child.

The serious nature of the disinheritance problem should not be underestimated. For example, following a bitter divorce dispute, the noncustodial parent may

36. See, e.g., Ala. Code § 43-8-91 (1975) (providing that testator's unintentionally omitted child born or adopted after will execution receives intestate share); Miss. Code Ann. § 91-5-5 (1972) (indicating that the afterborn pretermitted child takes intestate share of testator parent's estate); Tenn. Code Ann. § 32-3-103 (1984) (providing that a child born after the making of testator's will, and not provided for nor disinherited, receives intestate share of testator's estate).

37. In some states, for example, the protection can extend to the child who was omitted because of the testator's mistaken belief that the child was dead. See, e.g., Unif. Prob. Code § 2-302(c), 8 U.L.A. 140 (Supp. 1996) (providing that child omitted solely because testator believed child to be dead is entitled to share of testator's estate). In a few states, the pretermitted child statute includes any child omitted by the will, even if born before the will was executed. See, e.g., *In re Estate of Rubert*, 651 A.2d 937, 939 (N.H. 1994) (applying New Hampshire statute and distinguishing it from statutes that apply only to children born after the execution of the will). See also Robert E. Mathews, *Trends in the Power to Disinherit Children*, 16 A.B.A. J. 293, 294-95 (1930) (concluding that some courts emphasize social obligation over strict compliance with pretermitted child statutes, thus allowing child to take part of parent's estate).

38. See *supra* note 36 (providing list of sample statutes).

39. See Rein, *supra* note 8, at 25 ("Forgetting about the existence of a child one already has is on a par with misplacing a house—not very likely").

40. The omission most frequently occurs when the testator fails to update his will after the birth of one or more children. See, e.g., *In re Estate of Fleigle*, 664 A.2d 612, 615 (Pa. Super. Ct. 1995) (finding that child was properly considered a pretermitted heir where born after testator executed will); *Statler v. Dodson*, 466 S.E.2d 497 (W. Va. 1995) (concerning attorney fees for pretermitted child; testator died while fiancée was pregnant with child).

disinherit his minor child as one last slap at the custodial parent or the child. Even in the absence of malicious or spiteful motives, the noncustodial parent may become detached from the child or prefer a second, replacement family. One court noted the problem as follows:

[W]hile it is comparatively rare for a nondivorced parent to leave a spouse and their children out of a will, it is not so uncommon for a divorced parent to do so. A divorced parent may establish a new family which may command primary allegiance in a subsequent will. The well-being of children of a former marriage may seem more remote to a noncustodial parent than the well-being of those children over whom that same parent has immediate care and custody. In addition, the divorced parent may harbor animosity toward a former spouse, which disposition might obscure the natural tendency to provide in a will for their mutual children.⁴¹

Consequently, increasing numbers of instances are likely to occur such as those in which the noncustodial father bequeathed \$1 of his \$400,000 estate to an infant daughter from a former marriage;⁴² or bequeathed \$1 to his infant daughter a few weeks after divorcing the child's mother;⁴³ or devised everything to his current wife after acknowledging his infant child from an earlier marriage;⁴⁴ or left \$10 of a \$64,000 estate to his infant daughter being reared by his ex-wife.⁴⁵

Children of divorce are not the only ones who are likely to be disinherited. Since the early 1960s, the rate of nonmarital birth in this country has increased by almost five hundred percent.⁴⁶ In some metropolitan areas, more than fifty percent of children are now born out of wedlock.⁴⁷ When a paternity action is

41. *Kujawinski v. Kujawinski*, 376 N.E.2d 1382, 1390-91 (Ill. 1978) (citation omitted). See also *In re Estate of Brown* 597 P.2d 23, 24 (Idaho 1979) (noting that although the testator acknowledged the infant from a prior marriage in his will, he devised his entire estate to his second wife and their four children). The *Brown* court stated: "While it is true that the common law doctrine in effect permits a parent to disinherit a child, there is no great danger that a parent would exercise this arbitrary right so long as the family unit remained intact." *Id.* at 25.

42. *Hornung v. Estate of Lagerquist*, 473 P.2d 541, 543 (Mont. 1970) (indicating, however, that the support obligation extended beyond parent's death).

43. *Hill v. Matthews*, 416 P.2d 144, 144 (N.M. 1966).

44. *In re Estate of Brown*, 597 P.2d 23 (Idaho 1979).

45. *Herring v. Moore*, 561 S.W.2d 95, 96-97 (Ky. Ct. App. 1977).

46. In 1960, the nonmarital birth rate was 5%. Elizabeth Mehren, *American Family Steadily Eroding, Researchers Find*, L.A. Times, July 20, 1988, View, pt. 5, at 1. A June 1992 census study indicated that almost 25% of American women between eighteen and forty-four had given birth out of wedlock. Sam Fulwood III, *Out-of-Wedlock Births Rise Sharply Among Most Groups*, L.A. Times, July 14, 1993, at A1 (citing July 1993 Census Bureau release, "Fertility of American Women: June 1992").

47. See, e.g., Sam Fulwood III & Mary Powers, *Census Finds Surge in Births Out of Wedlock*, Com. Appeal (Memphis), July 14, 1993, at A1 (indicating that in Memphis, Tennessee and the surrounding county, more than one-half of all births in 1992 were to unmarried women).

brought against the putative father of a nonmarital child, he will often dispute the claim. If the claim is proven and support is ordered, the father may view the child merely as an unwanted source of debt. The father of the nonmarital child may have no personal contact with the child and may have less incentive than a divorced noncustodial father to provide for the child. Such a father may never consider the child the natural object of his bounty or recognize the moral obligation flowing from the act of procreation. In sum, the father obliged to pay child support in these circumstances may consider the child nothing more than a creditor. The father's ordinary creditors cannot be written off or "disinherited" by his will; ironically, the disinheritance of his child is perfectly permissible.

Whether the overall proportion of testators intentionally disinheriting their minor children is in fact increasing is ultimately unprovable in the absence of statistical studies of probate records. Even such studies would be of limited value, since a will disinheriting a child can be ambiguous. For example, such a will may not explain that the disinherited child has been otherwise provided for outside of the probate process, say, through an inter vivos trust for the child's support and education.⁴⁸ Nonetheless, extrapolating from the statistically demonstrated difficulties concerning the collection of child support⁴⁹ and the unequivocally increasing numbers of minor children living all or part of their youth outside the nuclear family, it seems almost inevitable that minor children are being disinherited more frequently than when the nuclear family presented the ubiquitous model of family. Children of divorce and nonmarital children are particularly likely to bear the brunt of disinheritance.

Few, if any, detailed statistical studies exist concerning the frequency with which parents disinherit their children in the United States.⁵⁰ The lack of

48. Cf. Sussman et al., *supra* note 33, at 87. A study concerning spousal disinheritance indicated two cases of disinheritance among the thirty-seven estates in which the testator was survived solely by his spouse. The authors were unable to obtain information concerning one case of disinheritance. In the other case, however, the authors learned that the testator had been separated from the survivor and that upon separation the survivor had received half of the testator's assets (as well as the household furnishings of his first wife). *Id.* Thus, it is clear that disinheritance upon the face of the will does not necessarily mean the testator has not provided for the disinherited person.

49. See Children's Defense Fund, *The State of America's Children* 71-121 (1992) (providing percentage of child support collected in 1990 in each state within the United States). The amount of support collected ranged from a low of 5.6% in Arizona to a high of 32.6% in Vermont. *Id.* See also American Bar Association, *America's Children At Risk: A National Agenda for Legal Action* 69 (1993) [hereinafter *Children at Risk*] (indicating that only 51% of women entitled to child support received full amount; 25% received nothing at all); Lieberman, *supra* note 11, at ix (noting that more than half of all fathers ordered to pay disobey such orders).

50. But see *infra* note 53 and accompanying text (indicating indirectly instances of disinheritance of children when testator devised everything to surviving spouse). From the few studies relating to the topic of child disinheritance, it appears that most adult Americans do not believe a parent should be able to disinherit his minor children. See, e.g., Marvin B. Sussman et al., *The Family and Inheritance* 210 (1970) (noting survey in which 57% of testate and 62% of intestate respondents agreed with the statement, "[w]hen a person makes a will, he or she should be required by law to leave money or property to his or her minor children"); Dunham, *supra* note 28, at 256

statistical study in this area may indicate that society assumes that parents will provide adequately for their children as natural objects of their bounty. It seems probable that most testators do still provide directly or indirectly for their minor children. Exceptional cases, however, have always occurred.⁵¹ A review of modern child support and succession cases suggests that instances of parents intentionally disinheriting their minor children are increasing.⁵²

Thus, the dearth of statistical studies concerning disinheritance of children cannot be asserted to prove that statutory protection of minor children from disinheritance is not needed. In fact, in the related area of spousal disinheritance, studies indicate that the great majority of testators recognize their obligation to their surviving spouse and will not disinherit them.⁵³ The surviving spouse is an autonomous, competent adult who voluntarily entered into a family relationship with the testator. Moreover, that surviving spouse has the ability to protect herself from disinheritance during the testator's lifetime by various contractual

n.29 (noting survey in which 93.4% of respondents indicated that disinheritance of one's minor child should be prohibited). The survey cited in the Dunham article was taken in Nebraska in 1958. Perhaps surprisingly, 63.4% of respondents favored prohibiting total disinheritance of one's children of any age. *Id.*

51. Note also that in the inter vivos setting, the number of noncustodial parents shirking the support obligation is staggering. *See infra* note 49 (providing statistics). A parent also may choose to litigate what support is mandated. *See, e.g., In re Terrell*, 357 N.E.2d 1113 (Ohio Ct. App. 1976). In *Terrell*, the question was the parent's duty to pay for the minor child's funeral. The father admitted his parental obligation of support, but contended that because the deceased child had no need of support, no obligation to pay funeral expenses existed. The court disagreed. *Id.* at 115.

52. *See supra* notes 42-45 and accompanying text (discussing cases of intentional disinheritance); *infra* note 49 (providing statistics concerning child support in America).

53. It appears that the surviving spouse is likely to be the sole beneficiary of a testator's will, even when he is survived by children. *See, e.g., Sussman et al., supra* note 33, at 86-95 (discussing survey of 226 estates and indicating that in 85.8% of those in which testator was survived by spouse and lineal kin, testator devised all to surviving spouse); Browder, *supra* note 28, at 1307 (indicating twenty-six of fifty-four wills studied bequeathed all to surviving spouse even though testator also was survived by issue); Dunham, *supra* note 28, at 252-53 (indicating that testator devised all to surviving spouse in the twenty-two estates surveyed where testator was survived by spouse and children). Preference for the spouse may occur even when the testator is survived by children from a former marriage. *See Sussman et al., supra* note 33, at 91 (indicating that in twenty-eight cases involving testator remarriage, more than half of testators devised their entire estates to spouses or legatees from latter marriages). When the testator is survived only by his spouse, she is particularly likely to be the sole beneficiary of his will. *Id.* at 87 (showing surviving spouse as sole beneficiary in 89.2% of thirty-seven such cases; noting disinheritance of the spouse in two of such cases, however).

In light of such statistics, it is not surprising that commentators have suggested that the spousal share provision is largely unnecessary. *See, e.g., Sheldon J. Plager, The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. Chi. L. Rev. 681 (1966). In this article, Professor Plager concluded:

The married testator on the whole shows little inclination to avenge himself at death for the slights and frictions of marital bliss. . . . For the total society this has real meaning: the need for a surviving spouse's choice between the deceased spouse's testamentary largess and the legislatively-decreed share is not a need of massive proportions.

Id. at 715.

devices such as antenuptial or postnuptial agreements, will contracts, life insurance, as well as by various property arrangements. Nonetheless, in all noncommunity property states but one,⁵⁴ statutory protections are firmly in place to ensure that the rare spouse who is disinherited may claim a part of the testator's estate.⁵⁵ Paradoxically, all states but one provide the disinherited minor child—who had no choice concerning his existence and who is unable to provide for himself—with no direct protection from disinheritance. In comparing the relative positions of the testator's competent adult spouse and dependent minor children, it seems that the children should have at least an equal (if not superior) claim for protection against disinheritance.

In sum, there are indeed parents—mothers as well as fathers, and parents in nuclear families as well as those outside nuclear families—who at death deny their moral obligation to provide for their minor children. This denial often has nothing to do with altruism or practical necessity, but rather represents a denial of moral responsibility often spurred by malice and spite. Although most parents still acknowledge their moral obligation to provide for their minor children upon death, other parents should not be allowed to slip through the cracks opened by the lack of statutory protection from disinheritance afforded to minor children.

Reason Two: The protection provided to the child's other parent, combined with that other parent's support obligations, will also benefit the disinherited minor child and society. Another explanation for the lack of direct protection of minors from disinheritance stems from the nuclear family paradigm. In noncommunity property states, title determines ownership of property held by husbands and wives during the marriage. Historically, most family wealth in these states was owned by husbands, who also were the principal income earners.⁵⁶ To protect families from disinheritance by these husbands and fathers, legislatures continued dower principles received from England⁵⁷ or, in this century, adopted elective share provisions.⁵⁸ These protections directly benefit the surviving spouse. In the nuclear family, the testator's minor children—who are also the children of the surviving spouse—receive indirect

54. These statutes appear in all common law states except Georgia. See Brashier, *supra* note 8, at 136-38 (discussing absence of elective share or dower for surviving spouse in Georgia).

55. In most of these states, the provision protects any disinherited spouse, regardless of her circumstances. Under the most recent version of the Uniform Probate Code, however, the disinherited spouse's claim is based on the length of the marriage, her own estate, and, in some instances, her need. See 1990 Unif. Prob. Code, art. II, part 2, § 8 U.L.A. 108, 108-38 (Supp. 1996) (providing elective share provisions as amended in 1993).

56. See Brashier, *supra* note 8, at 149-50 (discussing marital wealth and spousal protection in common law states); Margaret Valentine Turano, *UPC Section 2-201: Equal Treatment of Spouses?*, 55 Alb. L. Rev. 983, 1001-02 n.132 (1992) (discussing undervaluation of women's work and fact that wives earn less than husbands).

57. See Brashier, *supra* note 8, at 89-93 (discussing history and purpose of dower and its counterpart, curtesy, both at common law and as they exist today).

58. See *id.* at 99-113 (providing detailed discussion of origins and kinds of modern elective shares existing in common law states).

protection from disinheritance because of the survivor's continued legal obligation of support towards those children.⁵⁹ This "trickle down" or conduit effect has been extremely important in protecting disinherited minor children. In his *Commentaries*, Blackstone recognized the indirect protection dower affords young children.⁶⁰ To consider dower and elective share statutes solely as "spousal" protection provisions ignores this important conduit aspect of protection afforded to the couple's minor children.

In community property states, dower or the elective share is not generally needed: husbands *and* wives have equal ownership rights over marital property during the marriage itself.⁶¹ Again, however, the minor child in the nuclear family receives some protection from parental disinheritance because the surviving spouse, who has a one-half interest in the community property, continues to have a legal obligation to support the child.⁶²

Whether in common law or community property states, this indirect protection provided for a testator's minor children does not include millions of American children today. The indirect protection afforded to a testator's minor children by the conduit effect requires both a surviving spouse and a nuclear family scenario. More than one million American children were born out of wedlock in *each* of the first three years of this decade.⁶³ If the parents of these children die without marrying, there is no possibility for the trickle down effect to benefit the child.⁶⁴ This lack of protection may also extend to children who

59. Today the statutes are gender neutral, enabling a surviving spouse of either sex to claim the benefits of the statute. See *id.* at 148 n.213 (discussing extension of elective share benefits to widowers under principles of gender equality). See also *id.* at 100 nn.56, 149 (noting that widows remain the primary beneficiaries of such statutes because wives tend to outlive husbands and because husbands tend to control most family wealth).

60. See 2 William Blackstone, *Commentaries* *130 (stating that "the reason, which our law gives for adopting [dower], is a very plain and a sensible one; for the sustenance of the wife, and the nurture and education of the younger children"). See also Linda E. Speth, *More Than Her "Thirds": Wives and Widows in Colonial Virginia*, in *Women, Family, and Community in Colonial America: Two Perspectives* 5, 10 (Eleanor S. Riemer et al. eds., 1983) (noting that Virginia Burgesses believed that dower would provide minimum necessities for widow and children).

61. See Brashier, *supra* note 8, at 97-98 (discussing community property protection and its perceived advantages over common law system of ownership by title).

62. See *supra* note 23 (providing sample list of support statutes including those of several community property states).

63. See U.S. Bureau of the Census, 1995 Statistical Abstract of the United States 77 (115th ed. 1995) [hereinafter *Statistical Abstract 1995*] (indicating that 1, 225,000 nonmarital births occurred in 1992); U.S. Bureau of the Census, 1994 Statistical Abstract of the United States 80 (114th ed. 1994) (indicating that 1,213,800 nonmarital births occurred in 1991 and 1,165,400 such births occurred in 1990). Cf. Lionel Tiger, *Nasty Turns in Family Life*, *U.S. News & World Rep.*, July 1, 1996, at 57 (noting that out-of-wedlock births "now account for between a quarter and two-thirds of babies in industrial countries except Japan").

64. See also Brashier, *supra* note 8, at 155-56 (discussing exclusion of minor children of cohabiting parents from disinheritance protection). Children of gay and lesbian cohabitants are included among this group. Estimates made several years ago indicate that as many as eight to ten million children have a gay or lesbian parent. See *id.* at 162.

were born into a nuclear family that was later severed by divorce.⁶⁵ Ironically, in divorce cases, if the testator parent has remarried, his surviving spouse can or will receive protection for her benefit and the indirect benefit of her minor children, who may not be the children of the testator.⁶⁶

Thus, millions of American children are not afforded the indirect but important traditional protections stemming from dower, electives shares, and community property. Whether or not one embraces new and expanded definitions of family, it is undeniable that children have no control over the circumstances of their birth. They are innocent when born. The disparate treatment of minor children based on family status not only fails children outside the nuclear family, but unjustly shifts the burden of providing for those disinherited children to society as a whole.

Reason Three: Existing alternatives to forced heirship are sufficient to protect the intentionally disinherited minor. Another argument in defense of the current state of laws permitting minor child disinheritance in America is that minor children have other legal protections that ameliorate the effects of disinheritance. One such protection, already discussed, is the legal obligation of the surviving parent to support the disinherited minor child. As explained above, in increasing numbers of cases this protection from disinheritance is illusory. The legal parents of millions of children are not married (or are not married to one another). Thus, there is no benefit to the disinherited minor child through the trickle down or conduit theory when one parent dies. Moreover, millions of minor children today have only one legal parent. If that parent chooses to disinherit the child, there is no other "fall back" parent, and society may have to pick up the burden.

In non-nuclear families, among the most important protections for the minor child is a support agreement specifically imposing a continuing obligation on the parent's estate should the parent die during the child's minority. Courts will enforce an explicit posthumous obligation contained in a support agreement. Therefore, careful family law practitioners frequently include such a provision in drafting a child support agreement.⁶⁷ Since courts will enforce agreements that clearly bind the parent's estate, is the absence of protection from disinheritance really a problem for the minor child?

65. As is well known, almost one-half of all marriages in America ends in divorce. See Statistical Abstract 1995, *supra* note 63, at 102 (indicating that in 1988, 2,396,000 marriages were solemnized and 1,167,000 were ended by divorce).

66. See Brashier, *supra* note 8, at 116 (concluding that legislators were unlikely to have anticipated this strange result when most elective shares were adopted, since divorce was a relatively rare occurrence until mid-century).

67. See Lieberman, *supra* note 11, at 61 (concluding that a well-drafted child support agreement explicitly provides that support payments extend beyond the parent's death in the absence of an acceptable substitute such as life insurance or a specific bequest). At least some courts will extend the child support obligation beyond the parent's death even in the absence of a judicial decree or contractual agreement to that effect, based on the state's concern for the welfare of the children. See *Hill v. Matthews*, 416 P.2d 144, 145 (N.M. 1966) (noting various approaches in reported cases).

Yes. First, the child's representative seeking child support may neglect to include the binding posthumous obligation in the agreement. Under the traditional view, if the agreement is silent as to duration, the obligation ends at the parent's death and the child's continued need during minority is irrelevant.⁶⁸ Second, and more importantly, millions of minor children in non-nuclear families are not the object of binding child support contracts or judicial decrees.⁶⁹ Moreover, in the paradigmatic nuclear family, the child does not have these opportunities to ensure protection from disinheritance.

Among state probate laws, there are other legal protections occasionally available to the intentionally disinherited minor child. State homestead laws,⁷⁰ family allowance⁷¹ provisions, and personal property exemptions⁷² may include the testator's minor children.⁷³ The long-term protection afforded is minimal, however. For example, the family allowance is designed as a temporary award to tide the recipients over during the period of estate administration.⁷⁴ In addition, such provisions primarily benefit the surviving spouse. These statutes often exclude the testator's children when a surviving spouse exists.⁷⁵ Thus, such family protection provisions are not an adequate substitute for statutes protecting minor children from disinheritance.

A few states have statutes providing that when a testator disinherits his minor children leaving them dependent upon the county, the county itself may claim support from the estate.⁷⁶ Based on reported opinions, it appears that

68. See Brashier, *supra* note 8, at 166 n.271 (discussing lines of cases involving child support and death of parent).

69. See *Children at Risk*, *supra* note 49, at 69 (indicating that in 1989 "[o]nly 58% of the women with children whose fathers were absent had legally enforceable child support awards or agreements"). In 1989, there were 4.3 million *mothers* age fifteen and over living with children under twenty-one who did not have child support orders. *Id.* at 70.

70. See, e.g., 1990 Unif. Prob. Code § 2-402, 8 U.L.A. 143 (Supp. 1996) (providing homestead allowance of up to \$15,000).

71. See *id.* at § 2-404 (providing for family allowance to surviving spouse and minor children whom decedent was obligated to support and were in fact being supported by decedent).

72. See *id.* at § 2-403 (exempting up to \$10,000 of personalty).

73. For example, under the 1990 Uniform Probate Code, the minor children whom the decedent was obligated to support and children who were in fact being supported by the decedent are entitled to a reasonable allowance for their maintenance during the administration period, even if there is a surviving spouse. See *id.* at § 2-404 (providing, however, that the minor child's allowance is payable to surviving spouse if the minor child is living with surviving spouse).

74. See Brashier, *supra* note 8, at 134-35 (discussing the origin of the family allowance as a temporary protection measure and noting the varying treatment afforded by modern allowance provisions).

75. See, e.g., 1990 Unif. Prob. Code § 2-402, 8 U.L.A. 143 (Supp. 1996) (providing homestead allowance first to surviving spouse); *id.* at § 2-403 (providing exempt personalty first to surviving spouse). Under both of these statutes, the decedent's children only take if there is no surviving spouse.

76. See, e.g., Cal. Fam. Code § 3952 (West 1994); Mont. Code Ann. § 40-6-213 (1995); N.D. Cent. Code § 14-09-12 (1991); Okla. Stat. Ann. tit. 10, § 11 (West 1987); S.D. Codified Laws Ann. § 25-7-14 (1992).

these provisions are almost never used.⁷⁷ Although the use of such statutes could serve to protect the interests of society, the process of collection imposes a substantial administrative burden on the county. It seems more appropriate to recognize the claim as belonging to the child. After all, the parent's moral obligation serves primarily to benefit the child. The benefit to society is the secondary benefit that flows from fulfillment of the moral obligation.⁷⁸

To summarize, existing legal protections can in fortuitous circumstances protect some individual minor children who have been disinherited. To ensure that all disinherited minor child are adequately supported, however, statutory protection from disinheritance is needed.

Reason Four: The history and policy of testamentary freedom in this country should not be tossed aside lightly. Courts and scholars discussing American probate law have frequently emphasized the historical importance of testamentary freedom,⁷⁹ a concept "inherited" from England.⁸⁰ By the time of the American Revolution, an English testator could indeed exclude his children when bequeathing his chattels.⁸¹ A close look at laws permitting child disinheritance, however, indicates that this particular aspect of testamentary freedom may have developed by happenstance rather than through reasoned policy.⁸² Asserting the history of testamentary freedom as a basis for permitting a parent to disinherit his minor children is, at best, questionable.

In fact, the testamentary freedom afforded the English testator was slow to develop. Into the fourteenth century, the child of the English testator was entitled to a forced portion of his chattels.⁸³ In some parts of England, the right continued for hundreds of years longer.⁸⁴ In London, for example, the forced share continued into the eighteenth century.⁸⁵ The ultimate disappearance of the child's forced share has never been fully and adequately explained.⁸⁶ It

77. See Brashier, *supra* note 8, at 173 n.291 (discussing rare use of such statutes).

78. See *supra* notes 14-19 and accompanying text (discussing parent's moral obligation as the primary source of support).

79. See Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 Ariz. L. Rev. 235, 235 (1996) (noting that "[c]ourts and scholars often treat freedom of testation as if it were a fundamental tenet of our liberal legal tradition"). See also Joseph Dainow, *Limitations on Testamentary Freedom in England*, 25 Cornell L.Q. 337, 338 (1940) (noting the "well-nigh universal conviction" among Americans and the English concerning testamentary freedom, but questioning whether such freedom might one day be considered an "historical accident").

80. See Leslie, *supra* note 79, at 271 (noting that the United States inherited its respect for testamentary freedom from England).

81. George W. Keeton & L.C.B. Gower, *Freedom of Testation in English Law*, 20 Iowa L. Rev. 326, 337-40 (1935).

82. See *infra* notes 83-88 and accompanying text (noting that laws permitting disinheritance of children may have resulted from historical accident).

83. John Cribbet et al., *Cases and Materials on Property* 219 (7th ed. 1996).

84. Keeton & Gower, *supra* note 81, at 337-40.

85. *Id.* at 338.

86. See 2 Frederick Pollock & Frederic W. Maitland, *The History of English Law* 353 (1st ed. 1895) (noting that English child's forced portion "seems to [have] slip[ped] unconsciously into the

appears that the forced share was unpopular with merchants who wanted to dispose of their property as they wished.⁸⁷ The most plausible explanation for the disappearance of the child's forced share is that suggested by Pollack and Maitland: an unfortunate accident.⁸⁸ There can be no doubt, however, that the protection of children from disinheritance was an important concern in English history, for it is mentioned in the Charter of 1215.⁸⁹

Even after the child's forced share disappeared, English law recognized that family concerns must trump testamentary freedom to some extent.⁹⁰ It was not until the nineteenth century that an English testator gained full freedom of testamentary disposition.⁹¹ Moreover, complete testamentary freedom in England did not last long.⁹² Recognizing that the vast majority of civilized countries in the world protect family members—including children—from disinheritance, England in 1938 adopted provisions⁹³ protecting needy children from disinheritance.⁹⁴ Likewise, throughout this century other commonwealth countries (or their subdivisions) that once emphasized testamentary freedom have switched to systems of protected inheritance.⁹⁵

One might argue that the important moment concerning testamentary freedom is the time it was received from England; changes in English inheritance law prior and subsequent to that time are irrelevant. Adherence to a received system of laws makes sense when the system is based on a reasoned policy that continues to serve modern society with at least a modicum of success. The existence of a reasoned policy underlying our inherited English system permitting disinheritance is doubtful. More importantly, the system is a failure in terms of protecting children and the modern state. Departing from a received system of laws is necessary when that system leads to absurd results. Thus, for example, in this era in which millions of children are born out of wedlock, few Americans

decision of a very important and debatable question"); Keeton & Gower, *supra* note 81, at 339 (noting the theory that the demise of the forced portion may have been an historical accident).

87. Edmond N. Cahn, *Restraints on Disinheritance*, 85 U. Pa. L. Rev. 139, 140-41 (1936).

88. See *supra* note 86 (noting historical accident theory).

89. Keeton & Gower, *supra* note 81, at 337.

90. See, e.g., Dainow, *supra* note 79, at 344 n.42 (indicating that complete testamentary freedom in England was not established until the Wills Act of 1837).

91. *Id.*

92. For a discussion of the movement away from complete testamentary freedom in England in the twentieth century, see Brashier, *supra* note 8, at 121-33.

93. Inheritance (Family Provision) Act, 1938, 1 & 2 Geo. 6, ch. 45 (Eng.).

94. For a discussion of the 1938 Inheritance Act and its successors, see generally Dainow, *supra* note 79; Suman Naresh, *Dependent's Application Under the Inheritance (Provision for Family and Dependents) Act 1975*, 96 Law Q. Rev. 534 (1980); Richard R. Schaul-Yoder, Note, *British Inheritance Legislation: Discretionary Distribution at Death*, 8 B.C. Int'l & Comp. L. Rev. 205 (1985); J. Unger, *The Inheritance Act and the Family*, 6 Mod. L. Rev. 215 (1943).

95. New Zealand had in fact adopted such a system almost four decades before its adoption in England. See Joseph Dainow, *Restricted Testation in New Zealand, Australia and Canada*, 36 Mich. L. Rev. 1107, 1107-17 (1938). See generally Brashier, *supra* note 8, at 121-22 & n.125 (discussing history of family maintenance system outside of England).

would suggest that we continue the eighteenth-century probate law forbidding inheritance by "bastards."⁹⁶ In fact, our probate system has developed in significant ways not derived from the English system at all.⁹⁷ Reliance on the ambiguous history of permitting testamentary freedom to disinherit one's child is unpersuasive as a rationale for permitting children to be disinherited in America today.⁹⁸ Creating new policy arguments to support the received system permitting disinheritance is also fraught with difficulty.

No one would seriously suggest that legislatures abolish a parent's inter vivos legal duty of support because a parent with complete control over his wealth might thereby contribute more to society. Equally implausible is the suggestion that legislatures should continue to permit disinheritance of minor children because parents unfettered by testamentary restrictions will contribute more to society. If anything, the parent will be more concerned about restrictions that affect him during his lifetime. At his death, wealth is irrelevant to his decaying corpse.

In the early 1990s, during the battles over the Louisiana legitime,⁹⁹ a newspaper quoted one state legislator as having stated: "This is my money, I made it and I can do what I want with it."¹⁰⁰ The "it's my money" argument reflects a natural human desire to control the disposition of what one owns.¹⁰¹

96. See 1 Blackstone, *supra* note 15, at *447 (stating that "a bastard . . . can inherit nothing, being looked upon as the son of nobody") (emphasis in original). In an early American opinion, a court noted:

[T]here seems to be no maxim of [the common] law less questionable than that a bastard is *filius nullius*. . . . No doubt the law [barring illegitimates from inheriting as next of kin] was so established on higher principles than the interest of individuals. It was to render odious illicit commerce between the sexes, and to stamp disgrace on the fruits of it; and though the punishment usually falls upon the innocent, yet it was thought wise to prohibit them from tracing their birth to a source which is deemed criminal by law and by religion. It is enough that . . . the authors of this misfortune have the power to repair it by will or by gift; the law will not interpose.

Powers v. Wilkinson, 506 N.E.2d 842, 846 (Mass. 1987) (quoting *Cooley v. Dewey*, 4 Pick. 93, 94 (1827)). See also Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family* 1996 Utah L. Rev. (forthcoming Winter 1996) (discussing historical treatment of inheritance rights of nonmarital children and modern Supreme Court rulings concerning such children).

97. For example, the elective share is a twentieth-century American development. See *supra* note 58 and accompanying text (discussing spousal shares).

98. See *supra* note 79 (citing works that cast doubt on American reverence for testamentary freedom); *supra* notes 83-88 and accompanying text (noting that disappearance of child's forced inheritance in England was quite likely an historical accident).

99. See Brashier, *supra* note 8, at 117-21 (detailing struggles within Louisiana over the legitime in the early 1990s).

100. See Frances F. Marcus, *Disinheritance Law Kindles Passion in Louisiana*, N.Y. Times, Dec. 1, 1989, at B7) (quoting statement by legislator to former staff attorney in the State Attorney General's office).

101. See 2 William Blackstone, *Commentaries on the Laws of England* *2 (1966). As Blackstone stated:

Aside from the moral obligation of parental support, what the legislator failed to realize is that while we enjoy the benefits we have earned, we must also pay for the burdens we have created.¹⁰² The legislator's argument would elicit more sympathy if the forced inheritance laws were attempting to invade the testator's estate to provide direct benefits to non-family members. Providing for one's minor child, however, is not like paying a tax to government.¹⁰³ The minor child is a dependent who would not exist but for the presence of the testator himself. In an economic sense, the dependent minor children we create are burdens that we should not be able to shift to society by the simple act of disinheriting them.

One of the cruellest ironies in this area is that disinheritance between an adult parent and a minor child is almost always a one-way street. In forty-nine states, the parent—who is responsible for bringing the child into existence—can completely disinherit the child. The minor child, however, cannot disinherit his parent.¹⁰⁴ This is because in most states, a minor cannot execute a valid will.¹⁰⁵ As a result, at death the minor child is intestate and the child's parents are inevitably his principal—if not sole—heirs under state descent and distribution statutes.¹⁰⁶ A minor child may have acquired wealth through relatives or, in some instances, his own abilities. Alas, testamentary freedom

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

Id. Blackstone's words continue to ring true through the centuries.

102. See *supra* note 100. The article notes that in response to the legislator's statement, the staff attorney to whom he spoke stated: "They're your children and *you made them too* and they have a claim." (Emphasis added). See also *supra* notes 18-25 (discussing societal obligation to take responsibility for our actions, including those associated with procreation).

103. A review of modern intestacy statutes indicates that most legislatures still consider a decedent's children to be among the natural objects of his bounty. See Brashier, *supra* note 96 (summarizing the child's interest under intestacy statutes in the 50 states). As such, the child should be viewed as an extension of the testator himself.

104. See Brashier, *supra* note 8, at 170 (discussing the nonmutual aspects of disinheritance between parent and minor child).

105. See American Bar Association, All-States Wills and Estate Planning Guide (1993) (including minimum age requirements for individual to execute valid will). The planning guide indicates that two states, California and Idaho, permit emancipated minors to make wills. *Id.* at 4-31, 4-92. In Georgia, the minimum age requirement for executing a will is fourteen. *Id.* at 4-77. In Louisiana, the minimum age requirement is sixteen. *Id.* at 4-130. Indiana permits a minor to execute a will if a member of the Armed Forces. *Id.* at 4-105. See also Samuel M. Davis & Mortimer D. Schwartz, Children's Rights and the Law 34-36 (1987) (discussing transfers of property by minors).

106. See, e.g., Ala. Code § 43-8-42(3) (1975) (providing that where there is no issue or surviving spouse, intestate's parents take all); Ark. Code Ann. § 28-9-214(3) (Michie 1987) (providing that heritable estate goes to parents if intestate is survived by no descendant or spouse); Tenn. Code Ann. § 31-2-104(b)(2) (1984) (providing that intestate's parents take all where no issue or spouse of decedent survive); Tex. Prob. Code Ann. § 38(a)(2) (West 1980) (providing that all goes to parents where intestate leaves no surviving spouse or descendants).

clearly is not available to such a child, even when the parent deserves to be disinherited.

When we recognize that the testator's estate will do him no good in death, his act of disinheriting his minor child seems to be the ultimate abnegation of societal and moral responsibility. If upon death he has failed to recognize voluntarily his obligations to his minor children, then it is appropriate for the law to protect both the child and the state by imposing responsibility for the burden he created and leaves behind. The history and policy of testamentary freedom are insufficient reasons for continuing to permit the disinheritance of one's minor children.

Reason Five: Legislators are unaware of, or are uninterested in, disinheritance of children in America. If state legislatures are aware of the problem facing disinherited minor children in America, then it is strange that protection has not been enacted throughout the country.¹⁰⁷ Considering the political attention paid to child welfare and family values in recent years, such legislation would seemingly accord with the will of the majority of adult Americans and their public representatives, including those with widely divergent views of family life. For example, since parents in the nuclear family are currently free to disinherit their minor children, conservative and religious groups bandying the "family values" slogan should applaud efforts to ensure security for minor children upon the death of a parent. Groups advocating expanded definitions of family should also applaud such measures because they would provide protection to all minor children, regardless of status. All Americans concerned with the overburdened welfare system should approve such measures because they would reduce the amounts citizens have to pay for children created by others—children

107. See Brashier, *supra* note 8, at 163-70 (suggesting that legislative inertia, not approval of status quo, may account for failure to adopt protective measures). The intent behind dower, the elective share, homestead allowances, personal property exemptions, and family allowances provide substantial evidence that legislatures are concerned with protecting not only the surviving spouse, but also young children of a testator.

The most likely explanation for legislative inattention to this area seems to be unawareness of the problem. The proportion of nuclear families in the United States has seen a precipitous decline only in the past two or three decades. Thus, it seems probable that most state legislators are themselves products of nuclear families; older legislators, in particular, are likely to think primarily in terms of nuclear families. Protecting the child from disinheritance implicates both probate and family law. Thus, the legislator's concept of family structure is important. As Nitya Duclos has stated:

[T]he success of a universal family law depends on the existence of a paradigmatic family upon which the law is based. Families must share enough common features for universal laws to operate in roughly the same way for all those to whom they apply. If there is an insufficient "essence" of family, if there is no governing norm against which all families can fairly be measured, then family laws will only tend to work well for those families the drafters had in mind.

Nitya Duclos, *Some Complicating Thoughts on Same Sex Marriage*, 1 *Law & Sexuality* 31, 33 (1991). The nuclear family is no longer the sole paradigm. Moreover, as previously discussed, the current system provides inadequate protection for all children, including those currently in a nuclear family. See *supra* notes 56-66 and accompanying text.

whose support should rightfully be provided first and to the extent possible by their parents.

Of course, it is possible that despite what our legislators and we adults who elect them state publicly about the protection of innocent children, we actually share the attitude of the Louisiana legislator previously quoted.¹⁰⁸ Because we recognize that we have a moral obligation to the minor children we create, most of us would be ashamed to espouse the "it's my money" belief. In the absence of protective provisions for our children, however, the specter remains: we may care more for ourselves than for our children.

One hopes, however, that the lack of protection continues only because we have yet to grasp the seriousness of the disinheritance problem and thus have inadvertently failed to close the disinheritance loophole. As Professor Haskell stated almost twenty years ago:

There is no explanation for the failure to protect minor child from disinheritance . . . other than that such disinheritance rarely occurs. This is undoubtedly true, but the same can be said for all kinds of aberrational conduct which the law prohibits or punishes.

Every moral obligation need not have its legal counterpart. Moral obligations in the family support area do have legal counterparts in many respects, but the one inexplicable exception is the absence of any legal obligation to assure support for minor children in some manner after death.¹⁰⁹

Unlike adult family members (such as surviving spouses), minor children themselves do not have the political power to ensure their protection from disinheritance. In light of the changes in family structures within the past two decades, the moral claims of many of these children are likely to go unfulfilled absent statutory protection from disinheritance.

Reason Six: It would be difficult to devise an adequate scheme to protect children from disinheritance. A final argument is that even if state legislators were to recognize that children need to be protected from disinheritance, the difficulties of devising an adequate scheme would be insurmountable or not worth the effort.¹¹⁰ While it is true that devising such a scheme would be a formidable task and that the merits of different alternatives are subject to debate,

108. See *supra* notes 99-100 and accompanying text (discussing battles concerning legitimate in Louisiana in early 1990's).

109. Haskell, *Restraints*, *supra* note 8, at 114-15.

110. See Brashier, *supra* note 8, at 86 n.8 (noting that the very inability of the minor child to acquire, earn, manage, and protect his property interests is one reason attorneys have often advised clients from leaving property directly to such children by will); see also Mary L. Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 Am. B. Found. Res. J. 321, 325 (noting that attorneys frequently advise against bequests directly to minor child because such bequests require the appointment of a guardian for the child).

these contentions are not satisfactory reasons for continuing the status quo at the expense of innocent children.

What type of protective schemes should be considered?¹¹¹ The obvious choice—the one used most frequently throughout the world—is that of the legitime, or child's forced share. This share is the part of the parent's estate protected for his children, whatever their age when the parent dies. As previously mentioned, the civil law legitime applying in favor of both the adult and minor child was the law in Louisiana for decades.¹¹² Recently, however, Louisiana has adopted a limited legitime, excluding able children over twenty-three years of age at the time of the testator's death.¹¹³

The fixed fractional legitime applying in favor of *all* children of a testator is unlikely to attract many proponents in current state legislatures.¹¹⁴ The parent who has reared his child to adulthood generally has completed his legal obligation of support to the child. Many would argue that the moral obligation of support also ends at this point. Certainly the able adult child, capable of providing for himself, does not require the same protection from disinheritance that the incompetent minor child requires. It seems likely that legislatures, if persuaded to provide protections for children, would be inclined to protect minor children and perhaps, as did the Louisiana legislature, young adults.

Assuming that minor children are entitled to protection from disinheritance, is a fixed fractional system the best solution? The most attractive feature of the legitime as a means of child protection is ease of application. The child receives a fixed fractional interest which can easily be determined. This attractive feature is also what makes the legitime a far from perfect protective device.¹¹⁵ For example, the fractional portion is tied neither to the child's need nor to the *inter vivos* parental obligation of support. Thus, the only child of a wealthy testator will receive more than the only child of a poor testator, although the latter child may require a great deal more to meet his needs.

111. Commentators have made several proposals. See, e.g., Batts, *supra* note 8, at 1255-56 (proposing modified a forced share in which needs of minor children would be satisfied first); Brashier, *supra* note 8, at 170-80 (comparing and contrasting the legitime, testator's family maintenance, and ultimately proposing posthumous obligation of support for minor children based on guidelines; the obligation would receive top priority in distributing testator's estate); Haskell, *Power*, *supra* note 8, at 518-26 (proposing a limited forced share in which children under twenty-one also receive a supplemental forced share).

112. See Brashier, *supra* note 8, at 117-21 (discussing Louisiana legitime and battles over its continued existence).

113. See *supra* notes 3-5 and accompanying text (discussing current legitime of Louisiana).

114. See Brashier, *supra* note 8, at 170-72 (noting arbitrary, overinclusive aspects of fixed fractional forced inheritance and concluding that it is unlikely to find widespread acceptance in the United States).

115. For an enlightening discussion on the problems of developing laws where property and family law intersect, see Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 Tul. L. Rev. 1165 (1986).

On the other hand, the system employed by England and several other commonwealth countries avoids arbitrary fractions and instead permits the testator's children (and others) to claim "reasonable financial provision" from the estate.¹¹⁶ Again, it seems unlikely that American state legislatures would provide such protection for adult children. But could such a system be employed to protect minor children? The most attractive feature of this so-called "testator's family maintenance" system is its discretionary aspect. A court using this system can consider the minor child's need in making an award. This discretionary aspect, however, is also the most disturbing feature of the system: two children in exactly the same circumstances but bringing petitions before two different courts might obtain quite different awards. The lack of well defined guidelines for making awards under the family maintenance system, combined with the remarkable difference in training and experience of state probate judges in America, perhaps make the system of limited value as a model for adoption in the United States.¹¹⁷

An intermediate system—one that unlike the legitime considers the child's need and yet is not prone to the unpredictability of testator's family maintenance—could be developed.¹¹⁸ Legislatures could borrow and develop from inter vivos child support guidelines a workable system of protection from disinheritance for minor children.¹¹⁹ Unlike the inter vivos support obligation, which is often shirked by noncustodial parents, the posthumous support obligation could be easily fulfilled by application against the testator's estate. Because there is perhaps no moral obligation greater than that owed to one's minor child, the child's claim should be given high priority in the distribution of the decedent's estate.¹²⁰

116. See, e.g., Inheritance (Provision for Family and Dependents) Act, 1975, ch. 63, § 1 (Eng.).

117. See Brashier, *supra* note 8, at 172-73 (discussing testator's family maintenance and noting objections to its use in United States). See also Glendon, *supra* note 19, at 1186 (discussing family maintenance system and noting that "it is far from clear that a system that permits redistribution of decedents' estates according to a judge's own notion of what is reasonable is preferable to either free testation or forced heirship").

118. As one commentator noted:

The common law rule is based on the superficially sensible notion that death ends all. The civil law rule has feudal antecedents and is designed to hold the estate within the family. Today both legal regimes conflict with common sense. At the minimum, the common law should not permit a parent to deprive a minor child of necessary support, and the civil law should not restrict the parent's power of disposition over money he or she has earned, once the children are of age and not in need. A compromise between these extremes would produce a sensible solution. . . . Regarding the minor child, a sensible regulation would require the parent's estate to provide support during minority.

Krause, *supra* note 8, at 40-41.

119. See Brashier, *supra* note 8, at 173-80 (discussing eligibility, amount, and priority under intermediate system recognizing parent's posthumous support obligation).

120. See Brashier, *supra* note 8, at 176-78 (discussing priority problems when conflicts arise between needy minor children and others, such as a surviving spouse or general creditor).

This section of the article has addressed the child disinheritance problem primarily under probate law. An intermediate system of protection tied to *child support*, however, is also an obvious extension of modern family law. Thus, unlike the legitimate or testator's family maintenance, the intermediate system could be enacted through an expansion and amendment of support statutes currently applicable in the non-nuclear family scenario.¹²¹ Although protection of the child from disinheritance would be accomplished in either instance, characterizing the change as a child support measure enacted under state family laws would perhaps reduce or circumvent opposition from those who are wary of direct infringement upon testamentary freedom in state probate codes.

In sum, measures protecting minor children from disinheritance are needed. Developing and enacting such measures would be difficult and to some degree controversial.¹²² But those are not satisfactory reasons to deny our minor children protection.

IV. CONCLUSION

If we look solely within the United States when focusing on the minor child and disinheritance, the Louisiana legitimate is anomalous. If we look beyond our borders and examine legal systems around the world, however, we see that protection of the minor child from disinheritance is the rule, rather than the exception. Notably, this protection has existed for several decades in England, the country from whence came the perceived American fervor for testamentary freedom.

Although a numerical counting of countries affording protection to children might of itself cause us to reconsider the majority approach in the United States, more important reasons for reassessment are the practical realities of modern family life and the burdens child disinheritance can place on an already overtaxed welfare system. In a society in which multiple marriage and single

121. For example, Section 316(c) of the Uniform Marriage and Divorce Act permits a court to order a lump sum payment to a child from the parent's estate when the parent was obligated by judicial decree to support the child. *Unif. Marriage and Divorce Act* § 316(c), 9A U.L.A. 147, 490 (1987).

122. A proposal to impose a posthumous obligation of child support up to the amount of the child's intestate share was included in a 1971 draft version of the Uniform Parentage Act. The proposal read substantially as follows:

§ 21(b) If the father has disinherited his child or by will or otherwise has left his child an amount or property totaling less than [what] the child's distributive share would have been if the father had died intestate, [then] the father's liquidated obligation to support his child shall be enforceable against his estate. The child's recovery shall not exceed the amount that would have been allotted to or on behalf of such child as his distributive share had the father died intestate, and the court shall take into consideration benefits received and to be received by the child under Federal and State laws or private survivorship plans or insurance by reason of the death of his father.

The provision was not adopted by the Commissioners on Uniform State Laws. See Krause, *supra* note 8, at 41.

parenthood are increasingly common, both the minor child and the state are underprotected by the American system permitting disinheritance. The minor child's parents—single, married, or divorced—have a moral obligation to support the child. This obligation is properly viewed as the primary support obligation. The state's role in ensuring the child's support is secondary; it should begin when the parents are unable to provide for the child. Currently, however, these primary/secondary roles are legally recognized only during a parent's lifetime.

Probate laws should not permit a parent to shirk his moral obligation to his minor child and to shift that obligation to society at large by the simple act of disinheriting that child. The reasons asserted for permitting continued disinheritance of minor children are unpersuasive. Although most parents recognize their moral obligation to support their minor children, it appears that an increasing number of parents do not. Further, the probate protection afforded to a surviving spouse fails to provide even indirect protection to the testator's children when there is no surviving spouse or when the testator's children are not children of that surviving spouse. With the divorce rate hovering around fifty percent and the nonmarital birth rate headed for that mark, these scenarios are commonly encountered. Moreover, probate provisions such as the family allowance that occasionally include the otherwise disinherited child provide negligible protection. Finally, the argument that an individual's right of testamentary freedom outweighs his moral obligation to his minor children is absurd. Yet state legislatures are wary of direct changes in probate laws. An alternative means of providing minor children with protection from disinheritance would be to characterize the protection as an expansion of current child support statutes in state family law. Under such expanded child support laws, a minor child would be entitled to support from the deceased parent's estate.

Whatever route is chosen, developing a system to protect minor children from disinheritance will not be simple. Nevertheless, difficulty hardly counts as a reason for refusing to protect the young child, who has a moral claim to support from his parent that extends beyond the parent's death. Young children, truly the natural object of our bounty, do not have the political power to ensure legal protection from disinheritance for themselves. We must do it for them, recognizing that to do so is in the best interests of children and society. Louisiana should not have to stand alone in protecting the young child from disinheritance.