

1-1-2011

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Recommended Citation

Jacqueline Asadorian, *Disinheritance of Minor Children: A Proposal to Amend the Uniform Probate Code*, 31 B.C. Third World L.J. 101 (2011), <http://lawdigitalcommons.bc.edu/twlj/vol31/iss1/5>

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DISINHERITANCE OF MINOR CHILDREN: A PROPOSAL TO AMEND THE UNIFORM PROBATE CODE

JACQUELINE ASADORIAN*

Abstract: With the single exception of Louisiana, the United States provides no legislative protection against the disinheritance of minor children by their parents. This position is distinct from most other countries in the world, which require parents to provide for their children at death. Freedom of testation, a distinctly American value, is at odds with another value Americans hold dear: support and protection of one's family. This Note argues that the balance between these two discordant values has tipped too far in the direction of testamentary freedom, to the detriment of minor children. Non-custodial children are disproportionately affected by this lack of protection because they are the most likely group to be disinherited. Rather than rely on courts to inconsistently and arbitrarily protect children against disinheritance, this Note suggests that states should adopt forced heirship legislation to ensure that children are supported after the death of their parents.

INTRODUCTION

God Planted in Men a strong desire . . . of propagating their Kind, and continuing themselves in their Posterity, and this gives Children a Title, to share in the Property of their Parents, and a Right to Inherit their Possessions. Men are not Proprietors of what they have merely for themselves, their Children have a Title to part of it

—John Locke¹

Despite John Locke's view, which is codified in some form in most countries, the United States fails to protect minor children from disin-

* Note Editor, BOSTON COLLEGE THIRD WORLD LAW JOURNAL (2010–2011).

¹ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 206–07 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). *But see* JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 1 (8th ed. 2009). In a 1789 letter to James Madison, Thomas Jefferson stated: "The earth belongs in usufruct to the living; the dead have neither powers nor rights over it. The portion occupied by any individual ceases to be his when he himself ceases to be, and reverts to society." *Id.*

heritance by their parents.² While most other modern countries require parents to provide for their children after death, the United States values freedom of testation over the moral obligation to provide for children at death.³

In the United States, laws of testation are enacted at the state level, and only one state—Louisiana—has enacted laws protecting children from parental disinheritance.⁴ The failure of virtually all American states to protect minor children from disinheritance when a parent dies testate (with a will) stands in contrast to intestacy statutes, which dictate how a decedent's property will be distributed when he or she dies in the absence of a valid will, and usually provide for spouses and children.⁵

The lack of protection for disinherited minors in the United States is also incongruous with the protections afforded to spouses.⁶ Many American jurisdictions provide spouses with an elective share of the decedent's estate if they are written out of the testator's will.⁷ Many of

² See LOCKE, *supra* note 1, at 206–07; Brian C. Brennan, Note, *Disinheritance of Dependent Children: Why Isn't America Fulfilling its Moral Obligation?*, 14 QUINNIPIAC PROB. L.J. 125, 125 (1999).

³ See Ralph C. Brashier, *Protecting the Child from Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1, 1 (1996); Brennan, *supra* note 2, at 134. Among the countries that protect children from disinheritance are Argentina, Austria, Belgium, Bolivia, Brazil, Bulgaria, Chile, Columbia, Costa Rica, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Finland, France, Germany, Greece, Guatemala, Honduras, Hungary, India, Ireland, Italy, Japan, Republic of Korea, Lebanon, Liechtenstein, Malta, Mexico, Mongolia, Netherlands, Nicaragua, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, Russian Federation, Scotland, Spain, Sweden, Switzerland, Turkey, Ukraine, Uruguay, Venezuela, England, Malaysia, New Zealand, Northern Ireland, Singapore, and parts of Australia and Canada, and commonwealth colonies such as Hong Kong. Brashier, *supra*, at 1 n.3. Freedom of testation is defined as the largely unrestricted ability of a person to choose the disposition of his or her property upon death. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (2003) (“The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please.”).

⁴ See Brashier, *supra* note 3, at 1; *infra* Part I.

⁵ 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, 1198 (1990). Intestacy statutes are designed to carry out the likely intent of the average intestate decedent and preserve the economic health of the family after a death. See DUKEMINIER ET AL., *supra* note 1, at 75–76.

⁶ See Batts, *supra* note 5, at 1198–99.

⁷ *Id.* Professor Batts notes that:

When the surviving spouse has been written out of the deceased spouse's will, or has been devised inadequate assets, many American jurisdictions provide the surviving spouse with a remedy known as the elective share. In the major-

the same justifications for overriding the intent of the testator to provide for an omitted spouse apply equally well to minor children who are disinherited by their parents.⁸

In general in the United States, protection and support of one's family is highly valued.⁹ In fact, every state requires parents to support their minor children during life, and states impose civil and criminal penalties when these support obligations go unfulfilled.¹⁰ The importance of parental support of minor children has both moral and economic dimensions.¹¹ Morally, the support of children is stitched into the fabric of society, and states have an interest in providing for minor children.¹² This obligation has an important economic effect as well because when a parent is unwilling or unable to provide for a child, the state must step in and provide support.¹³ These moral and economic arguments imply that parents should be obligated to provide for their dependent and minor children at death, as in life.¹⁴ Yet this inclination

ity of jurisdictions that have this remedy, the surviving spouse may receive as much as one-third or one-half of the estate.

Id. This Note focuses on intentional disinheritance of minor children. *See infra* Part I.A. Many states have pretermitted heir and spouse statutes that correct testators' wills in the case of unintentional disinheritance. *See* DUKEMINIER ET AL., *supra* note 1, at 527, 533; Ronald Chester, *Disinheritance and the American Child: An Alternative from British Columbia*, 1998 UTAH L. REV. 1, 28 ("[P]retermitted heir statutes and concepts like undue influence do indirectly provide American children some disinheritance protection."). The Uniform Probate Code (UPC) provides that if a testator fails to provide for his or her children born or adopted after the execution of the will, the omitted children receive a share in the estate. UNIF. PROBATE CODE § 2-302 (amended 1993). Because pretermitted heir statutes largely solve the problem of unintentional disinheritance, this Note focuses on intentional disinheritance and whether it should continue to be tolerated in the United States. *See* DUKEMINIER ET AL., *supra* note 1, at 527.

⁸ *See* Batts, *supra* note 5, at 1199 (noting that the "overriding state concern that the surviving spouse does not become a ward of the state" applies equally to children who may become wards of the state if they are disinherited).

⁹ *See id.* at 1197 ("The sanctity and inviolability of the parent-child bond is a fundamental concept imbedded in America's social and legal structure.").

¹⁰ *See* Brashier, *supra* note 3, at 5-7.

¹¹ *See id.* at 4-5.

¹² *See id.* ("Our collective moral sense informs us that each parent has an obligation to nurture his children until they reach adulthood.").

¹³ *See id.*

¹⁴ *See id.* The existence of legal support obligations during a parent's life provides further support for the proposition that these obligations should not terminate upon the death of a parent. *See id.* at 5-6 (discussing state statutes that require parents to fulfill their support obligations, whenever financially possible).

is inherently in tension with another distinctly American value—freedom of testation.¹⁵

The American system that places paramount importance on testamentary freedom causes particular problems for non-custodial children who are left out of their natural parents' wills.¹⁶ These children are disproportionately affected by the United States' failure to require their parents to provide for them at death.¹⁷

This Note explores the balance the United States has struck between freedom of testation and support for minor children and argues that the scale has tipped too far in the direction of testamentary freedom. Part I examines the current status of the laws of testation in the United States and discusses the flaws in the system that allow parents to disinherit their minor children without cause. Part II explores the ways in which American courts have attempted to “get around” testamentary plans that fail to provide for children through doctrines such as undue influence, fraud, and mental capacity. Part III posits that the current American system, which in effect allows courts to alter testamentary plans in order to provide for disinherited children, is costly, taxes judicial resources, and fails to provide consistent results. Part III argues that these inadequacies disproportionately affect non-custodial minor children. Finally, Part IV proposes that the Uniform Probate Code (UPC) should be amended to include a requirement that parents provide for their minor children at death.

I. BACKGROUND ON THE CURRENT STATUS OF AMERICAN LAWS OF TESTATION AS THEY RELATE TO THE DISINHERITANCE OF CHILDREN

The American ideal of testamentary freedom is not a foregone conclusion—countries all over the world protect children from disinheritance, including England.¹⁸ In his Commentaries, William Black-

¹⁵ Tamara York, *Protecting Minor Children from Parental Disinheritance: A Proposal for Awarding a Compulsory Share of the Parental Estate*, 1997 DET. C. L. REV. 861, 871.

¹⁶ See Brashier, *supra* note 3, at 3 (noting that non-custodial parents are “unlikely to provide for those minor children by will when disinheritance is perfectly permissible” and finding that the societal burden is likely to increase in our current era of “fractured families and multiple marriages”). For the purposes of this Note, “non-custodial children” refers to those children who do not physically reside with the parent at issue. *See id.*

¹⁷ See Brashier, *supra* note 3, at 3.

¹⁸ See Adam Dayan, Note, *The Kids Aren't Alright: An Examination of Some of the Flaws in American Law Regarding Child Disinheritance, the Reasons That Children Should Be Protected, and a Recommendation for the United States to Learn from the Australian Model That Protects Children Against Disinheritance*, 17 CARDOZO J. INT'L & COMP. L. 375, 380–82 (2009). The British

stone noted that descent to the children of the deceased was established by long and persisting custom.¹⁹ However established these customs were throughout the rest of the world, testamentary freedom overshadowed the moral obligation of providing for one's children at death in the United States.²⁰

Until the 1980s, it was “generally accepted that the right to transmit or inherit property at death was neither a natural right nor was it constitutionally protected.”²¹ In the landmark case of *Hodel v. Irving*, however, the U.S. Supreme Court held that the ability to transmit property at death was a constitutionally protected property right akin to the right to exclude.²² While *Hodel* essentially afforded constitutional

concept of *legitim* provided “the forced share of a decedent’s estate from which the deceased cannot disinherit his children without justification,” a concept that was not adopted by the United States. *Id.* at 381 n.33.

¹⁹ 2 WILLIAM BLACKSTONE, COMMENTARIES *11–12 (“A man’s children or nearest relations are usually about him on his death-bed, and are the earliest witnesses of his decease. They became therefore generally the next immediate occupants, till at length, in process of time, this frequent usage ripened into general law.”). Blackstone also notes, however:

While property continued only for life, testaments were useless and unknown; and, when it became inheritable, the inheritance was long indefeasible, and the children or heirs at law were incapable of exclusion by will. Till at length it was found, that so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigence of their families required. This introduced pretty generally the right of disposing of one’s property, or a part of it, by *testament*

Id. at *12.

²⁰ See Brashier, *supra* note 3, at 1 n.3; Dayan, *supra* note 18, at 382.

²¹ See *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942) (“Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance.”); DUKEMINIER ET AL., *supra* note 1, at 3.

²² See *Hodel v. Irving*, 481 U.S. 704, 716 (1987); DUKEMINIER ET AL., *supra* note 1, at 10. At issue in *Hodel* was the Indian Land Consolidation Act of 1983, which provided that parcels of land below a certain size and value would escheat to the tribe at the death of the owner. 481 U.S. at 709. Thus, the property owner was unable to pass on his land at death. *Id.* at 716. The Court unanimously held that the Act totally abrogated the right to pass on property, which amounted to a taking under the Fifth Amendment. *Id.* at 717. The statute was unconstitutional because it failed to provide compensation for this taking. See *id.* at 717–18. One commentator argues: “It should be understood that the Supreme Court’s constitutional protection of the right of disposition in *Hodel v. Irving* is akin to declaring ‘dead hand control’ of property a natural right. Thus, *Irving* is potentially revolutionary.” Ronald Chester, *Essay: Is the Right to Devise Property Constitutionally Protected?—The Strange Case of Hodel v. Irving*, 24 SW. U. L. REV. 1195, 1199 (1995). “Dead hand control” refers to the ability of a person to use wealth to influence others’ behavior after death. See DUKEMINIER ET AL., *supra* note 1, at 27.

protection to the right to pass on property at death, it did not prescribe any details as to what the right to devise or inherit entails.²³

While the right to pass on property at death (either through intestate succession or by the use of a will) is constitutionally protected, it is clear that there is no right to inherit.²⁴ The case of *Shapira v. Union National Bank* demonstrates that courts are willing to uphold restrictive provisions in wills because a child has no right to inherit.²⁵ In *Shapira*, the testator's will contained a provision that stipulated that his son could receive his inheritance only if he married a Jewish girl within seven years of testator's death.²⁶ The testator's son brought suit, arguing that the will provision at issue violated his constitutional right to marry and was against public policy.²⁷ Finding against the son, the court upheld the will and held that there is no natural or constitutionally protected right to inherit.²⁸ Thus, *Shapira* adds an important wrinkle to the constitutionally protected right to transmit property at death guaranteed by *Hodel*—there is no parallel constitutionally protected right to inherit.²⁹

A. *Why Is Freedom of Testation So Important in the United States?*

The lack of legislative protection against disinheritance in the United States is a salient indicator of the value America places on testamentary freedom.³⁰ While states will not allow a surviving spouse to be completely disinherited, a surviving child may be disinherited in every state except Louisiana.³¹ An examination of the various reasons parents disinherit their children sheds light upon whether freedom of testation can be defended in this context in light of the limits placed upon testamentary freedom in the context of spousal support.³²

One of the most persuasive arguments for maintaining the American system of testamentary freedom is that parents typically do fulfill their moral and financial obligations to their children (and to the

²³ See *Hodel*, 481 U.S. at 717–18.

²⁴ See *id.*; *Shapira v. Union Nat'l Bank*, 315 N.E.2d 825, 828 (Ohio Ct. Com. Pl. 1974).

²⁵ See *Shapira*, 315 N.E.2d at 828.

²⁶ See *id.* at 826. The will further stipulated that the Jewish girl must have two Jewish parents. See *id.*

²⁷ See *id.* at 827, 829.

²⁸ See *id.* at 828 (holding that “the right to receive property by will is a creature of the law, and is not a natural right or one guaranteed or protected by . . . the United States constitution.”).

²⁹ See *Hodel*, 481 U.S. at 717–18; *Shapira*, 315 N.E.2d at 828.

³⁰ See Brashier, *supra* note 3, at 1; Brennan, *supra* note 2, at 134.

³¹ See Batts, *supra* note 5, at 1198–99; Brashier, *supra* note 3, at 1.

³² See Batts, *supra* note 5, at 1199; Brashier, *supra* note 3, at 7.

state).³³ Thus, some might argue that there is no need to enact legislation protecting children from disinheritance.³⁴

Notwithstanding the fact that most parents do in fact provide for their minor children, there are a number of acceptable reasons they may intentionally disinherit their children.³⁵ In some circumstances, parents choose to disinherit their children, not out of lack of love or concern, but because they believe disinheritance is in the best interest of the child.³⁶ Additionally, many testators (particularly older testators with moderate estates) want to devise their entire estate to a surviving spouse.³⁷ In the case where a couple has minor children, the testator may leave his or her entire estate to the surviving spouse with the expectation that the surviving spouse will care for the surviving minor children, thus providing indirect support for the minor children.³⁸ In the case of an older testator with adult children, the decedent may feel that the surviving spouse has a greater need for financial support.³⁹

While these justifications for disinheritance are not unreasonable or without merit, their underlying rationale is most applicable to the disinheritance of adult children.⁴⁰ Minor children, who are unable to

³³ See Brashier, *supra* note 3, at 7.

³⁴ See *id.*

³⁵ See *id.*

³⁶ See *id.* (“[S]ome 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.”). Wealthy testators frequently espouse this rationale when they are faced with the decision of whether to provide for their adult children. See *id.* at 7–8. In these instances, “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.” *Id.* at 8.

³⁷ See DUKEMINIER ET AL., *supra* note 1, at 75; Brashier, *supra* note 3, at 8.

³⁸ See DUKEMINIER ET AL., *supra* note 1, at 76 (“[S]udies of estates with minor children show [leaving the entire estate to the surviving spouse to the exclusion of the children] to be the usual practice of those leaving wills.”). The UPC intestacy statute also follows this common practice. See UNIF. PROBATE CODE § 2-102(1) (amended 1993) (providing that, if all the decedent’s children are also children of the surviving spouse, and the surviving spouse has no other children, the surviving spouse takes the entire estate to the exclusion of the decedent’s children); see also Brennan, *supra* note 2, at 131. The protection afforded to minor children is limited in its effect when a testator leaves his or her entire estate to the surviving spouse because it “requires both a surviving spouse and a nuclear family. In instances where the parents are not married, or when there is only one parent surviving, that ‘fall back’ protection is gone.” *Id.*

³⁹ See Brashier, *supra* note 3, at 8 (“With life expectancies and costs of elder care increasing, the testator spouse may feel that most, if not all, of his estate should be devised to the surviving spouse.”).

⁴⁰ See *id.* at 7–9 (discussing reasons why a testator might disinherit his or her children and explaining why these reasons are more readily applicable to the disinheritance of adult children).

care for themselves, often do not warrant intentional disinheritance and are thus in need of protection against arbitrary disinheritance.⁴¹

Moreover, some parents may intentionally disinherit their children for reasons that many would find morally reprehensible.⁴² In the increasingly common case of non-nuclear families, parents may feel detached from their biological children, particularly when they have created new families.⁴³ In addition, parents may disinherit their children out of anger or spite for the custodial parent or child.⁴⁴

In order to contextualize the United States' adherence to the ideal of testamentary freedom, it is useful to explore some alternate systems that require parents to provide for their children at death.⁴⁵

B. *Alternatives to the United States' Allowance of Disinheritance:
Forced Heirship and Family Maintenance Statutes*

1. Forced Heirship

Forced heirship provisions are typically found in the Scandinavian countries, in many civil law countries, and in Louisiana.⁴⁶ Forced heirship involves an allocation of a portion or percentage of the decedent's estate, dictated by statute, to the decedent's children.⁴⁷

Louisiana, the sole U.S. state to require parents to provide for their children at death, has adopted a forced heirship approach.⁴⁸ The Louisiana forced share (*legitime*) is derived from French law, and protects

⁴¹ See *id.* at 8 (“[D]isinheritance 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.”).

⁴² See *id.* at 9.

⁴³ See *id.* at 9–10.

⁴⁴ See Brashier, *supra* note 3, at 9–10.

⁴⁵ See Batts, *supra* note 5, at 1211, 1213 (discussing forced heirship provisions and family maintenance statutes).

⁴⁶ *Id.* at 1211. Countries that employ the forced heirship approach include Belgium, Brazil, Denmark, Finland, France, Germany, Greece, Hungary, Lebanon, Mexico, the Netherlands, Norway, Poland, Saudi Arabia, Scotland, Sweden, Switzerland, Turkey, Ukraine, Venezuela, and Uruguay. York, *supra* note 15, at 865 n.17.

⁴⁷ Batts, *supra* note 5, at 1211.

⁴⁸ See LA. CIV. CODE ANN. art. 1493(A) (2008). The statute provides:

Forced heirs are descendants of the first degree who, at the time of the death of the decedent, are twenty-three years of age or younger or descendants of the first degree of any age who, because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or administering their estates at the time of the death of the decedent.

Id.; Brashier, *supra* note 3, at 1.

against the disinheritance of children under twenty-three years of age as well as the mentally and physically disabled, regardless of age.⁴⁹ The Louisiana forced share is not without its limitations—a child may be disinherited for “just cause.”⁵⁰ This “just cause” provision allows parents to disinherit children who have acted in a way so as not to “deserve” their inheritance.⁵¹

There are many benefits to forced heirship provisions.⁵² Most importantly, they guarantee that the needs of children (particularly minor children) are met, whenever possible, by their parents rather than by the state.⁵³ Forced heirship statutes, like child support statutes, require that parents provide for their children at death as in life.⁵⁴ Thus, the state’s interest in ensuring that children do not needlessly become wards of the state is furthered by forced heirship provisions.⁵⁵ More generally, the statutes reflect a societal feeling that it is natural for chil-

⁴⁹ LA. CIV. CODE ANN. art. 1493; DUKEMINIER ET AL., *supra* note 1, at 521. Prior to 1989, the Louisiana forced share extended to all children, regardless of age or need. Batts, *supra* note 5, at 1211.

⁵⁰ LA. CIV. CODE ANN. art. 1621(A). The statute provides:

A parent has just cause to disinherit a child if:

- (1) The child has raised his hand to strike a parent, or has actually struck a parent; but a mere threat is not sufficient.
- (2) The child has been guilty, towards a parent, of cruel treatment, crime, or grievous injury.
- (3) The child has attempted to take the life of a parent.
- (4) The child, without any reasonable basis, has accused a parent of committing a crime for which the law provides that the punishment could be life imprisonment or death.
- (5) The child has used any act of violence or coercion to hinder a parent from making a testament.
- (6) The child, being a minor, has married without the consent of the parent.
- (7) The child has been convicted of a crime for which the law provides that the punishment could be life imprisonment or death.
- (8) The child, after attaining the age of majority and knowing how to contact the parent, has failed to communicate with the parent without just cause for a period of two years, unless the child was on active duty in any of the military forces of the United States at the time.

Id.

⁵¹ *See id.*

⁵² *See* Batts, *supra* note 5, at 1223–25.

⁵³ *See id.* at 1223 (noting that providing for children’s needs not only closely relates to the “moral’ obligation of a living parent to ‘support, maintain, educate, and provide for the future of his children’” but is also a compelling interest of the state (quoting Cynthia A. Samuel et al., *Successions and Donations*, 45 LA. L. REV. 575, 594 (1984))).

⁵⁴ *See id.* at 1211; Brashier, *supra* note 3, at 5–7.

⁵⁵ *See* Batts, *supra* note 5, at 1211; Brashier, *supra* note 3, at 5–7.

dren to expect an inheritance from their parents.⁵⁶ Many commentators posit that forced heirship promotes family bonding, cohesiveness, stability, responsibility, identity, and belonging, which are attributes that any rational society would seek to encourage.⁵⁷

Finally, the procedural simplicity of forced heirship is an important benefit of the system.⁵⁸ Because the application of the statute is automatic, judicial resources are not expended as they are in a family maintenance system.⁵⁹ The ease of application is also beneficial for estate planning purposes.⁶⁰ Because parents are aware of the statutory forced share, they can create testamentary plans that are less likely to be struck down by courts using judicial doctrines in order to provide for disinherited children.⁶¹

The most compelling drawback of forced heirship is the rigidity required in its application.⁶² Forced heirship statutes are typically applied without regard for the size of the estate or the age, level of need, or independence of the children.⁶³ Additionally, forced heirship provisions essentially pit the rights of the surviving spouse against the rights of the surviving children, and may depart from what the average testator would desire.⁶⁴ Finally, some commentators argue that guaranteed inheritance, which is the result of forced heirship, might cause heirs to

⁵⁶ See Batts, *supra* note 5, at 1224 (pointing out that the natural expectation of an inheritance is “entrenched in our laws of intestacy, yet totally discarded when in tension with testamentary freedom”).

⁵⁷ See *id.* at 1222, 1225.

⁵⁸ See *id.* at 1225; *infra* Part I.B.2.

⁵⁹ See Batts, *supra* note 5, at 1213–14; 1225; *infra* Part I.B.2.

⁶⁰ See Batts, *supra* note 5, at 1227.

⁶¹ See DUKEMINIER ET AL., *supra* note 1, at 520; Batts, *supra* note 5, at 1225, 1227 (“[E]state planners could take advantage of the known quantity aspect of forced heirship in planning the estate.”); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 577 (1997).

⁶² See Batts, *supra* note 5, at 1226.

⁶³ See *id.* (“Forced heirship formalizes the ancient familial distribution of the decedent’s estate to the decedent’s kin; the emphasis is on family, not individual need.”).

⁶⁴ See DUKEMINIER ET AL., *supra* note 1, at 75 (“[W]hen there are no children from a prior marriage, most persons want everything to go to the surviving spouse, thus excluding parents and siblings—and children. This preference is particularly strong among persons with moderate estates”); Batts, *supra* note 5, at 1226 (“Most of those interviewed would leave most, if not all, of small estates to the surviving spouse only, contrary to the property distribution of most intestacy laws between surviving spouse and children. This preference did not continue when there were remarriages, adult children, or children of prior marriages.”) (footnote omitted). It is in these fractured families where protection against disinheritance is needed most. See Brashier, *supra* note 3, at 3.

become lazy and unmotivated because they know they will ultimately inherit from their parents.⁶⁵

2. Family Maintenance Statutes

Another common international practice that protects children's inheritance is the family maintenance system, which is present in many common law countries.⁶⁶ Under this system, children who are omitted from a parent's will may seek discretionary judicial intervention in order to obtain a portion of the deceased parent's estate.⁶⁷ Thus, unlike forced heirship provisions, family maintenance systems "allow[] flexibility in providing for the needs of heirs."⁶⁸

The primary benefit of the family maintenance system lies in its elasticity, which allows judges to examine the age, need, and independence of children in order to determine the appropriate level of inheritance.⁶⁹ The Australian case of *Lambeff v. Farmers Co-operative Executors and Trustees Ltd.* provides an excellent example of this flexibility.⁷⁰ There, the court provided for the adult daughter of the testator, whom he disinherited by devising his entire estate in equal parts to his two

⁶⁵ See Batts, *supra* note 5, at 1221 (explaining that a perceived disadvantage of guaranteed inheritance is that it may "cause heirs to cease to work and so reduce . . . the total wealth of the country").

⁶⁶ See *id.* at 1211. Countries that have adopted family maintenance systems include England, Wales, New Zealand, Australia, and some parts of Canada. Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 140 (2008).

⁶⁷ See Batts, *supra* note 5, at 1213–14.

⁶⁸ See York, *supra* note 15, at 870. New Zealand has adopted a quintessential example of a family maintenance statute. See Batts, *supra* note 5, at 1214. The New Zealand Family Protection Act allows any child of the deceased (in addition to other categories of protected claimants) to petition the court for intervention to provide for his or her needs. See *id.* The statute provides:

If any person (referred to in this Act as the deceased) dies, whether testate or intestate, and in terms of his or her will or as a result of his or her intestacy adequate provision is not available from his or her estate for the proper maintenance and support of the persons by whom or on whose behalf application may be made under this Act, the Court may, at its discretion on application so made, order that any provision the Court thinks fit be made out of the deceased's estate for all or any of those persons.

Family Protection Act 1955 No 88 (N.Z.).

⁶⁹ See Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199, 1213–14 ("Proponents laud the model's flexibility, which allows estate distribution to be 'tailored to individual need' and 'evolving lifestyles.'") (footnote omitted).

⁷⁰ See *Lambeff v. Farmers Coop. Ex'rs & Trs. Ltd.* (1991) 56 SASR 323, 324–26 (Austl.).

adult sons.⁷¹ In determining the appropriate division of the estate, the court considered the relative job security, salary, property ownership, and family situation of the three children of the deceased.⁷² Ultimately, although the plaintiff was in a better financial situation than her half-brothers, the court found that she was deserving of a portion of her father's estate.⁷³

The flexibility inherent in the family maintenance system speaks to the natural desire to protect children in need while allowing for some degree of testamentary freedom.⁷⁴ Thus, proponents of the family maintenance model praise its protection of family members, particularly children, with the least possible interference with testamentary freedom.⁷⁵

The unfortunate drawback of the family maintenance system is that, because of the discretionary nature of the system, there is the distinct possibility of inconsistent results.⁷⁶ Additionally, its flexibility can only be achieved by expending substantial resources.⁷⁷ Because each

⁷¹ See *id.* at 324, 328.

⁷² See *id.* at 324–26.

⁷³ See *id.* at 324–26, 328. The court held:

The plaintiff was abandoned by the deceased at the age of 10, and had no support from him thereafter. She later made efforts to befriend her father. She has done nothing to disentitle herself. It is true that she has acquitted herself reasonable well in life without her father's support, but I think she would have done better with proper support for her advancement in life. I think her claim succeeds, but in all the circumstances the provision should be modest. I order that the defendants pay her a legacy of \$20,000 out of the estate.

Id. at 328.

⁷⁴ See Batts, *supra* note 5, at 1215. Professor Batts explains that the New Zealand Family Protection Act elevates “certain aspects of the parent-child bond over certain aspects of testamentary freedom. When there is need on the part of a dependent, that need is addressed, testamentary wishes notwithstanding; when there is no need, testamentary wishes are followed.” *Id.*

⁷⁵ See *id.*; Foster, *supra* note 69, at 1214 (noting that proponents appreciate that “[u]nlike the alternative foreign and U.S. entitlement-based systems[,] . . . the family maintenance scheme ‘does not apply automatically’ but rather comes into play only upon petition by qualifying ‘aggrieved claimants’”) (footnote omitted).

⁷⁶ See Foster, *supra* note 69, at 1215. Critics argue that “the family maintenance model would introduce such complexity and unpredictability into the U.S. probate process that it would undermine estate planning and obstruct simple, orderly transfer of property rights.” *Id.* But see Joseph Dainow, *Restricted Testation in New Zealand, Australia and Canada*, 36 MICH. L. REV. 1107, 1111 (1938) (noting that, in the application of New Zealand's family maintenance statute, “the general principles of construction have been consistent, and despite the extreme latitude of the court's discretion, the decisions have not been conflicting”) (footnote omitted).

⁷⁷ See Foster, *supra* note 69, at 1215 (explaining that critics of family maintenance systems find that “the costs of a discretionary redistribution system are . . . unacceptable”).

claim is decided on a case-by-case basis, the judicial system is heavily taxed.⁷⁸ Finally, because a lawsuit must be initiated in order to amend the testator's plan of disposition, family maintenance systems present the possibility of increased litigation and familial discord.⁷⁹ As some commentators have noted, the American propensity toward litigation may make the family maintenance system too burdensome and unworkable in the United States.⁸⁰

II. INDIRECT JUDICIAL PROTECTIONS AGAINST THE DISINHERITANCE OF CHILDREN

Although there is no formal protection against disinheritance in forty-nine American states, courts have made use of a number of doctrines in order to "remedy" testamentary plans that fail to provide for children.⁸¹ Some of the doctrines that have been used to amend wills in order to provide for disinherited children include undue influence, mental capacity, and fraud.⁸² These doctrines are widely and flexibly

⁷⁸ See Batts, *supra* note 5, at 1216; Foster, *supra* note 69, at 1215.

⁷⁹ See Batts, *supra* note 5, at 1216; Foster, *supra* note 70, at 1215 (noting concerns that a family maintenance system in the United States would "'promote litigation,' increase 'information and administrative costs,' and 'deplete estates.')" (footnotes omitted).

⁸⁰ See, e.g., Batts, *supra* note 5, at 1216 ("The fortune of New Zealand and England in avoiding a deluge of litigation from the family maintenance system may not repeat here, of course, where litigation may be the 'American way.'"); Foster, *supra* note 69, at 1215 (noting that the U.S. probate system is "comprised of multiple, local probate courts, staffed often by lay judges chosen on the basis of politics rather than merit," and making it unsuitable to place such power in the hands of these courts) (footnotes omitted).

⁸¹ See *DUKEMINIER ET AL.*, *supra* note 1, at 520; Madoff, *supra* note 61, at 611. Professor Madoff argues that:

[T]he undue influence doctrine dictates that unless the family has done something to "deserve" disinheritance, the bulk of a person's property should be left to his or her spouse and blood relatives. . . . If the bequest fails to meet the proscribed norms, the will is set aside and the property passes under the laws of intestacy. . . . Thus, the impact of the undue influence doctrine is to act as a form of forced heirship.

Madoff, *supra* note 61, at 611.

⁸² See *DUKEMINIER ET AL.*, *supra* note 1, at 520. In order to be competent to make a will:

[T]he testator must be an adult . . . and "must be capable of knowing and understanding in a general way [1] the nature and extent of his or her property, [2] the natural objects of his or her bounty, and [3] the disposition that he or she is making of that property, and must also be capable of [4] relating these elements to one another and forming an orderly desire regarding the disposition of the property."

used to amend testamentary plans that disinherit children.⁸³ Thus, it appears that while the laws in the United States favor testamentary freedom, many courts unofficially attempt to implement “natural” plans of disposition (i.e. plans that provide for blood relatives) against the stated intent of the testator by employing these remedial doctrines.⁸⁴

A. *The Undue Influence Doctrine*

Although judicial opinions consistently state that the court’s primary purpose is to effectuate testator intent, courts apply doctrines such as undue influence in a manner that is contrary to this stated pur-

Id. at 159 (quoting RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1(b) (2003)). In order for there to be undue influence in the eyes of the law, there must be coercion: “It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence.” *Id.* at 180. In the absence of direct evidence of undue influence, courts will often allow circumstantial evidence to prove that: “(1) the donor was *susceptible* to undue influence, (2) the alleged wrongdoer had an *opportunity* to exert undue influence, (3) the alleged wrongdoer had a *disposition* to exert undue influence, and (4) there was a *result* appearing to be the effect of the undue influence.” *Id.* at 181–82. Fraud occurs “where the testator is deceived by a deliberate misrepresentation and does that which he would not have done had the misrepresentation not been made.” *Id.* at 207. The *Restatement (Third) of Property* defines undue influence in the following way: “A donative transfer is procured by undue influence if the wrongdoer exerted such influence over the donor that it overcame the donor’s free will and caused the donor to make a donative transfer that the donor would not otherwise have made.” RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3(b) (2003).

⁸³ See DUKEMINIER ET AL., *supra* note 1, at 520. The authors note:

A will disinheriting a child virtually invites a will contest. . . . “[T]estamentary capacity,” “undue influence,” and “fraud” are subtle and elastic concepts that judges and juries can use to rewrite the testator’s distribute plan in order to “do justice.” In contests by disinherited children, judges and juries are frequently influenced by their sympathies for the children.

Id.

⁸⁴ See Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236 (1996). Professor Leslie notes:

Notwithstanding frequent declarations to the contrary, many courts are as committed to ensuring that testators devise their estates in accordance with prevailing normative views as they are to effectuating testamentary intent. Those courts impose upon testators a duty to provide for those to whom the court views as having a superior moral claim to the testator’s assets, usually a financially dependent spouse or persons related by blood to the testator. Wills that fail to provide for those individuals typically are upheld only if the will’s proponent can convince the fact-finder that the testator’s deviation from normative values is morally justifiable.

Id. (footnote omitted).

pose.⁸⁵ Thus, the theoretical importance of testamentary freedom is perhaps disingenuous upon careful study of judicial opinions.⁸⁶

Professor Melanie Leslie conducted a study that examined all cases that considered undue influence in their review over a randomly chosen five-year period.⁸⁷ Her study showed that many courts, when “confronted with wills that disinherited family members in favor of non-family members,” upheld findings of undue influence, even in the absence of substantial evidence.⁸⁸ Professor Leslie found that these court opinions rely heavily on the unnatural nature of a bequest to a non-family member, particularly when the testator did nothing to explain the disinheritance.⁸⁹ Professor Leslie’s study provides strong evidence that courts favor “natural” dispositions to family members over dispositions to non-family members, even in the face of a testator’s clear intent to disinherit.⁹⁰

B. *Undue Influence at Work: Case Studies*

Gaines v. Frawley provides an excellent example of a court finding undue influence in the face of an “unnatural” disposition despite the testator’s clear intent.⁹¹ There, Lois Frawley left her entire estate to her live-in boyfriend, Edward Gaines, to the exclusion of her two adult sons.⁹² The court found that Frawley’s boyfriend exerted undue influence, even though there were “few of the traditional indicia of undue

⁸⁵ See *id.* at 243–44. Professor Leslie studied all reported cases that applied the undue influence doctrine within a five-year period and found that courts “were much more likely to honor testamentary intent when the will provided for family members as opposed to non-relatives.” *Id.*

⁸⁶ See *id.* at 236.

⁸⁷ See *id.* at 243. Professor Leslie reviewed a total of 160 cases, which she located by utilizing the Westlaw topic and key numbers, for the period between December 31, 1984 and January 1, 1990. See *id.* & n.41.

⁸⁸ See *id.* at 245 (“[C]ourts implicitly relieved the contestant of the burden of proof, shifting the burden to the will’s beneficiary.”).

⁸⁹ See Leslie, *supra* note 84, at 245. Specifically, Professor Leslie illustrates that, when faced with a will contest in which the testator disinherited a family member in favor of a non-family member, courts will “implicitly break the rule placing the burden of proof on contestants . . .” *Id.* at 246. Additionally, Leslie notes that courts consider the “moral worthiness” of the family members, and are more likely to find undue influence when the disinherited family member has done nothing to “deserve” disinheritance. See *id.*

⁹⁰ See *id.* at 246 (“[T]he court often substituted its judgment for the judgment of the testator; the issue became not whether the document represented the testator’s intent, but whether the testator’s intentions offended the courts’ sense of justice or morality.”).

⁹¹ See *Gaines v. Frawley*, 739 S.W.2d 950, 955 (Tex. App. 1987).

⁹² *Id.* at 951–52.

influence.”⁹³ As evidence of her susceptibility to influence, the court relied on the fact that Frawley had emphysema and cancer, even though neither illness provided evidence of weakened mental capacity.⁹⁴ The court then turned to the question of whether Gaines’ influence was undue, and relied on evidence that the couple drank heavily and had a tempestuous and illicit relationship—Gaines was still married to his seventh wife when he moved in with Frawley.⁹⁵ Finally, the court turned to the relationship between Frawley and her sons, finding that the sons had a good relationship with their mother and visited her often.⁹⁶ This positive relationship between Frawley and her sons was used as evidence of the unnatural nature and unjust result of her testamentary disposition.⁹⁷ The court ultimately found that Frawley’s boyfriend had unduly influenced her, despite the lack of evidence that Gaines had “actively sought to influence” Frawley’s will.⁹⁸

Gaines provides a quintessential example of how courts will often loosen their evidentiary standards and shift burdens of proof in order to remedy what they feel are unjust, unnatural dispositions that disinherit family members.⁹⁹ The application of doctrines such as undue influence and fraud is justified overtly as an attempt to protect a testator’s right to dispose of his or her property as he or she sees fit.¹⁰⁰ Cases

⁹³ See *id.* at 955; Leslie, *supra* note 84, at 250. Additionally, the *Restatement (Third) of Property* provides a nonexhaustive list of suspicious circumstances that may lead to an inference of undue influence, few of which were found in *Gaines*. See 739 S.W.2d at 953–55; RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmt. h (2003).

⁹⁴ See *Gaines*, 739 S.W.2d at 953; Leslie, *supra* note 84, at 250 (noting that “[t]here was no evidence . . . of weakened mental capacity or incoherence. . .” in *Gaines*).

⁹⁵ See *Gaines*, 739 S.W.2d at 951–54; Leslie, *supra* note 84, at 251 (“[T]he court emphasized the illicit nature of the relationship between testator and beneficiary and the seemingly repulsive personality of the beneficiary.”).

⁹⁶ See *Gaines*, 739 S.W.2d at 954–55.

⁹⁷ See *id.* at 955; Leslie, *supra* note 84, at 252 (“[T]he court stressed what it viewed as the injustice of the will provisions, emphasizing that the sons had gotten along well with their mother and had been frequent visitors to her home.”).

⁹⁸ See *Gaines*, 739 S.W.2d at 955; Leslie, *supra* note 84, at 251. Despite the lack of concrete evidence that would prove that Frawley was susceptible to influence or that her boyfriend in fact did seek to influence the provisions of Frawley’s will, the court stated:

The above circumstances considered with evidence of Mrs. Frawley being weakened and impaired, in addition to testimony showing her fear of appellant, is sufficient to justify a jury in determining her will was unnatural in its terms. The necessary elements of undue influence by appellant over testatrix are supported by tangible evidence.

See *Gaines*, 739 S.W.2d at 955.

⁹⁹ See *Gaines*, 739 S.W.2d at 955; Leslie, *supra* note 84, at 245–46.

¹⁰⁰ See Madoff, *supra* note 61, at 576. Professor Madoff provides the following example: “[I]f an aged testator leaves everything to his nurse of one month, disinheriting his family,

such as *Gaines* demonstrate, however, that, rather than furthering testamentary freedom, doctrines such as undue influence are actually used to impose testamentary norms, even in the face of unambiguous testamentary intent.¹⁰¹ In fact, because the doctrine of undue influence is often used to impose testamentary norms (which are in turn susceptible to societal norms), the application of the doctrine may not take into account “alternative” lifestyles, and cases applying the doctrine may become outdated as social norms evolve.¹⁰² Thus, the doctrine is somewhat unstable and should not be relied upon to protect disinherited children.¹⁰³

a court’s finding of undue influence will be justified on the basis that the will does not represent the testator’s true wishes.” *Id.*

¹⁰¹ See *Gaines*, 739 S.W.2d 955; Madoff, *supra* note 61, at 576 (“[R]ather than furthering freedom of testation, the undue influence doctrine denies freedom of testation for people who deviate from judicially imposed testamentary norms—in particular, the norm that people should provide for their families.”).

¹⁰² See *In re Will of Kaufmann*, 247 N.Y.S.2d 664, 685, 689 (App. Div. 1964), *aff’d*, 205 N.E.2d 864 (N.Y. 1965). In this case, Robert D. Kaufmann, a wealthy man who sought an independent life away from his family, met Walter Weiss, a man who became Kaufmann’s financial advisor, business consultant, and romantic partner—the two men became extremely close and purchased a home together. See *id.* at 666–67, 683; Madoff, *supra* note 61 at 592. Kaufmann executed wills in successive years, each year increasing Weiss’s share of Kaufmann’s estate. See *Kaufmann*, 247 N.Y.S.2d at 667, 671; Madoff, *supra* note 61, at 594–95. Because homosexuality was a less acceptable lifestyle in 1964 when the case was decided, the Court found undue influence and set aside the bequest to Weiss, despite Kaufmann’s clear intentions. See *Kaufmann*, 247 N.Y.S.2d at 685–86; Madoff, *supra* note 61, at 598. Kaufmann sent a letter to his family along with his amended will, which left “a sizeable portion” of his property to Weiss. *Kaufmann*, 247 N.Y.S.2d at 671. The letter stated:

Walter gave me the courage to start something which slowly but eventually permitted me to supply for myself everything my life had heretofore lacked: an outlet for my long-latent but strong creative ability in painting . . . a balanced, healthy sex life which before had been spotty, furtive and destructive; an ability to reorientate myself to actual life and to face it calmly and realistically. All of this adds up to Peace of Mind. . . .

I am eternally grateful to my dearest friend—best pal, Walter A. Weiss. What could be more wonderful than a fruitful, contented life and who more deserving of gratitude now, in the form of an inheritance, than the person who helped most in securing that life? I cannot believe my family could be anything else but glad and happy for my own comfortable self-determination and contentment and equally grateful to the friend who made it possible.

Id. at 671. The court found “[t]he emotional base” reflected in the letter to be “gratitude utterly unreal, highly exaggerated and pitched to a state of fervor and ecstasy.” *Id.* at 674.

¹⁰³ See Chester, *supra* note 7, at 28; Madoff, *supra* note 61, at 598. Professor Madoff explains:

It would be easy to dismiss *Kaufmann* as just another example of judicial homophobia from an era in which courts and society at large were openly prejudiced against homosexual relationships. However, to categorize this case as

To highlight the inadequacy of reliance on the undue influence doctrine to protect minor children against disinheritance, it is useful to explore a case where a court did not apply the doctrine despite the clear presence of traditional indicia of undue influence.¹⁰⁴ In *Lipper v. Weslow*, Sophie Block left a will devising the entirety of her estate to two of her children, consequently disinheriting her three grandchildren (the children of Block's deceased first child).¹⁰⁵ The will in question was prepared by one of the beneficiaries of the will (Block's son), and contained a lengthy explanation as to why Block was disinheriting her grandchildren.¹⁰⁶ The court focused on the written intention of the testator, overlooking a number of factors in finding that there was no undue influence: Block was eighty-one years of age when she executed the will, there was evidence that the testator's son who prepared the will bore malice toward the deceased son and was in a position to influence the testator, and there was evidence that the stated reasons for disinheriting Block's grandchildren were untrue.¹⁰⁷ Despite the existence of a

an aberration, a misapplication of the undue influence doctrine, is to miss the more significant lesson that this case offers. What is notable about the *Kaufmann* decision is that it rests on firm ground under the standard doctrinal undue influence analysis. Changing mores have given us the opportunity to see this doctrine for what it is: an imposition of societal norms as to appropriate testamentary behavior.

Madoff, *supra* note 61, at 598 (footnote omitted); *see also In re Estate of Sarabia*, 270 Cal. Rptr. 560, 566 (Ct. App. 1990) (upholding a jury finding of no undue influence). The facts of *Sarabia* are substantially similar to those in *Kaufmann*—the similarities of the facts coupled with the disparate findings of undue influence highlight the inconsistent application of the doctrine. *See Sarabia*, 270 Cal. Rptr. at 561–62, 564–65; *Kaufmann*, 247 N.Y.S.2d at 485–86.

¹⁰⁴ *See Lipper v. Weslow*, 369 S.W.2d 698, 701, 703 (Tex. App. 1963); Chester, *supra* note 7, at 28.

¹⁰⁵ *See Lipper*, 369 S.W.2d at 699.

¹⁰⁶ *See id.* at 699, 700–01. The will explained that Block was disinheriting her grandchildren because they had “shown a most unfriendly and distant attitude towards [her].” *See id.* at 700. She further stated that she had not seen her grandchildren in several years, and that her daughter-in-law (the wife of her deceased son) had contacted Block very infrequently after her son's death (flowers on Christmas and a few greeting cards). *Id.* at 700–01.

¹⁰⁷ *See id.* at 701. The Court noted:

There is evidence that defendant Lipper bore malice against his dead half brother. He lived next door to testatrix, and had a key to her house. The will was not read to testatrix prior to the time she signed same, and she had no discussion with anyone at the time she executed it. There is evidence that the recitations in the will that Bernice Weslow [testator's daughter-in-law] and her children were unfriendly, and never came about testatrix, were untrue. There is also evidence that the Weslows sent testatrix greeting cards and flowers from 1946 through 1954, more times than stated in the will.

confidential relationship between Block and her children and the suspicious circumstances, the court placed the burden on the will contestants to prove undue influence and ultimately found against them.¹⁰⁸

The many doctrines courts use to amend wills often militate against the disinheritance of children in the United States.¹⁰⁹ As the above cases demonstrate, however, this remedy is imperfect, because the application of these judicial doctrines may be inconsistent and cannot be relied upon.¹¹⁰ In order to protect minor children from disinheritance and conserve state resources, the judicial inclination that deceased parents should provide for their children should be codified in order to ensure consistent results.¹¹¹ While the reasoning of courts in utilizing doctrines such as undue influence to remedy disinheritance is sound, the prevalence of these doctrines indicates that legislatures should be attending to the underlying issue rather than allowing courts to decide each case on an ad hoc basis.¹¹²

III. LEGISLATION AS THE BEST MEANS TO PROTECT MINOR CHILDREN FROM DISINHERITANCE

The common judicial practice of reforming wills in order to provide for disinherited family members, while not codified, is practically similar to the family maintenance system because both allow for the flexible allocation of resources to disinherited children.¹¹³ The use of judicial doctrines to amend testamentary plans, however, is an inadequate substitute for a law that guarantees a forced share for children, or

Id.

¹⁰⁸ See *id.* at 703.

¹⁰⁹ See Madoff, *supra* note 61, at 577 (“[F]amily protectionism is built into the very fabric of the undue influence doctrine. . . . The doctrine does not act to protect the intent of the testator, but rather to protect the testator’s biological family from disinheritance.”).

¹¹⁰ See Kaufmann, 247 N.Y.S.2d at 685–86; Gaines, 739 S.W.2d at 955; Lipper, 369 S.W.2d at 703; Chester, *supra* note 7, at 28 (arguing that the protection afforded by judicial doctrines give some protection to children in the United States, but that the protection is “indirect, haphazard, and finally unsatisfactory”).

¹¹¹ See Brashier, *supra* note 3, at 7; Chester, *supra* note 7, at 28; Madoff, *supra* note 61, at 598.

¹¹² See Chester, *supra* note 7, at 28; Madoff, *supra* note 61, at 598.

¹¹³ See DUKEMINIER ET AL., *supra* note 1, at 520 (discussing the wide and flexible use of doctrines such as undue influence to amend testamentary plans); Foster, *supra* note 69, at 1213–14 (discussing the flexibility of family maintenance systems that allow courts to amend testamentary dispositions on a case-by-case basis). Family maintenance statutes and judicial doctrines such as undue influence have in common that they give the judiciary the flexibility and discretion to amend testamentary plans. See DUKEMINIER ET AL., *supra* note 1, at 520; Foster, *supra* note 69, at 1213–14.

for one that expressly gives courts the power to amend wills.¹¹⁴ In the absence of legislation, judicial decisions utilizing doctrines such as undue influence to amend wills run the risk of being arbitrary and inconsistent.¹¹⁵ The use of the undue influence doctrine provides a prime example of this inconsistency because the stated purpose of the doctrine deviates significantly from the ways in which courts utilize the doctrine.¹¹⁶ In short, indirect judicial protections against the disinheritance of minor children embody the same problems as family maintenance statutes—the application of the doctrine is too discretionary and too inconsistent.¹¹⁷

While most testators provide for their minor children either directly through a testamentary bequest or indirectly by leaving the entirety of their estate to the surviving spouse, who is often the parent of the minor, the problem of the intentional disinheritance of minor children is nevertheless important.¹¹⁸

¹¹⁴ See *DUKEMINIER ET AL.*, *supra* note 1, at 510; Chester, *supra* note 7, at 28; Foster, *supra* note 69, at 1213–14.

¹¹⁵ See Chester, *supra* note 7, at 28; *supra* Part II.B.

¹¹⁶ See Madoff, *supra* note 61, at 575–76 (explaining that the undue influence doctrine is understood as an attempt to protect testator's right to freedom of testation, but in fact, the judiciary uses the doctrine to impose the testamentary norm that people should provide for their families); *supra* Part II.B.

¹¹⁷ See Batts, *supra* note 5, at 1216; Chester, *supra* note 7, at 28; Foster, *supra* note 69, at 1215.

¹¹⁸ See *DUKEMINIER ET AL.*, *supra* note 1, at 76; Jeffrey P. Rosenfeld, *Will Contests: Legacies of Social Change*, in *INHERITANCE AND WEALTH IN AMERICA* 173, 174 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998) (explaining that disinheritance only occurs in fewer than three percent of probated estates). Rosenfeld warns, however, that “[w]ill contests are socially and economically significant events They can rupture and realign the social fabric of families, and keep millions of dollars tied up in litigation for years. . . . [They] often involve large estates, and can create decades of ill-will in families.” Rosenfeld, *supra*; see also Paul G. Haskell, *Restraints Upon the Disinheritance of Family Members*, in *DEATH, TAXES AND FAMILY PROPERTY: ESSAYS AND AMERICAN ASSEMBLY REPORT* 105, 114–15 (Edward C. Halbach, Jr. ed., 1977). Professor Haskell cautions:

There is no explanation for the failure to protect minor children 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 needs to 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.

Id.

As non-traditional families are becoming more common, disinheritance of non-custodial minor children is likely to increase as well.¹¹⁹ Disinheritance will likely predominantly affect those children whose parents are divorced, those born out of wedlock, and particularly those children with a non-custodial parent who has started a new family.¹²⁰ In these situations, money left to the surviving spouse is not money that is, in essence, indirectly left to the minor children.¹²¹ Additionally, these are the children who are more likely to be intentionally disinherited by their non-custodial parents.¹²² The law should not implicitly sanction this disproportionate treatment of children who, through no fault of their own, do not reside with both of their biological parents.¹²³

Perhaps the most compelling argument for requiring parents to provide for their children at death is a moral one—parents are morally

¹¹⁹ See Brashier, *supra* note 3, at 9 (“[N]oncustodial parents appear particularly likely to disinherit their minor children.”); Ronald Chester, *Should American Children Be Protected Against Disinheritance?*, 32 REAL PROP. PROB. & TR. J. 405, 410 (1997) (“Increasingly, disinheritance involves families reconstituted after divorce and remarriage.”); see also Rosenfeld, *supra* note 118, at 177. Rosenfeld interviewed twenty-eight estate litigators and found that changes in family structure and the impact of divorce and remarriage accounted for 74.9% of the recent will contests in these attorneys’ caseloads. See Rosenfeld, *supra* note 118, at 176, 177.

¹²⁰ See Brashier, *supra* note 3, at 9–10. The court in *Kujawinski v. Kujawinski* stated 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.

376 N.E.2d 1382, 1390–91 (Ill. 1978) (citation omitted); see also Batts, *supra* note 5, at 1200 (“[T]he substantial fifty percent divorce rate and the frequent incidence of remarriage . . . often attenuates the child’s bond with one parent and leads to the increased possibility of disinheritance of children.”) (footnote omitted); Rosenfeld, *supra* note 118, at 179 (“[A]n estimated 1,300 stepfamilies are being formed every day More than 6 million children live with the biological mother and a stepfather; 740,000 live with the biological father and a stepmother.”).

¹²¹ See Brennan, *supra* note 2, at 131.

¹²² See Batts, *supra* note 5, at 1201 (“The possible alienation and disaffection of the noncustodial parent toward the child might result in disinheritance of the child who that parent never really knew.”).

¹²³ See Brashier, *supra* note 3, at 9–10, 11 (“Children of divorce and nonmarital children are particularly likely to bear the brunt of disinheritance.”).

obligated to support their own children.¹²⁴ This moral obligation to support one's children is codified by law in child support statutes, but it also runs deeply through the veins of American society.¹²⁵ While parents are legally obligated to support their minor children during life, there exists no requirement that parents provide for their children at death, an incongruity that seems arbitrary and illogical.¹²⁶ In fact, it may make more sense to require parents to provide for their children at death because a decedent has no use for money after death.¹²⁷

Interestingly, child support is one of the few financial obligations that appears to disappear at death.¹²⁸ For example, a testator's creditors may make claims against his estate, demonstrating that all the testator's financial responsibilities do not die along with him.¹²⁹ This begs the question: why should a testator have a greater responsibility to his creditors than he does toward his minor children?¹³⁰ Both types of "debt" were entered into voluntarily, and both creditors and minor children can be said to have a right to a testator's money after he or she dies.¹³¹

In addition to the moral arguments in favor of requiring parents to support their minor children, there are serious economic consequences for failing to do so.¹³² As previously mentioned, surviving

¹²⁴ See 1 BLACKSTONE, *supra* note 19, at *435 (noting that natural law provides the source of the duty of parents to support their children); Brashier, *supra* note 3, at 4.

¹²⁵ See Brashier, *supra* note 3, at 4-6. Indeed, Blackstone reminds us of the aspect of choice that leads to the existence of a child:

The duty of parents to provide for the *maintenance* of their children is a principle of natural law; an obligation . . . 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 which they have bestowed shall be supported and preserved.

See 1 BLACKSTONE, *supra* note 19, at *435.

¹²⁶ See Brashier, *supra* note 3, at 5-6 & n.21 (discussing various state support statutes that require able parents to support their children while living). Brashier further notes, "When a minor child's parent dies, the child's need does not suddenly disappear." *Id.* at 7; see also Knowles v. Thompson, 697 A.2d 335, 336-40 (Vt. 1997) (discussing the importance of continued child support after divorce and after the death of a parent).

¹²⁷ See Brashier, *supra* note 3, at 19 ("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.").

¹²⁸ See *id.* at 5 n.21.

¹²⁹ See *id.*

¹³⁰ See *id.*

¹³¹ See 1 BLACKSTONE, *supra* note 19, at *425.

¹³² See Batts, *supra* note 5, at 1199.

spouses are entitled to a statutory share of the decedent's estate based in part on the justification that surviving spouses should not become wards of the state.¹³³ This justification is as compelling, if not more so, when applied to the disinheritance of minor children who are, in almost all circumstances, unable to provide for themselves.¹³⁴

When a parent cannot or will not support his or her minor children, the state has a responsibility to step in and provide for them.¹³⁵ In the case of children whose parents cannot support them for financial, physical, or other reasons, the use of state money to provide for these children is necessary and commonly accepted.¹³⁶ Parents who voluntarily choose not to provide for their children in their testamentary plans, however, are a different story.¹³⁷ These parents pass a financial burden to others—typically either to the surviving custodial parent or the state.¹³⁸ Thus, in addition to the moral arguments that should induce

¹³³ See *id.*

¹³⁴ See *id.* at 1999–1200. Professor Batts notes:

The surviving spouse might have assets independent of the deceased, or may be able to establish another financially supportive relationship through remarriage or cohabitation with a significant other. None of these options is available to the minor child, who did not voluntarily or knowingly establish the family relationship with the testator. If public policy has seen fit to protect spouses from disinheritance, the same statutory protections should be provided for children.

Id. at 1200; see also Jan Ellen 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, 47 (1979). Professor Rein explains:

While few would gainsay the moral right of the spouse to protection against disinheritance, a decedent's dependent children would seem to have an even higher moral claim to such protection. Spouses, after all, enter into the husband-wife relationship voluntarily at an age when they can protect their interests while children do not volunteer to be brought into the parent-child relationship thrust upon them at birth.

Rein, *supra*, at 47.

¹³⁵ See Brashier, *supra* note 3, at 5.

¹³⁶ See *id.* at 5 (noting that in instances where parents are unable to support their children, “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”).

¹³⁷ See *id.* (“[S]ociety must require by law that the capable parent support his children despite his abnegation of moral responsibility.”).

¹³⁸ See Batts, *supra* note 5, at 1229 (“[A]lthough the parental support obligation is applicable to both parents, in many instances the surviving parent may not have sufficient independent resources to provide for the child.”).

the states to enact legislation to protect minor children from disinheritance, there are compelling economic reasons as well.¹³⁹

Our current system and the family maintenance system, which rely on ad hoc judicial correction to provide for disinherited children, are both burdensome, inconsistent, and costly.¹⁴⁰ Because courts are already using doctrines to “correct” disinheritance of children, we could improve upon this judicial inclination by adopting legislation that would protect minors against disinheritance with greater consistency and less judicial discretion.¹⁴¹ Protectionist legislation would expressly ensure that American courts are not bogged down by time-consuming and costly will contests that could be avoided with a statutory share for minor children.¹⁴²

In addition to taxing the judicial system, will contests are financially undesirable for families (both the named beneficiaries and the contesting parties) because much of the decedent’s estate can be depleted during the course of the litigation.¹⁴³ In fact, as a result of the high cost of litigation, it is likely that most disinherited children are dissuaded from contesting a parent’s will.¹⁴⁴ Thus, there may be disinherited heirs who do not even receive the benefit of judicial doctrines such as undue influence.¹⁴⁵

Enacting legislation that would prevent the disinheritance of minor children would likely be met with little resistance, since Americans generally believe that parents should not be able to disinherit minor children.¹⁴⁶ In one study, 860 residents of Nebraska were asked whether parents should be legally allowed to will property outside the family and

¹³⁹ See *id.* (explaining that, when a parent disinherits a minor child, “the state must step in and support the child while the deceased parent is free to leave estate assets to strangers at the expense of both the children and the state”).

¹⁴⁰ See *DUKEMINIER ET AL.*, *supra* note 1, at 520 (discussing the wide and flexible use of doctrines such as undue influence to amend testamentary plans); Foster, *supra* note 69, at 1213–14 (discussing the flexibility of family maintenance systems that allow courts to amend testamentary dispositions on a case-by-case basis); *supra* Part II.B.

¹⁴¹ See *In re Will of Kaufmann*, 247 N.Y.S.2d 664, 685–86 (App. Div. 1964), *aff’d*, 205 N.E.2d 864 (N.Y. 1965); *Gaines v. Frawley*, 739 S.W.2d 950, 955 (Tex. App. 1987); *Lipper v. Weslow*, 369 S.W.2d 698, 703 (Tex. App. 1963); Chester, *supra* note 7.

¹⁴² See *Kaufmann*, 247 N.Y.S.2d at 685–86; *Gaines*, 739 S.W.2d at 955; *Lipper*, 369 S.W.2d at 703; Batts, *supra* note 5, at 1222–25; Chester, *supra* note 7.

¹⁴³ See Rosenfeld, *supra* note 118, at 187 (“Between one-fourth and one-third of an estate can be eaten up by legal costs when parties contest a will.”).

¹⁴⁴ See *id.* at 188 (“[The] time, energy, and expense of litigation do dissuade most people from raising legal objections. Those who are not dissuaded by the expense are often prevented by social pressures from family and kin.”).

¹⁴⁵ See *DUKEMINIER ET AL.*, *supra* note 1, at 520.

¹⁴⁶ See Batts, *supra* note 5, at 1232–33.

leave nothing to the children.¹⁴⁷ Approximately ninety-three percent of those interviewed believed that parents should not be allowed to disinherit children under twenty-one years of age.¹⁴⁸ In fact, 63.4% of respondents believed that parents should not be able to disinherit children over twenty-one years of age.¹⁴⁹ This study, along with many like it, indicates that, in general, Americans would be amenable to laws that would specifically outlaw the disinheritance of minor children.¹⁵⁰

Ultimately, minor children are in need of legislative protection against disinheritance.¹⁵¹ Children, unlike adults, lack the political power to fight for their needs; thus, the legislature must step in and demand that children's support needs are met.¹⁵²

IV. THE SOLUTION: AMEND THE UNIFORM PROBATE CODE TO INCLUDE A FORCED HEIRSHIP PROVISION SIMILAR TO LOUISIANA'S

In order to protect minor children from disinheritance by their parents, the UPC should adopt a forced heirship provision akin to that of Louisiana.¹⁵³ As a model code, the UPC sets the tone for many state laws, and many states have adopted statutes that are substantially similar to those in the UPC.¹⁵⁴ Forced heirship would be preferable to a family maintenance system in the United States because the American propensity toward litigation likely would make the family maintenance model too burdensome on American courts.¹⁵⁵ Additionally, the outcome certainty that would result from a forced share system would ensure the support of minor children and would aid in parents' estate planning.¹⁵⁶ Forced heirship would protect both minor non-custodial

¹⁴⁷ See JULIUS COHEN ET AL., *PARENTAL AUTHORITY: THE COMMUNITY AND THE LAW* 23, 77 (1958).

¹⁴⁸ See *id.*

¹⁴⁹ See *id.*

¹⁵⁰ See *id.*; Batts, *supra* note 5, at 1230 n.173 (listing empirical studies of people's knowledge of and attitudes toward the laws of inheritance in the United States).

¹⁵¹ See Brashier, *supra* note 3, at 22.

¹⁵² See *id.*

¹⁵³ See LA. CIV. CODE ANN. art. 1493 (2008); Batts, *supra* note 5, at 1253.

¹⁵⁴ See Andrew Stimmel, Note, *Mediating Will Disputes: A Proposal to Add a Discretionary Mediation Clause to the Uniform Probate Code*, 18 OHIO ST. J. ON DISP. RESOL. 197, 214 (2002) (noting that eighteen states have enacted the UPC, either in whole or in substantial part, and that "most other states have enacted portions of it"). Stimmel further notes that the UPC is very influential: "Because of the participants and the drafting process, a uniform code carries significant persuasive weight on state legislators when contemplating reform in their own statutory codes." *Id.* at 215.

¹⁵⁵ See Batts, *supra* note 5, at 1216; Foster, *supra* note 69, at 1215; *supra* note 80.

¹⁵⁶ See Batts, *supra* note 5, at 1225, 1227; Brashier, *supra* note 3, at 7.

children, who are most likely to be disinherited by their non-custodial parent, as well as the states by ensuring that the children do not needlessly become wards of the state.¹⁵⁷

Amending the UPC in this way should not be problematic.¹⁵⁸ First, as mentioned above, studies show that Americans generally do not believe parents should be able to disinherit their minor children.¹⁵⁹ Thus, there is likely to be little backlash against a law prohibiting this behavior.¹⁶⁰ Additionally, judicial use of curative doctrines in cases of disinheritance demonstrates that the testamentary freedom that Americans value is more of a fiction than a reality.¹⁶¹

Moreover, true testamentary freedom is further curtailed by the familial, financial, and estate administration obligations that must be satisfied before the final distribution of property under the will is accomplished.¹⁶² Many states have family allowances, homestead laws, and exempt property set-asides that allow the surviving spouse and minor children to claim certain assets.¹⁶³ Additionally, creditors must be paid out of the estate before (and can even make claims after) other distributions are made.¹⁶⁴ Finally, almost all states have some form of spousal elective share.¹⁶⁵ Thus, the notion of complete testamentary freedom is in some respects illusory, and a forced share for minor children is sim-

¹⁵⁷ See Batts, *supra* note 5, at 1225; Brashier, *supra* note 3, at 3, 5.

¹⁵⁸ See COHEN ET AL., *supra* note 147, at 23, 77; Batts, *supra* note 5, at 1230 n.173, 1232–33 (listing empirical studies of people’s knowledge of and attitudes toward the laws of inheritance in the United States).

¹⁵⁹ See COHEN ET AL., *supra* note 147, at 23, 77; Batts, *supra* note 5, at 1230 n.173, 1232–33.

¹⁶⁰ See COHEN ET AL., *supra* note 147, at 23, 77; Batts, *supra* note 5, at 1230 n.173, 1232–33.

¹⁶¹ See Leslie, *supra* note 84, at 238 (“[O]ur law is no stranger to the concept of testamentary familial duty, and often imposes such a duty overtly. In fact, the urge to restrict testamentary freedom in favor of the family is almost universal; most legal systems expressly protect family members from disinheritance.”); Dayan, *supra* note 18, at 384–85.

¹⁶² See Batts, *supra* note 5, at 1243.

¹⁶³ See *id.* Every state has a family allowance statute that authorizes the probate court to set aside an allowance for the maintenance and support of the surviving spouse, and usually the minor children. See DUKEMINIER ET AL., *supra* note 1, at 475. This allowance, however, is limited to a fixed period. See *id.* Homestead laws vary by state, but they are designed to protect the family home for the use of the surviving spouse and minor children, “free from the claims of the decedent’s creditors.” See *id.* at 474. The personal property set-aside is the right of the surviving spouse (and often minor children) to receive certain “tangible personal property of the decedent up to a certain value,” often including household furniture and clothing. See *id.*

¹⁶⁴ See Batts, *supra* note 5, at 1245.

¹⁶⁵ See DUKEMINIER ET AL., *supra* note 1, at 476 n.2 (“Georgia is the only separate property state without an elective share statute, though it does mandate at least one year of support for the spouse.”).

ply another obligation that must be met before the testator's testamentary plan can be carried out.¹⁶⁶

CONCLUSION

As American family demographics change, so too must the laws designed to protect minor children. The disinheritance of minors poses a problem for American children as well as for the states because children who do not receive support from their deceased parents are more likely to become wards of the state. Today, with an unprecedented number of divorces and re-constituted families, the number of non-custodial children is on the rise, and this group has an increased risk of disinheritance. In order to ameliorate the disproportionate burden on non-custodial children, states should adopt legislation that would require parents to provide for their minor children at death. Studies show that such laws would likely be popular with the American public. By adopting a provision akin to Louisiana's forced share statute, the UPC will provide the necessary inspiration for states to adopt similar legislation of their own.

¹⁶⁶ See Batts, *supra* note 5, at 1243–45.

