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2009

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### Recommended Citation

Irene D. Johnson, A Suggested Solution to the Problem of Intestate Succession in Nontraditional Family Arrangements: Taking the "Adoption" (and the Inequity) Out of the Doctrine of "Equitable Adoption", 54 St. Louis U. L.J. 271 (2009), <http://digitalcommons.pace.edu/lawfaculty/734/>.

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# A SUGGESTED SOLUTION TO THE PROBLEM OF INTESTATE SUCCESSION IN NONTRADITIONAL FAMILY ARRANGEMENTS: TAKING THE “ADOPTION” (AND THE INEQUITY) OUT OF THE DOCTRINE OF “EQUITABLE ADOPTION”

IRENE D. JOHNSON\*

## INTRODUCTION\*\*

Legal adoption and intestate succession are both creatures of statutory law. To legally add a child into a family that is not the child’s family of birth, the potential adoptive parent(s) must satisfy a complex array of statutory requirements. Only after meeting the criteria established by statute and following statutory procedures for the finalization of the adoption will the court determine that the child (now the adopted child) enjoys the status of a full-blown member of the adoptive family.<sup>1</sup> Intestate succession involves a

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\*\* Certain terminology has been adopted throughout this article for ease of discussion. In cases where a child had been raised by a family and has sought equitable adoption in order to inherit under the doctrine of equitable estoppel, this article will refer to the people who could be found to have equitably adopted the child as parents, “father,” or “mother,” as appropriate, rather than using an expression such as “putative equitably adopting parents.” “Parents” is used either in the plural form of two adults caring for a child or one adult caring for a child. The expression “not born into or legally adopted into a family” is used to describe the circumstances of any child who might claim to have been equitably adopted, even though in some cases one of the child’s birth parents will have been a family member who has participated in raising the child, because equitable adoption would have been sought as a method of inheriting from the other parent (often the child’s stepparent) and because in some cases the child will have been raised by relatives of the birthparents such as the child’s grandparents. For purposes of this article, a child is not “born into” a family, and the family is not the child’s “birth family” unless the child is being raised by both of the child’s birth parents or by one of the child’s birthparents without parental-type involvement of another person.

1. WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, *WILLS, TRUSTS AND ESTATES* § 2.10, at 100 (3d ed. 2004) (“In the middle of the 19th century, state legislatures began to enact general adoption legislation. Formal adoption today has evolved from a relative rarity to a common occurrence . . .”). See, e.g., UNIF. ADOPTION ACT (1994) (noting that over 130,000 adoptions are granted in the U.S. each year); N.Y. DOM. REL. LAW § 117 (McKinney 1999 & Supp. 2008). For an examination of legal adoption in the United States, see Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*, 37 VAND. L. REV. 711, 713–17 (1984).

state-devised statutory plan for disposition of a decedent's probate estate in situations in which the decedent has not effectively disposed of that property by will or other arrangements often referred to as testamentary substitutes.<sup>2</sup>

These two creatures of the law occasionally meet in the arena of equitable adoption, a limited remedial doctrine devised by courts using their equitable powers to permit a child who has not been formally adopted into the family where the child has been raised (not the child's birth family) to inherit by intestate succession from the child's putative equitably adopting parent(s).<sup>3</sup> The doctrine of equitable adoption, as devised by courts of equity, recognizes the child as an heir of the parent(s) in very limited circumstances.<sup>4</sup> Other than satisfaction of the requirements for an equitable adoption in those states that recognize the doctrine,<sup>5</sup> the only way to become an heir for intestate succession purposes is to be born into or adopted into a family.<sup>6</sup>

2. See ELIAS CLARK ET AL., CASES AND MATERIALS ON GRATUITOUS TRANSFERS—WILLS, INTESTATE SUCCESSION, TRUSTS, GIFTS, FUTURE INTERESTS AND ESTATE AND GIFT TAXATION 55 (5th ed. 2007) ("In this country, intestate succession is based entirely on statute."). See, e.g., UNIF. PROB. CODE §§ 2-1012–114 (amended 1990); N.Y. EST. POWERS & TRUSTS LAW §§ 4-1.1–1.6 (McKinney 1998 & Supp. 2008).

3. Scholarship addressing equitable adoption includes: Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 172–74; Margorie Engel, *Pockets of Poverty: The Second Wives Club—Examining the Financial [In]Security of Women in Remarriages*, 5 WM. & MARY J. WOMEN & L. 309, 355–58 (1999); Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 39–40 (2000) [hereinafter Gary I]; Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 WAKE FOREST L. REV. 223 (2008); Adam J. Hirsch, *Inheritance Law, Legal Contraptions, and the Problem of Doctrinal Change*, 79 OR. L. REV. 527, 547–51 (2000); Kristine S. Knaplund, *Grandparents Raising Grandchildren and the Implications for Inheritance*, 48 ARIZ. L. REV. 1, 5–9 (2006); William G. Reeves, *Inheritance by Equitable Adoption: An Overview of Theory and Proof*, 57 J. MO. B. 130 (2001); Rein, *supra* note 1; Rebecca C. Bell, Comment, *Virtual Adoption: The Difficulty of Creating an Exception to the Statutory Scheme*, 29 STETSON L. REV. 415, 416 (1999); Lisa M. Gunno, Comment, *De Facto Marriage in West Virginia: If the Court Recognizes the Relationship for Alimony, Why not for Probate?*, 109 W. VA. L. REV. 867, 873–81 (2007); J.C.J., Jr., Note, *Equitable Adoption: They Took Him into Their Home and Called Him Fred*, 58 VA. L. REV. 727 (1972); Carolee Kvorciak Lezuch, Comment, *Michigan's Doctrine of Equitable Parenthood: A Doctrine Best Forgotten*, 45 WAYNE L. REV. 1529 (1999); James R. Robinson, Comment, *Untangling the "Loose Threads": Equitable Adoption, Equitable Legitimation, and Inheritance in Extralegal Family Arrangements*, 48 EMORY L.J. 943, 954–67 (1999).

4. See *infra* Part I.

5. The majority of state courts recognize, at least in some contexts, the doctrine of equitable adoption. Tracy Bateman Farrell, Annotation, *Modern Status of Law as to Equitable Adoption or Adoption by Estoppel*, 122 A.L.R.5th 205, § 3(a) (2004) (discussing cases from a variety of state courts).

6. See Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 206–08 (2001); Gary I, *supra* note 3, at 27. For examples of such statutory provisions, see UNIF. ADOPTION ACT (1994); N.Y. DOM. REL. LAW § 117 (McKinney 1999 & Supp. 2008).

This Article seeks to make known the need to change inheritance law regarding children not born or legally adopted into a family, but raised, for some time, in a traditional or nontraditional family arrangement. As will be shown, while equitable adoption *does* remedy a few inequitable situations, the doctrine is not based on legally defensible theories, makes irrational distinctions among children who are essentially similarly situated, and is not nearly inclusive enough to do justice—especially when so many children today are being raised in nontraditional family arrangements lacking legal sanction. Moreover, the group of potential candidates for some sort of remedial action is quite large; more than half of all decedents in the United States die without effectively disposing of probate property by will.<sup>7</sup> This Article advances the idea that the law should be changed to recognize the reality of domestic arrangements, to the benefit of children who usually have no say when they are removed from their birth families and often come from disadvantaged economic circumstances. As one commentator recently recognized, the absence of effective laws in these areas disproportionately affects lower-income and minority groups.<sup>8</sup> The basic idea behind equitable relief is that equity will do justice.<sup>9</sup> Equitable adoption, as now employed, creates more injustice: children whose situations are essentially the same are treated differently because of the artificial requirements for finding an equitable adoption.

Part I of this Article examines the doctrine of equitable adoption, focusing on its deficiencies in addressing some of the issues of the modern family. Part II considers the specific issue of intestate succession, the way that the equitable adoption doctrine falls short in providing a consistent rational result of heirship in the modern family, and the reasons for expanding inheritance rights to “family members” claiming an intestate share despite the fact that they were not born into or legally adopted into the family arrangement. Part III proposes answers to these difficult problems, suggesting a statutory provision defining “child,” for inheritance purposes, to include children raised in families that are not their families of birth, but avoiding denominating this relationship as one of “adoption”—carrying with it a suggestion of a legal sanction which these relationships lack.

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7. Gary I, *supra* note 3, at 15–16 (discussing surveys on rates of intestacy). For a discussion of intestate succession statutes and rates of and reasons for intestacy, see *infra* Part II.

8. Higdon, *supra* note 3, at 226. Professor Higdon states: “[G]iven that the rate of informal adoptions is relatively high among many . . . minority communities . . . , it is the children of these minority families who are more likely to be excluded as heirs . . . simply by virtue of being reared in the ‘nontraditional’ extended family model.” *Id.* For a discussion of modern family arrangements and their relationship to the equitable adoption doctrine, see *infra* notes 149–58 and accompanying text.

9. 30A C.J.S. *Equity* § 97 (2009) (Westlaw).

## I. THE CURRENT DOCTRINE OF EQUITABLE ADOPTION

Equitable Adoption, also known as “virtual adoption,” “de facto adoption,” and “adoption by estoppel,”<sup>10</sup> is a remedial doctrine that has been recognized in a majority of United States jurisdictions.<sup>11</sup> A few state courts have refused to apply the doctrine,<sup>12</sup> while other states appear not to have considered the issue.<sup>13</sup> To explain the equitable adoption doctrine, an example might be helpful:

Sally, an unemployed seventeen-year-old who is in her senior year of high school and lives with her mother, becomes pregnant and gives birth to a daughter, Norah. Sally is unable to care for Norah, but Sally's sister, Jenny, and Jenny's husband, James, a couple who would provide a suitable home for Norah, agree to take custody of Norah and raise her as their own child. Moreover, they agree in writing to legally adopt Norah according to the laws of the state in which they live. Jenny and James do, indeed, raise Norah as their own child. In fact, they never tell Norah that they are not her birth parents. Meanwhile, Norah, Jenny, and James have no contact with Sally because Sally has become a religious zealot, has taken vows of silence and poverty, and lives a hermit's life in a rustic cabin in the North Woods. Jenny and James, for a variety of reasons, chief among them being that they led Norah to believe that they are her birth parents, never adopt Norah. They raise her, educate her, feed and clothe her, advise her on various important issues, instill in her their moral beliefs, and, in all other ways, meet her needs.

Norah, believing that Jenny and James are her birth parents, displays behavior toward them which would be expected in this situation. She calls them “Mom” and “Dad,” gives them love and affection, and performs chores around the house. As an adult, she works in the family business and contributes significantly to its success. When Jenny and James become elderly, Norah cares for them so that they do not have to go into nursing homes.

Finally, Jenny dies. Jenny's will provides that all her property go to James. Eventually, James dies. He never got around to making a will, and his probate estate is to pass by intestate succession. Norah qualifies as the administrator of his estate. She expects that she will succeed to all of James's property because the relevant intestacy statute provides, “if no spouse, all to decedent's issue per stirpes.”

When Norah obtains her birth certificate, she is shocked to learn that Jenny and James were not her birth parents. Moreover, James' brother and sister claim to be his heirs and entitled to take his property by intestate succession.

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10. Robinson, *supra* note 3, at 955.

11. See Farrel, *supra* note 5.

12. *Id.*

13. Connecticut, Idaho, Maine, Massachusetts, New Hampshire, and Rhode Island appear to have no reported cases considering this issue.

They are correct in that, if Norah is not an “issue” of James, the brother and sister would be James’s next-of-kin and entitled to inherit under the intestacy statute. Norah, who has built the family business and thereby contributed to the accumulation of wealth by James and had been told by James that he would “always take care of” her, finds herself a “stranger” to the estate and is devastated. Not only does she not inherit, but she now suffers psychological trauma by learning that her entire life has been “one big lie.”

Norah consults a lawyer who tells her that, under the law of the state having jurisdiction over James’s estate, the court-devised doctrine of equitable adoption would permit her to be James’s heir for intestacy purposes. She would have to go to court and demonstrate certain things under a strict burden of proof. But if she did so, she would be James’s heir. The lawyer cautions her that success in the litigation would not mean that she would get the status of an adopted child with all of the rights appurtenant thereto. She simply would be entitled to inherit from James.

This example includes all of the elements of a classic case for the equitable adoption doctrine: a child is raised outside of the child’s birth family by people who made a contract to adopt the child but did not do so.<sup>14</sup> Moreover, the child, believing the people raising her were her biological (or legally adoptive) parents, renders to the parents the respect, love, and affection due to parents. And finally, one of the parents dies without a will or other arrangement for the disposition of the parent’s property in a situation that she would have inherited had she been the biological or legally adopted child of the parent. Using the equitable adoption doctrine, the child will be considered equitably adopted and thereby an heir for intestate succession purposes. Not all cases of equitable adoptions include these exact elements, but the elements in this example would probably lead a court to conclude that the child was equitably adopted.<sup>15</sup>

Equitable adoption was designed to remedy the unfortunate position of the child to whom adoption was promised but never became a reality.<sup>16</sup> Occasionally the doctrine is justified simply on the basis of equity:<sup>17</sup> “equity considers as done that which ought to have been done” (i.e. the contracted-for adoption).<sup>18</sup> Most jurisdictions recognizing equitable adoption, however,

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14. See *infra* Part I. See also *supra* note 3.

15. See *supra* note 3.

16. See *supra* note 3.

17. See, e.g., *Wooley v. Shell Petroleum Corp.*, 45 P.2d 927, 933 (N.M. 1935) (“[A]ll we need is an equity to invoke the court’s power to treat as done what should have been done.”).

18. While embracing a recognized theory for the use of equitable adoption, courts bolster their arguments with this maxim. See, e.g., *Calista Corp. v. Mann*, 564 P.2d 53, 60–62 (Ala. 1977) (“[T]hese various theories all rest squarely upon the equitable maxim ‘that equity regards as done that which ought to have been done.’”); *Holloway v. Jones*, 246 S.W. 587, 591 (Mo. 1922) (“[H]e who has taken possession of a child in the capacity of an adopting parent cannot escape the duties and liabilities incident to that capacity by failing to follow the forms that the statute has prescribed to that end.”); *Tuttle v. Winchell*, 178 N.W. 755, 757 (Neb. 1920) (“Equity

employ one of two theories to support the doctrine: specific performance of the contract to adopt,<sup>19</sup> or an estoppel theory whereby the persons contracting to adopt (the parents) and their privies (the probate estate of the parent) are estopped from denying the adoption.<sup>20</sup> Both of these theories have significant problems in addition to the underinclusiveness to which this Article is primarily addressed. And, in applying either, courts generally require that a contract to adopt be found.<sup>21</sup> The “contract” requirement will be addressed before moving to the specific difficulties with each rationale.

considers that done which should have been done . . . .”); *Jones v. Guy*, 143 S.W.2d 906, 909 (Tex. 1940) (“[Equitable adoption] exercise[s] . . . the equitable power of the court to grant relief to the child, against the fraud of the adoptive parents’ neglect or design in failing to do that which he in equity was obligated to do . . . .”).

19. See, e.g., *Habecker v. Young*, 474 F.2d 1229, 1229 (5th Cir. 1973) (applying Florida law); *Benefield v. Faulkner*, 29 So. 2d 1, 3 (Ala. 1947); *In re Estate of Lamfrom*, 368 P.2d 318, 321 (Ariz. 1962); *In re Estate of Ford*, 82 P.3d 747, 750 (Cal. 2004); *Laney v. Roberts*, 409 So. 2d 201, 202 (Fla. Dist. Ct. App. 1982); *Williams v. Murray*, 236 S.E.2d 624, 625 (Ga. 1977); *Chehak v. Battles*, 110 N.W. 330, 331 (Iowa 1907); *In re Estates of Williams*, 348 P.2d 683, 684 (Utah 1960); *In re Estate of Seader*, 76 P.3d 1236 (Wyo. 2003). See also *Higdon*, *supra* note 3, at 257–66; *Reeves*, *supra* note 3, at 130–35; *Rein*, *supra* note 1, at 770–80; *Robinson*, *supra* note 3, at 955–56. For discussion of specific performance as a theory on which to justify equitable adoption, see *infra* Part I.B.1.

20. See, e.g., *Holloway*, 246 S.W. at 591; *Mize v. Sims*, 516 S.W.2d 561, 564 (Mo. Ct. App. 1974); *Wooley*, 45 P.2d at 932; *Jones*, 143 S.W.2d at 908; *Cubley v. Barbee*, 73 S.W.2d 72, 79–80 (Tex. 1934). See also *Higdon*, *supra* note 3, at 257–66; *Reeves*, *supra* note 3, at 130–35; *Rein*, *supra* note 1, at 770–80; *Robinson*, *supra* note 3, at 955–56. Indeed, Texas defines “child” for intestate succession purposes as including “an adopted child, whether adopted by any existing or former statutory procedure or by acts of estoppel . . . .” TEX. PROB. CODE ANN. § 3(b) (Vernon 1980 & Supp. 2007). For discussion of the Texas court interpretations of this statutory provision, see *infra* note 84 and accompanying text. For discussion of estoppel as a theory on which to justify equitable adoption, see *infra* Part I.B.2.

21. As noted by William G. Reeves,

Although there are some evidentiary distinctions between proving up an equitable adoption by contract [(specific performance)] and an equitable adoption by estoppel, the result under either theory is the same: The putative adopter is either compelled to perform his agreement [(contract)] to adopt or he is precluded from denying an agreement [(contract)] that is implied under principles of equity.

*Reeves*, *supra* note 3, at 131. Professor Rein also maintains, “Regardless of the theory used, unless they find substantial compliance with the adoption statutes, the courts almost unanimously require that a contract to adopt be proved before they will grant equitable relief.” *Rein*, *supra* note 1, at 771–72. The highest court of only one state, West Virginia, has expressly done away with the necessity of finding a contract to adopt, either express or implied. *Wheeling Dollar Sav. & Trust Co. v. Singer*, 250 S.E.2d 369, 374 (W. Va. 1978). The court stated:

While the existence of an express contract of adoption is very convincing evidence, an implied contract of adoption is an unnecessary fiction created by courts as a protection from fraudulent claims. We find that if a claimant can, by clear, cogent and convincing evidence, prove sufficient facts to convince the trier of fact that his status is identical to

### A. *The Contract to Adopt*

Since an unperformed promise serves as the basis for both of these theories of recovery, most courts that grant relief by finding an equitable adoption requires, as a preliminary matter, a contract to adopt (either written or oral) between the persons relinquishing custody of the child and the persons obtaining custody of the child.<sup>22</sup> In some cases, courts are willing to infer such a contract from the particular circumstances,<sup>23</sup> including the child's age when entering the family in which the child was raised,<sup>24</sup> the relationship between

that of a formally adopted child, except only for the absence of a formal order of adoption, a finding of an equitable adoption is proper without proof of an adoption contract.

*Id.* For further discussion of *Wheeling Dollar*, see *infra* notes 73–85 and accompanying text.

22. See, e.g., *Luker v. Hyde*, 69 So. 2d 421, 424 (Ala. 1953) (“We think [while] the evidence shows there was a common understanding between appellant and Mr. and Mrs. Snead . . . Such an understanding is not sufficient to justify a decree of specific performance . . .”); *Benefield v. Faulkner*, 29 So. 2d 1, 3 (Ala. 1947) (“When the boy was sent to Babston in 1902 by the Methodist Orphanage there was executed a contract between Babston and the Alabama Methodist Orphanage . . . [Where] one standing in loco parentis has surrendered the custody of the child to the adoptive parent, upon the mutual agreement that such child shall be adopted by . . . the latter . . . a court of equity will decree a specific performance of the adoption contract by such parent . . .”); *Foster v. Check*, 96 S.E.2d 545, 548 (Ga. 1957) (“This rule of law is that a contract of adoption of a minor child . . . entitle[s] said contract to be specifically enforced in equity if the adopting party fails to secure a legal adoption.”); *Franzen v. Hallmer*, 89 N.E.2d 818, 822 (Ill. 1950) (“[T]he rule in such cases [is] that the evidence must be clear, explicit and convincing that such a contract existed[;] . . . the evidence here . . . fails to establish the existence of a contract of adoption by the standard of proof required in such cases.”); *Chehak v. Battles*, 110 N.W. 330, 331 (Iowa 1907) (“The surrender of a child by its parent to another, who at the time agree to adopt the child as his own . . . is generally held as a valid consideration; and, as it is made for the benefit of the child, he may maintain an action for specific performance.”); *Bland v. Buoy*, 74 S.W.2d 612, 620 (Mo. 1934) (“[W]e think the evidence sufficient to establish the alleged oral undertaking or agreement by Halleck Bland to adopt plaintiffs.”); *Lynn v. Hockaday*, 61 S.W. 885, 889 (Mo. 1901) (“Mr. and Mrs. Lynn both agreed with the grandmother to adopt this child; that on the faith of that agreement the child was given to them, and thus the agreement was performed on the part of the grandmother . . .”).

23. See, e.g., *In re Estate of Lamfrom*, 368 P.2d 318, 321 (Ariz. 1962) (“[T]he contract to adopt need not be express but may be implied from the acts, conduct, and admissions of the adopting parties.”); *Estate of Rivolo*, 194 Cal. App. 2d 773, 777 (1961) (“We think the [circumstances] . . . here establishes the existence of a contract of adoption . . . by clear, convincing and unequivocal evidence.”); *Cavanaugh v. Davis*, 235 S.W.2d 972, 975 (Tex. 1951) (“It was not necessary . . . that there be direct evidence of the agreement. It . . . could be proved by the acts, conduct and admissions of the parties and other relevant facts and circumstances.”).

24. Courts will consider whether the child entered the home at an age at which he would not remember being brought into the family, and thus, feeling for his entire life that he was a family member. See, e.g., *Lamfrom*, 368 P.2d at 320 (finding an equitable adoption based on considerations that the child had no memories of being in the custody of anyone other than the people who raised him); *Hockaday*, 61 S.W. at 886 (considering that because the child entered the home at such a tender age, she believed that she was the biological child of the parents); *Cavanaugh*, 235 S.W.2d at 974 (finding that the child, who had been orphaned at the age of 15



the child and the people raising the child,<sup>25</sup> representations to the child about the child's relationship to the people raising the child,<sup>26</sup> representations to others about the child's relationship to the people raising the child,<sup>27</sup> and several other factors.<sup>28</sup> The contract requirement excludes from relief many children who deserve such a remedy.<sup>29</sup>

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months and spent part of the next few years with the "mother," entered the home of the parents when the child was 7 years of age).

25. Courts will consider whether the child functioned in the family as a biological or legally adopted child—as a family member who related to the family head(s) as a child would to parent(s). *See, e.g., Cavanaugh*, 235 S.W.2d at 974–76 (considering that the child used the name of the family in which she was raised, that she called the parents "mom" and "dad," and that she rendered to them the love and affection ordinarily demonstrated by a child in a family); *Lynn*, 61 S.W. at 886 (considering the love and affection ordinarily demonstrated by a child in a family).

26. Courts will consider whether the child was told or led to believe that he was the biological or legally adopted child of the family. *See, e.g., Calista Corp. v. Mann*, 564 P.2d 53, 56, 62 (Ala. 1977) (considering that the child, who had been adopted by tribal custom, but who had not been legally adopted, had been told that she was adopted); *Lamfrom*, 368 P.2d at 320 (Ariz. 1962) (considering that the parents called him "son," told him that he had been adopted by them, and told him he would inherit their property); *Rivolo*, 194 Cal. App. 2d at 775 (considering that the parents had told the child that "she would . . . be their little girl" and, later, that they had adopted her); *Lynn*, 61 S.W. at 886 (considering that the child had not been permitted any contact with her birth brothers and sisters, and that she had been led to believe that she was the birth child of the parents); *Cavanaugh*, 235 S.W.2d at 976 (considering that the child, who came into the home at the age of fifteen months, believed, until she was twenty-three-years-old, that she was the biological child of the parents).

27. Courts will consider whether the child was represented by the parents as a biological or legally adopted child of the family. *See, e.g., Calista Corp.*, 564 P.2d at 56, 62 (considering that the child, who had been adopted by tribal custom, but had not been legally adopted, had been represented to others as the adopted child of the parents); *Rivolo*, 194 Cal. App. 2d at 774 (considering that the "father" had told others that he and his wife had adopted the child); *Cavanaugh*, 235 S.W.2d at 976 (considering that the parents listed themselves as child's parents on official forms, such as school enrollment forms).

28. Courts will also consider evidence that they believe tends to negate the implication of an equitable adoption, such as allegations that the child, in adulthood, had not maintained close ties with the parents, or accusations of misbehavior. *See, e.g., Laney v. Roberts*, 409 So. 2d 201, 203 (Fla. Dist. Ct. App. 1982) ("The performance required by the child is satisfied by living in the home of the adoptive parents, not by being an ideal child forever, or even during childhood."); *Tuttle v. Winchell*, 178 N.W. 755, 757 (Neb. 1920) ("In taking into their keeping and agreeing to rear a child of tender years, [the parents] could not know what disposition and character the boy might develop . . . . Nothing so serious occurred, however, as to cause a breach in his relations with the family, and he continued a member of it until he became of age."); *Winne v. Winne*, 59 N.E. 832, 835 (N.Y. 1901) ("If . . . instead of . . . becoming an upright and respected man, [the child] had become dissolute or otherwise led an unworthy life . . . the court might well have refused this relief.").

29. As noted above, some jurisdictions require a child to establish a written or oral agreement to adopt before being entitled to relief. In other jurisdictions, such an agreement could be implied from circumstantial evidence. Without such evidence, the child's suit would fail. Many children, however, are raised in families into which they have not been born or legally

One of the difficulties with the requirement of a contract to adopt is determination of when, if ever, such a contract arises. Courts that have granted relief by finding an equitable adoption invariably focus on the time when the child first came to reside with the parents.<sup>30</sup> The assumption is that all parties to the arrangement<sup>31</sup> entered into the arrangement with the expectation that it would be permanent.<sup>32</sup> This assumption immediately precludes potential relief for all children in a temporary custody arrangement that evolved into a permanent situation. For example, an indigent birth mother arranges to have her child cared for by her parents until she gets back on her feet. She fully intends to regain physical custody of her child, and her parents fully intend to return the child to her custody. Then, the birth mother marries a man who is not interested in raising her child.<sup>33</sup> She never retrieves her child. The child

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adopted. And with respect to many of these children, adoption had not been contemplated. These children cannot be granted relief under the traditional equitable adoption doctrine. For discussion of this issue, see *infra* notes 149–59 and accompanying text, and notes 206–10.

30. Courts look for an agreement to adopt at the time that physical custody of the child was transferred to the parent(s). See, e.g., *Luker v. Hyde*, 69 So. 2d 421, 424–25 (Ala. 1953) (declining to find equitable adoption despite the fact that the child was raised as a family member and functioned as a child of the family, where the child had been brought into the home as an infant but a written agreement to adopt, which had allegedly been made by the parents, could not be produced); *Barlow v. Barlow*, 463 P.2d 305, 307, 310 (Colo. 1969) (finding an equitable adoption where the parents, before they got custody of the child, and before the child's birth, had contracted with the unwed mother to adopt the child but had never adopted the child); *Winder v. Winder*, 128 S.E.2d 56, 58–59 (Ga. 1962) (finding an equitable adoption where the parents, at time they received custody of the abandoned infant from the hospital, agreed to take child into their home and adopt him, and had expected hospital employees to arrange for an adoption, but none occurred); *Lynn*, 61 S.W. at 888 (finding an equitable adoption where the court determined the grandmother intended that the child be placed with the couple for adoption when custody of the child was surrendered to the parents by the child's grandmother).

31. For a discussion of the issue of who, exactly, are the parties to such a contract, see *infra* notes 43–49 and accompanying text.

32. Even in cases in which a contract to adopt is implied by circumstances, the courts focus on behaviors which tend to show that the child was treated, from the time the child entered the home, in all ways as if the child was the biological or legally adopted child of the family. See *supra* notes 22–29 and accompanying text. As noted by Professor Higdon, “the current tests for equitable adoption only recognize those individuals for whom the birth parents and the foster parents contemplated . . . an adoption.” Higdon, *supra* note 3, at 266–67. For further discussion of this issue, see *infra* notes 149–59 and accompanying text.

33. In *Smith v. Richardson*, for example, the child raised an action for social security benefits where his maternal grandparents raised him, and the facts revealed the following:

The child was born on the 17th day of February, 1952 . . . . The child's mother shortly thereafter (approximately one month) married one Bert Boling, now deceased, and since said husband apparently objected to her keeping said child, the child's physical custody was placed in her parents, the wage earner and his wife, when the child claimant was approximately five months of age.

347 F. Supp. 265, 265–66 (S.D. W. Va. 1972).

remains in the grandparents' home and they raise the child. If one of the grandparents dies without a will while the birth mother is still alive, under most intestate succession statutes, the mother will inherit something as a child of the grandparents, thereby precluding the grandchild from inheriting.<sup>34</sup> Moreover, the child will not be deemed an heir by an equitable adoption because there was no contract to adopt. And at the time the child entered the grandparents' home, there was no expectation that the grandparents would adopt or even keep the child long-term. In fact, there was never an agreement—the situation simply evolved. Many more children are raised outside their birth or legally adoptive families in these types of evolving situations than are raised with the initial expectation that the situation will be permanent.<sup>35</sup> Thus, the equitable adoption doctrine is underinclusive. It helps those relatively fortunate children who find themselves permanently and quasi-officially transplanted into the families in which they will be raised, while excluding those that have no assurance their situations will continue. Ultimately, both groups of children have suffered the loss of their biological families, but only one group can be helped by the equitable adoption doctrine.

Another problem with requiring a contract is identifying the parties to the contract. While the initial agreement will be between the birth parents or other persons surrendering custody of the child and the parents to whom custody of the child is transferred,<sup>36</sup> courts often look to the child's performance of duties

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34. For example, New York law provides, "If a decedent is survived by . . . [a] spouse and issue, fifty thousand dollars and one-half of the residue to the spouse, and the balance thereof to the issue by representation." N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(a)(1) (McKinney 1998 & Supp. 2008). In the case where neither grandparent survives, New York law provides "the whole to the issue, by representation." *Id.* § 4-1.1(a)(3). To take by "representation" in this case would mean that the living child (of the birth mother) would succeed in preference to the grandchild. *Id.* § 1-2.16. For a discussion of the issues created by grandparents raising grandchildren, see Knapland, *supra* note 3. Professor Knapland concludes that the most sensible remedy for these situations is for the grandparents to write a will. *Id.* at 18–21. *See also* CAL. PROB. CODE § 6402 (2009) ("[T]he part of the intestate estate not passing to the surviving spouse or surviving domestic partner . . . passes . . . [t]o the issue of the decedent."); CONN. GEN. STAT. § 45a-438 (2008) ("After distribution . . . to the surviving spouse . . . all the residue . . . shall be distributed . . . among the children . . .").

35. *See* Higdon, *supra* note 3, at 226–49, 266–67. Sources discussing the diverse natures of modern families and propose the legal recognition of these various family structures, rather than relying on the predominant current recognition of the "nuclear family," include Brashier, *supra* note 3, at 94–95; Engel, *supra* note 3, at 313; Gary I, *supra* note 3, at 28–29; Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 645–46 (2001) [hereinafter Gary II]; Foster, *supra* note 6, at 201–02; Higdon, *supra* note 3, at 223–24; Knapland, *supra* note 3, at 16–17; Rein, *supra* note 1, at 712; Robinson, *supra* note 3, at 943.

36. *See* cases cited *supra* note 22.

to the parents as part of the consideration for the contract.<sup>37</sup> So the child, often only a mere infant,<sup>38</sup> is made a party to the contract.<sup>39</sup> On the other hand, some courts appear to view the child as a third-party beneficiary of the contract.<sup>40</sup> Either way, there is an expectation in the law that the person surrendering

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37. In a frequently quoted passage, the Supreme Court of Arizona, in applying the specific performance theory of recovery in equitable adoption, listed the following requirements as established in two earlier cases:

(1) [T]he promisor must promise in writing or orally to adopt the child; (2) the consideration flowing to the promisor must be twofold: (a) the promisee parents must turn the child over to the promisor, and (b) the child must give filial affection, devotion, association and obedience to the promisor during the latter's lifetime; (3) when upon the death of the promisor the child has not been made the legally adopted child of the promisor, equity will decree that to be done which was intended to be done and specifically enforce the contract to adopt; (4) the child will be entitled to inherit that portion of the promisor's estate which he would have inherited had the adoption been formal.

*In re Estate of Lamfrom*, 368 P.2d 318, 321 (Ariz. 1962). The duties that the child might perform as part of the consideration for the contract under the specific performance theory or under the estoppel theory are acts that the child will have performed in reliance on the ostensible promise to adopt. These include giving love, affection, obedience, and respect. See *Estate of Lamfrom*, 368 P.2d at 321 (finding that the child had "give[n] filial affection, devotion, association and obedience to the promisor during the latter's lifetime"). Another duty is performing tasks in the home. See *Jones v. Guy*, 143 S.W.2d 906, 908 (Tex. 1940) ("[S]aid [child] was kind and affectionate to the [parents] . . . waiting on them when they were sick and doing any and all kinds of work required of her . . . which work was such as was ordinarily required of children by their parents."). Children may also participate in family efforts to acquire wealth. See *Herring v. McLemore*, 286 S.E.2d 425, 426 (Ga. 1982) (finding probative that "[the child] lived in the home of [the parent] and worked on his farm, milking cows, picking cotton, and doing other farm chores"). For case discussing the child caring for the parents in sickness and in their declining years, see *Williams v. Dorrell*, 714 So. 2d 574, 575 (Fla. Dist. Ct. App. 1998) (finding that the child lived with the decedent in the family home, tending to his needs until his death); *In re Estate of Painter*, 67 N.W.2d 617, 620 (Iowa 1954) ("At times when the [parents] were ill [the child] would come and assist in caring for them."). A duty may even occur when the child provides the parents the status of parents to a child, see *Lynn v. Hockaday*, 61 S.W. 885, 889 (Mo. 1901) ("[T]he place of an only daughter in the lives of [the parents] . . . and performed her part as such . . . which the law regards as sufficient consideration to support the contract.").

38. See, e.g., *Winder v. Winder*, 128 S.E.2d 56, 57 (Ga. 1962) (noting that the child entered home directly from hospital in which he had been born); *Lukas v. Hays*, 283 S.W.2d 561, 563–64 (Mo. 1955) (noting that the child entered home at about six-months of age); *In re Estates of Williams*, 348 P.2d 683, 684 (Utah 1960) (noting that the child entered home at about three weeks of age).

39. Professor Rein notes, "If the child is a primary party to the contract . . . then we must assume that the natural parents or other persons surrendering custody to the foster parent have contracted on his behalf as his agent." Rein, *supra* note 1, at 773.

40. See, e.g., *Hilt v. Hooper*, 203 S.W.2d 334, 338 (Tex. Civ. App. 1947) ("[I]t matters little, if anything at all, that the contract to adopt was between third parties . . ."). Professor Rein comments, "The problem with this classification is that the child supplies at least half of the consideration." Rein, *supra* note 1, at 772.

custody of the child will be someone who has the legal ability to agree to adoption of the child. Courts have refused to find an equitable adoption where the person surrendering custody and agreeing to adoption is someone lacking the legal ability to do so.<sup>41</sup> Again, in this instance, the child is excluded from relief for a reason totally beyond the child's control. Two children might be raised in comparable situations except for the fact that, with respect to one child, the birth parents made the arrangement for change of custody while, with respect to the other, another person with no legal status made the arrangement. The second child could not get relief from the equitable adoption doctrine. This excludes many children born and raised in lower-income situations where the birth parents might be unavailable to consent because of death or other impairment, and where no one has become a legal guardian of the child because of economics, ignorance of the need for such status, or fear of the child going into the foster care system if the situation is brought to the attention of child welfare authorities.<sup>42</sup>

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41. See, e.g., *O'Neal v. Wilkes*, 439 S.E.2d 490, 492 (Ga. 1994) (finding no equitable adoption where the child's biological mother died and the child's biological father never acknowledged paternity because the person surrendering custody was the child's paternal aunt, not the child's legal guardian with legal authority to agree that the child be adopted); *Winder*, 128 S.E.2d at 58–59 (finding that where the child had been abandoned at the hospital at which he had been born, the parents had gained custody directly from the hospital, and there was no equitable adoption because the hospital personnel had no legal authority to consent to an adoption). Professor Rein questions the legal propriety of the assumption that the birth parents, at least, have the authority to agree that their child be adopted by the people taking custody of the child. Rein, *supra* note 1, at 773–74.

42. In *O'Neal v. Wilkes*, the child lived with her biological mother until the mother's death, when the child was eight years old. 439 S.E.2d at 491. Then the child lived with her maternal aunt for four years. *Id.* The maternal aunt gave custody of the child to a woman who allegedly wanted a child. *Id.* This woman later brought the child back to the child's paternal aunt who then gave custody to the Cooks, who raised the child thereafter. *Id.* The child's biological father never acknowledged paternity. *Id.* After Mr. Cook died without a will, the child (then a middle-aged woman) sought to inherit from Mr. Cook as an equitably adopted child. *Id.* As noted above, she was denied relief on the grounds that the paternal aunt had no legal authority to consent to an adoption and, thus, no agreement to adopt could be found. *Id.* at 492. The court expressed regret: "While we sympathize with [the child's] plight, we conclude that [the paternal aunt] had no authority to enter into the adoption contract with Cook and the contract, therefore, was invalid." *Id.* Professor Higdon picks up the story:

In neither the majority nor the dissent . . . do any of the justices take note of the racial or cultural background in which this case arose. For instance, nowhere in the opinion does the court note any of the circumstances that might have made it either unlikely or extremely difficult for the Cooks to adopt [the child]. For instance, nowhere in the opinion is it revealed that [the child] is African American, that the rural Georgia town where she lived with the Cooks has a mere population of 767 (751 of which are African American), or that there were no lawyers in that town during the time period in which [the child] came to live with the Cooks. In fact, all the court ever really says as to [the child's] background is that "we sympathize with [the child's] plight." Although the reader does

A birth parent who refuses to agree to terminate parental rights and permit an adoption presents a similar problem.<sup>43</sup> If the birth parent or other legal guardian agrees to some custody arrangement but refuses to agree to adoption, equitable adoption cannot be found. Without such consent, a contract to adopt cannot be established, and the evidence of the refusal would rebut any presumption of an appropriate contract to adopt based on the circumstances of the case.

Another issue, and one that has not received attention from the courts,<sup>44</sup> is the question of the suitability of the persons taking custody of the child. On any theory of equitable adoption requiring a contract to adopt, one would expect that the prospective parents are people who could have adopted if they had taken the appropriate steps to do so. The contract, then, is between people who had the authority to grant permission to adopt and people who can satisfy their promise to adopt. But when courts consider claims for equitable adoption, they do not question whether the parents satisfy the requirements for

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not know what the court meant by "plight," by calling it "[the child's] plight," there is some implication that the situation in which [the child] had found herself was somehow exclusive to her. However, as evidenced by the prevalence of informal adoptions in the minority communities within the United States, if the law continues to fail to account for cultural differences in the area of equitable adoption, [the child's] plight could very well become the plight of many Americans.

Higdon, *supra* note 3, at 269 (footnotes omitted). For further discussion of the equitable adoption doctrine's failure to be responsive to the needs of children for whom no contract to adopt would be found because they have not been raised in traditional family arrangements, see *infra* notes 149–58 and accompanying text.

43. See, e.g., *In re Adoption of Glover*, 702 S.W.2d 12 (Ark. 1986) (refusing to permit adoption by grandparents of nine-year-old grandchild, who had lived with them for four-and-a-half years, without the consent of the child's birth mother—the birth father, the grandparents' son, had agreed to the adoption but the birth mother had refused consent); *In re Doe*, 638 N.E.2d 181, 182–83 (Ill. 1994), *cert. denied sub nom. In Baby Richard v. Kirchner*, the Supreme Court denied certiorari, which terminated a biological father's right to refuse consent to adoption. 513 U.S. 994 (1994). The relevant statute gave the father the right, for the first thirty days after the birth, to block an adoption by withholding his consent to the adoption. *Id.* But because the father was told that the child had died and did not learn of the adoption plan until fifty-seven days after the child's birth, the father could not block the contemplated adoption by refusing to give his consent. *Id.*

44. There is no available case law discussing the issue of the capability of the parents to have legally adopted the child as a factor in determining whether an equitable adoption has occurred. Courts have noted that a particular child could not have been adopted because of some impediment, see *In re Estate of Lamfrom*, 368 P.2d 318, 321 (Ariz. 1962) (holding an original adoption by parents nullified by re-adoption of child by biological father), and have considered, as circumstances tending to show partial performance of the agreement to adopt, incomplete or ineffective adoption efforts, see *Benefield v. Faulkner*, 29 So. 2d 1, 3 (Ala. 1947) (finding that adoption documents which were signed by the parents were never properly filed so a legal adoption did not take place), but courts apparently have not considered the critical question of the enforcement of a contract to adopt: the capability of the contracting party to perform.

legal adoption of the child by demonstrating, for example, absence of criminal convictions, or satisfaction of requirements of appropriate economic status, marital status, and appropriate age and health of the potential adoptive parents.<sup>45</sup> While this is troubling in and of itself, because it suggests a major defect in the contract-requirement analysis, it also suggests a problem with the designation “equitable adoption.” To use the word “adoption” suggests that the persons who have adopted, even equitably, satisfy certain statutory requirements devised for the child’s protection—that the home where the child was placed and raised would be suitable under a “best interests of the child” analysis.<sup>46</sup> The term “adoption” carries with it an imprimatur of propriety according to the state statute on adoption. The word “adoption,” however, should not be used in connection with cases in which a legal adoption has not occurred. Doing so would remove the implied statutory sanction of a living situation that has not received, in many cases, any sort of scrutiny at the outset of the arrangement for custody of the child.

It is not suggested that children raised in these circumstances should have no inheritance rights. Rather the name “equitable adoption” makes an assumption, which simply narrows, again, the opportunities for a child to benefit. Whatever the suitability of the circumstances in which the child was raised, a remedy should be available to that child if the person who raised the child dies intestate. Aside from situations in which abuse might be present, no

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45. New York statutes require, for example, that the potential adoptive parent(s) in a private placement adoption obtain certification before the child can enter the home. N.Y. DOM. REL. LAW § 115.1(b) (McKinney 1999 & Supp. 2008). The certification process requires that the potential adoptive parents provide a petition which includes information about their marital status and history, their physical and mental health, their financial circumstances, their history regarding any questions of child abuse, and their history regarding any prior petitions for certification. N.Y. DOM. REL. LAW §§ 115-d.1(a)–(d). Moreover, the statute provides:

Notwithstanding any other provision of law to the contrary, a petition for certification as a qualified adoptive parent shall be denied where a criminal history record of the applicant reveals a conviction for (i) a felony conviction at any time involving: (1) child abuse or neglect; (2) spousal abuse; (3) a crime against a child, including child pornography; or (4) a crime involving violence, including rape, sexual assault, or homicide, other than a crime involving physical assault or battery; or (ii) a felony conviction within the past five years for physical assault, battery, or a drug-related offense.

*Id.* at § 115-d.3-a (b).

46. *See, e.g.,* *Lehr v. Robertson*, 463 U.S. 248, 266 (1983) (“The [adoption] legislation at issue in this case . . . is intended to establish procedures for adoptions . . . . Those procedures are designed to promote the best interests of the child . . . .”); *Lindley v. Sullivan*, 889 F.2d 124, 133 (7th Cir. 1989) (“State adoption proceedings center upon the best interest of the *child* . . . .”); *Sylvander v. New England Home for Little Wanderers*, 584 F.2d 1103, 1106 (1st Cir. 1978) (“The [adoption] statute empowers the court to grant the petition [for adoption] . . . if it finds that the ‘best interests’ of the child will be served thereby.”). As noted by a New Mexico court, “[T]he statutory adoption procedure is designed to protect children from being adopted by unsuitable persons.” *Otero v. City of Albuquerque*, 965 P.2d 354, 360 (N.M. Ct. App. 1998).

one inquires into the suitability of a home if a child is raised by his birth parents. Moreover, for intestate succession purposes, the biological child would inherit if the biological parent died intestate,<sup>47</sup> regardless of the suitability of the home in which he was raised. The same should be true for the child raised outside his immediate family of birth. In whatever situation the child was raised, inheritance rights should not depend on circumstance that were completely out of his control, such as the initial and continuing suitability of the environment in which he was raised.

In addition to the issues of agreement to adopt, there are difficulties with those cases in which a court finds a contract to adopt based on circumstantial evidence (or bolsters the finding of an oral agreement to adopt by considering such circumstantial evidence).<sup>48</sup> Courts have favorably considered some matters: such as the child having the belief that he was the birth child of the parents raising him or that he had been formally adopted by these people.<sup>49</sup> But the decision to grant relief should not turn on such an issue. Many children are raised in circumstances knowing they are not in their birth family and have not been formally adopted. And yet, they are as dependent on the people raising them, and relate to such people no differently from those without that information.<sup>50</sup> In some cases, the child knows he cannot be adopted because of lack of consent of his birth parents<sup>51</sup> or has not been

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47. See, e.g., intestate succession statutes cited *supra* note 2.

48. See *supra* notes 22–29 and accompanying text.

49. See *supra* note 26 and accompanying text. This evidence is also considered relevant to the determination of whether the putative equitably adopting parents or their privies should be estopped from denying the adoption. See *infra* notes 106–13 and accompanying text.

50. In *Garcia v. Saenz*, for example, a case where the plaintiff sought equitable adoption on the basis of estoppel, the court denied relief and found no agreement to adopt. 242 S.W.2d 230, 232 (Tex. Civ. App. 1951). The court considered probative the fact that the child knew that he had not been adopted by the people raising him:

While [the child] lived there he worked on [the parents'] farm and was treated as a natural son. When he was ten years old [the child] learned that he was not the natural son of the [parents]. There was no evidence presented which would show that [the child] had performed his tasks by reason of any reliance upon representations made to him which induced such performance under the belief that he was an adopted child.

*Id.* at 230–31. On the other hand, in *Laney v. Roberts*, an unusual case on this issue, the court found equitable adoption despite the fact that the child, who in every other regard was treated by the parents as their child, was aware of her status. 409 So. 2d 201, 203 (Fla. Dist. Ct. App. 1982). The court stated that “there is absolutely no evidentiary value in the fact that [the child] knew she was not formally adopted . . . or was unaware of the agreement [to adopt].” *Id.*

51. See, e.g., *Helmecci v. Sec’y of Health, Educ. & Welfare*, No. 81-3006, 1982 U.S. App. LEXIS 12300, at \*4–5 (6th Cir. 1982) (finding no equitable adoption under Ohio law despite the fact that the child had been raised by the parents because, at inception of the custody arrangement, the birth parents had refused to consent to adoption); *Hayes v. Sec’y of Health, Educ. & Welfare*, 413 F.2d 997, 998 (5th Cir. 1969) (finding no equitable adoption under Texas law despite the fact that the child had been raised, since the age of two, by the parents because the



adopted for various reasons, such as economic factors.<sup>52</sup> In some cases, the child will maintain some relationship with the birth family or come to the

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biological parents, wanting the child to retain their family name, had refused to consent to an adoption). In these cases, equitable adoption was denied because there could not have been an agreement to adopt since the birth parents had refused to consent to adoption. These cases also are relevant to the issue of whether the child's awareness of his true status in a family should militate against the finding of an equitable adoption.

52. Two reasons cited for failure to adopt, especially in kinship custody arrangements, is that the family members raising the child "view formal adoption of the child as unnecessary and as depriving the biological parents of parental rights." Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACKLETTER L.J. 39, 64 (1993). Apparently, if the child is raised in their extended birth family, the people raising the child are not concerned about the assurance of permanence that legal adoption would bring because they would be willing to surrender the child to the birth parents if those parents sought to reacquire custody.

Another reason for failure to adopt is fear. People, especially the undereducated and/or those in poor financial circumstances, are often fearful of the adoption process. They might be concerned that they would not meet the criteria for a legal adoption. In *Barlow v. Barlow*, for example, a case in which the Supreme Court of Colorado found an equitable adoption, evidence was produced that the parents had not undertaken to legally adopt the child because:

[The attorney] . . . said [that] there wasn't a chance for [the parents] to get adoption papers, that [they had] better just drop that, that to keep the baby and keep still, not try to get any adoption papers, because [the authorities] would certainly take the baby away from [the parents] . . . [because of the "father's"] "bootlegging" activities.

463 P.2d 305, 307 (Colo. 1969). They might be unwilling to have officials examining their domestic and financial circumstances. They might even misapprehend the adoption process itself. In *In re Estate of Ford*, for example, a case in which equitable adoption relief was denied because the court found that the foster parents did not have an intent to adopt the child even though, in many ways, the child had functioned in the family as a family member, evidence was produced that "[the foster mother] told . . . a family friend . . . that 'they wanted to adopt Terry,' but [the foster mother] was 'under the impression that she could not put in for adoption while he was in the home' . . . [and] worried that if [the child] was removed during the adoption process he might be put in 'a foster home that wasn't safe.'" 82 P.3d 747, 749 (Cal. 2004).

Economic factors are often cited as a reason a child raised in a family had not been adopted into that family, because legal adoption, with its attendant costs, was simply too expensive. In *Smith v. Richardson*, for example, lack of money was alleged as a reason the child had not been legally adopted within the two-year period required for the relief the child sought. 347 F. Supp. 265, 266 (S.D. W. Va. 1972). In that case, the child sought certain social security child insurance benefits as the "adopted" child of his grandfather. *Id.* at 265. The child's grandparents raised him from the age of five months and legally adopted him when he was one month shy of his eighteenth birthday. *Id.* at 266. The child argued that, prior to his legal adoption, he had been equitably adopted by his grandparents, and that such equitable adoption should satisfy the statutory requirements. *Id.* The court did not find an equitable adoption. *Id.* at 268. The court noted the child's allegations that "due to a lack of money no adoptive steps were undertaken" within the statutory period. *Id.* at 266.

Finally, some potential parents have failed to perform their promise to adopt because of laziness or inertia. In *Mize v. Sims*, for example, a case in which equitable adoption was found, evidence showed that the father who raised the child told a witness "that it was his intention 'all along the years' to legally adopt [the child] but kept putting it off from one time to another and

family in which he was ultimately raised with the ability to recall prior living circumstances. It seems silly to suggest that a child who was lied to by the people raising him, or made unfounded assumptions about his status, could obtain relief under the equitable adoption doctrine while a child to whom false representations were not made should be excluded from such relief. At the time that relief is sought, the child's belief should be irrelevant. If anything matters, it should be whether he was raised in a family,<sup>53</sup> and whether a parental member of that family has died without having a will in place.

Courts also consider what the child called the parents and what the parents called the child. Great emphasis is placed on whether the child referred to the people raising him as "Mom" and "Dad," or the like, and whether the parents referred to the child as "my son," "my child," or words of similar import.<sup>54</sup> Another point of emphasis is how the child was represented to the outside world, both by the people raising the child and by the child himself.<sup>55</sup> Courts will consider whether the child used the family's name on official certificates, such as his birth certificate,<sup>56</sup> and whether the parents represented themselves

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'never did get around to getting papers.'" 516 S.W.2d 561, 563 (Mo. Ct. App. 1974). In *In re Estate of Painter* on the basis of compelling evidence that the children had in all respects been treated as, and believed themselves to be, family members, the court found an equitable adoption, noting that "[t]he record abundantly supports the trial court's finding that an agreement to adopt was made and through neglect was never legally consummated." 67 N.W.2d 617, 620 (Iowa 1954) (emphasis added).

Certainly, a child who has entered a home at an age of awareness might be cognizant of the fact that he had not been born or legally adopted into the family. In *O'Neal v. Wilkes*, the child was twelve years old when she entered the home of the person from whom she sought to inherit. 439 S.E.2d 490, 491 (Ga. 1994). Moreover, some children will be made aware of their unadopted status by the people raising them. Granting relief to these children should not turn on whether they have been misled into believing that they have been born into or adopted into the family in which they are raised.

53. "Family" has been defined as "a functional group situation in which opportunities exist for at least economic and instrumental cooperation, informal communications, and reciprocated social and emotional obligations among family members." Melvin N. Wilson & Timothy F. J. Tolson, *Familial Support in the Black Community*, 19 J. CLINICAL CHILD. PSYCHOL. 347, 347 (1990). For discussion of the many forms that the modern family can take, see *infra* notes 138–46 and accompanying text.

54. See, e.g., *Smith v. Sec'y of Health, Educ. & Welfare*, 431 F.2d 1241, 1244–45 (5th Cir. 1970) (applying Texas law and finding equitable adoption by grandparents for purposes of social security insurance benefits for the child by establishing that the children knew their grandparents only as "mammy" and "pappy"); *Long v. Willey*, 391 S.W.2d 301, 304 (Mo. 1965) ("[The child] referred to [the parents] as 'mother' and 'Daddy.' . . . [And] letters from [the 'father'] to [the child] . . . were signed 'Dad' and letters from [the 'mother'] were signed 'Love, Mom.'").

55. See cases cited *supra* notes 25–28.

56. See, e.g., *Smith*, 431 F.2d at 1245 (finding equitable adoption by grandparents under Texas law for purposes of social security child's insurance benefits where the children used their grandparents' last name as their own); *Cavanaugh v. Davis*, 235 S.W.2d 972, 976 (Tex. 1951) ("[The 'mother'] went with [the child] when she was first enrolled in school and she was enrolled

as being the child's biological or adoptive parents.<sup>57</sup> Again, these factors should have little relevance to whether the child should inherit. No one questions whether children raised in their biological families have referred to their parents as "Mom" and "Dad." They are free to call their parents by their first names or whatever else they wish and still are entitled to inherit. This analysis depends, again, on what the parties to the purported contract believed or intended rather than what happened. The question, therefore, should be whether the child was a member of the family raising the child, and from which he now hopes to inherit by intestate succession.

Other factors that courts consider include whether the child performed childly duties while in the home: Did he put out the trash, hoe the garden, operate a tractor on the family farm, work in the family business, or demonstrate love and affection to the parents?<sup>58</sup> Sometimes a court will also consider whether the child and the parents remained close after the child reached the age of majority.<sup>59</sup> None of these factors would, of course, be relevant in answering the question of whether a biological child should inherit from his biological parents. Courts consider these questions in regard to finding a contract to adopt:<sup>60</sup> the question, under the specific performance model for relief, of consideration for the enforcement of the promise to adopt, and, under the estoppel model for relief, as reasons why the parents should be estopped from denying an adoption.<sup>61</sup> Part of the reasoning is that the child performed as a child would in a family, and, thus, must have believed that the child was in a family. As noted by commentators,<sup>62</sup> a "yes" answer to these

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[in the parents' name] and she had never thereafter gone under any other name until she married . . .").

57. See cases cited *supra* note 27.

58. See *supra* note 37.

59. See, e.g., *Herring v. McLemore*, 286 S.E.2d 425, 426 (Ga. 1982) (finding equitable adoption after establishing that the child continued to care for the "father" by preparing meals, washing clothes, and staying in the hospital with him); *Williams v. Dorrell*, 714 So. 2d 574, 575 (Fla. Dist. Ct. App. 1998) ("[The child] remained living with the decedent in the family home and tended to his needs until his death . . . [when the child] was twenty-seven years old.").

60. See *supra* notes 22–29 and accompanying text.

61. See *infra* notes 106–13 and accompanying text.

62. In connection with the estoppel theory of equitable adoption and the requirement of finding reliance, Professor Rein notes:

Reliance on the agreement itself is usually impossible because a young child cannot comprehend the import of a contract. Reliance on a representation of status is almost as difficult to establish. It seems safe to assume that most children, even if they knew of their lack of status, would remain in the foster home and continue to act as dutiful children simply because they would have no other viable option. Not surprisingly, courts which adhere strictly to the reliance requirement find themselves rejecting meritorious equitable adoption claims for want of the requisite reliance. The opinions of these courts suggest that equity will intervene only on behalf of a child who is so calculating,

questions does not really reflect anything about whether he thought he was formally in a family. Whatever the child's belief, it would be natural to assume childly duties and display affection to the people raising him. And, as is often the case, a "no" answer is not probative either. In many biological families there is estrangement between parent and child at some time in their history. Such a factor does not deprive the biological child of inheritance from his biological family; he does not have to "earn" his right to inherit by behaving in a particular way. If inheritance rights were based on the worthiness of the potential heirs, intestate succession would not be an easy system to administer. One should remember that a person who is dissatisfied with his offspring, adopted child, or child raised by him, but not born to or adopted by him, need only execute a will that excludes such child from receiving property from his probate estate. The law should not make the exclusion if the decedent has not elected to do so. As will be discussed below, the identified justifications for the intestate distributions prescribed by statute are not furthered by making any distinction based on worthiness of the child to inherit.<sup>63</sup>

One state, West Virginia, has specifically dispensed with the "contract" requirement for finding an equitable adoption. In *Wheeling Dollar Savings &*

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covetous, and ungrateful that he is willing to perform filial services in the family home only on condition that he get an heirship out of it.

Rein, *supra* note 1, at 776–77 (footnotes omitted).

63. The identified purposes of intestate succession statutes are to effectuate a decedent's intent (usually by providing for inheritance by close family members, including children who had been dependent on the decedent) to promote the interests of society by providing support for those who had been dependant on the decedent, and to provide for ease of administration of estates. See *infra* Part II.A. Whether a child had been in a close family relationship with the decedent, and whether that child had been dependent on the decedent for financial and emotional support, does not depend on whether the child believed he was adopted or born into the family. Moreover, what the child called the parents and what he called himself also should not be relevant. If he was being supported financially and/or emotionally by the people raising him, permitting him to inherit from them would further the goals of effectuating the decedent's presumed intent and protecting those who had been dependant on the decedent. As to ease of administration of estates, finding inheritance rights of a child raised in such an adoptive family would make estate administration simpler. An administrator would have a few definite objective criteria to apply to determine inheritance rights; only in difficult cases would the involvement of a court be required. This is contrary to the current situation in equitable adoption. Because equitable adoption is a judicially devised equitable remedy, every case in which it is implicated must go to a court. See *infra* note 232 and accompanying text. For further discussion of this proposal and its effect in regard to the identified purposes of intestate succession statutes, see *infra* notes 295–307 and accompanying text. Intestate succession statutes do not, of course, make any distinctions based upon the potential heir's personal relationship with the decedent. As noted by Professor Gary, "The statutes do not take into consideration whether the decedent had an ongoing relationship with the heir or even knew the heir." Gary I, *supra* note 3, at 2–3.

*Trust Co. v. Singer*,<sup>64</sup> the West Virginia Supreme Court established that, to be found to be “equitably adopted,” a child “must prove by clear, cogent and convincing evidence that he has stood from an age of tender years in a position *exactly* equivalent to a formally adopted child.”<sup>65</sup> The court followed this with a set of circumstances it considered probative in providing such proof,<sup>66</sup> and went on to note, “While the existence of an express contract of adoption is very convincing evidence, an implied contract of adoption is an unnecessary fiction created by courts as a protection from fraudulent claims.”<sup>67</sup> While dispensing with the contract requirement, however, many of the factors in the West Virginia test that the child “has stood from an age of tender years in a position *exactly* equivalent to a formally adopted child” are the same ones that other courts use to determine that a contract to adopt is inferable from circumstances.<sup>68</sup> Thus, while this is a nominal change, it does not significantly

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64. 250 S.E.2d 369 (W. Va. 1978). This case addressed whether a child who had been raised by the life beneficiary of a trust, but was not the biological or adopted child of the life beneficiary, could take as a remainder person of the trust. *Id.* at 373. The trust provided that the remainder of the trust “shall be distributed . . . among my heirs the children of the said [life beneficiaries] then living, the children of each taking the parents share.” *Id.* at 371. If no child survived either of the life beneficiaries, the trust provided that “said fund is to be distributed among my heirs at law.” *Id.* The issue before the court was whether the child raised by the life beneficiary could take a remainder interest as a “child” under the doctrine of equitable adoption. *Id.* at 373. The child had not raised equitable adoption *per se* as a theory of recovery, but the Supreme Court of West Virginia interpreted the child’s pleading as raising that issue. *Id.* at 372. The West Virginia court did not determine the merits of the child’s position, but set out a test for determining, in West Virginia, whether an equitable adoption had occurred. *Id.* at 373–74.

65. *Id.* at 373 (emphasis added).

66. The court stated:

Circumstances which tend to show the existence of an equitable adoption include: the benefits of love and affection accruing to the adopting party; the performances of services by the child; the surrender of ties by the natural parent; the society, companionship and filial obedience of the child; an invalid or ineffectual adoption proceeding; reliance by the adopted person upon the existence of his adoptive status; the representation to all the world that the child is a natural or adopted child; and the rearing of the child from an age of tender years by the adopting parents. Of course, evidence can be presented which tends to negate an equitable adoption such as failure of the child to perform the duties of an adopted child; or misconduct of the child or abandonment of the adoptive parents; however, mere mischievous behavior usually associated with being a child is not sufficient to disprove an equitable adoption.

*Id.* at 373–74 (citations omitted).

67. *Id.* at 374. The court continued:

We find that if a claimant can, by clear, cogent and convincing evidence, prove sufficient facts to convince the trier of fact that his status is identical to that of a formally adopted child, except only for the absence of a formal order of adoption, a finding of an equitable adoption is proper without proof of an adoption contract.

*Id.*

68. *Id.* at 373 (emphasis added).

alter the analysis. The Court did, however, provide a rationale which has been referred to as a “*de facto*, lifetime-family-member rationale,”<sup>69</sup> rather than specific performance or estoppel, for the finding of an equitable adoption: “An equitably adopted child in practical terms is as much a family member as a formally adopted child and should not be the subject of discrimination.”<sup>70</sup> The West Virginia Supreme Court continued this nondiscriminatory approach in *First National Bank v. Phillips*,<sup>71</sup> deciding that, for purposes of inheritance, an equitably adopted child may inherit not only *from* his parents but also *through* his parents for purposes of inheriting from a sibling—the biological child of the parents.<sup>72</sup> The court also declared that *Wheeling Dollar* “expressly holds that the statutory adoption procedure is not the exclusive method of obtaining adoptive status.”<sup>73</sup> In the twenty-three years following *First National Bank*, no other jurisdiction has permitted such an inroad to finding that an equitable adoption does not convey any status<sup>74</sup> on the equitably

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69. *First Nat'l Bank v. Phillips*, 344 S.E.2d 201, 204 (W. Va. 1985).

70. *Wheeling*, 250 S.E.2d at 373.

71. 344 S.E.2d 201 (W. Va. 1985).

72. Applying the *Wheeling Dollar* test, the court concluded:

If an equitable adoption is established by clear, cogent and convincing evidence, the equitably adopted child would inherit from another child of the adoptive parent under [the West Virginia intestate succession statute] which provides that an adopted child inherits “from . . . the lineal . . . kindred of such adopting parent or parents in the same manner and to the same extent as though said adopted child were a natural child of such adopting parent or parents . . . .”

*Id.* at 205 (omissions in original).

73. *Id.* at 204.

74. Courts other than those in West Virginia have consistently held that a determination of equitable adoption does not confer the status of an adopted child; it only permits the child to have benefits such as inheritance from the parents or, in some cases, entitlements such as social security benefits that would accrue to a “child” of the wage earner, or the right to bring a wrongful death action for the death of the parent. In Alabama, for example, the state supreme court has applied an equitable adoption theory, granting the child the right to inherit from the parent, but holding that the status of equitably adopted child for inheritance purposes fails to make the child a child of the parent for purposes of the prevention of the parent’s life estate from ending upon his death without children. *Robinson v. Robinson*, 215 So. 2d 585, 590 (Ala. 1967). The court stated that “where there is a contract to adopt . . . an equity court may decree specific performance of the contract to allow inheritance . . . [but] the equity court may not construe the contract as making the child a legally adopted child . . . .” *Id.* In a case in which a child, who had been raised from the age of two by his aunt and had received a disposition under the aunt’s will, sought to use the equitable adoption doctrine as a basis for paying the smaller inheritance taxes than a child of the aunt would have paid, a Maryland court rejected the claim, stating that “use of [equitable adoption] does not affect the actual status of the child.” *McGarvey v. State*, 533 A.2d 690, 691, 693 (Md. 1987). And finally, in a declaratory judgment action seeking declaration that, under equitable adoption doctrine, a child had the status of an adopted child, the Supreme Court of Missouri permitted relief in terms of inheritance, but refused to give the child the status of an adopted child for other purposes. *Menees v. Cowgill*, 223 S.W.2d 412, 418 (Mo. 1949). *See also*

adopted child other than giving the right to inherit from the parents<sup>75</sup> or, in some cases, to receive other benefits available to a child of the parents.<sup>76</sup>

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J.C.J., Jr., *supra* note 3, at 738. For a discussion of the limitations put on a statutory definition of "child" for intestate succession purposes to include a child "adopted . . . by acts of estoppel," see *infra* note 84.

75. The *First National Bank* court was unwilling to extend its decision to inheritance *through* the parents in situations other than those involving a sibling. The court stated in a footnote, "We leave to another day the more troublesome question of whether the equitably adopted child would inherit from collateral kindred of the adoptive parent(s)." 344 S.E.2d 201, 205 n.6 (W. Va. 1985). Other courts considering the question of an equitably adopted child inheriting *through* the equitably adopting parents have rejected any such rights. In *Estate of Furia*, for example, the California Court of Appeals found that a child equitably adopted by a predeceased "father" could not collected as an heir under the estate of her "grandmother." 126 Cal. Rptr. 2d 384, 388 (Cal. Ct. App. 2002). The court stated that the child "might be able to qualify as an equitably adopted child . . . . However, . . . [t]he status of an equitably adopted child would not give [the child] the right to inherit . . . through [the 'father'] . . . because [she] cannot satisfy the requirements of [the adoption statute] . . . ." *Id.* In a case from Maryland, *Board of Education v. Browning*, the child, who had been raised from the age of three by her biological father and her stepmother, who never adopted the child, sought to inherit from the stepmother's sister on the basis of equitable adoption. 635 A.2d 373, 378 (Md. 1994). But the court rejected her claim and ruled that the property would escheat to the state of Maryland, stating that "the doctrine of equitable adoption does not affect the status of the child; it merely entitles the adopted child to inheritance rights from the adoptive parent." *Id.* In a case from Minnesota, a child claimed to have been equitably adopted and sought to inherit from the estate of the brother of the alleged adoptive father. *In re Estate of Olson*, 70 N.W.2d 107, 110 (Minn. 1955). But the court refused to grant the relief sought, stating: "When the words 'equitable adoption' are used, it is our opinion that the court, under its general equity powers, merely is treating the situation as though the relationship had been created between the one promising to adopt and the beneficiary of that promise." *Id.* In a Texas case, where a child alleged that he had been equitably adopted and that he should obtain a larger share of the estate of his "father's" brother, the court rejected the claim. *Asbeck v. Asbeck*, 362 S.W.2d 891, 893 (Tex. 1962) ("A judgment of adoption by estoppel binding the privies of [the 'father'] is not conclusive against the [estate of the 'uncle'] and as to them does not fix the adoptive status of [the child].").

Even in Texas, where the definition of "child" for intestate succession purposes includes "an adopted child, whether adopted by any existing or former statutory procedure *or by acts of estoppel* . . ." TEX. PROB. CODE ANN. § 3(b) (Vernon 1980 & Supp. 2007) (emphasis added), the statute has been interpreted narrowly, and extension of inheritance rights to equitably adopted children from collateral relatives of the parents has not been permitted. In *Pouncy v. Garner*, for example, a Texas appellate court refused to permit a child who claimed equitable adoption to inherit from the daughter of the alleged parents. 626 S.W.2d 337, 342 (Tex. App. 1981). Despite the existence of the statutory definition of "child," the court found that the daughter's estate would not be subject to including the child in intestate heirs because "[u]nder adoption by estoppel, only the adoptive parents and their privies are estopped to deny the adoption . . . . A child adopted by estoppel does not inherit from collateral kindred, as there is no privity of estate between such kindred and the adoptive parents." *Id.* The court in *First National Bank*, a case that had remarkably similar facts criticized *Pouncy* as being wrongly decided. 344 S.E.2d 201, 204 (W. Va. 1985). The court's interpretation of the Texas statute renders the statute meaningless

since the equitable adoption doctrine, as practiced in Texas, would already provide for inheritance rights from the parents. *Id.* at 205.

76. For example, with respect to receipt of a child's dependents' and survivors' benefits, the Social Security Act provides:

In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this title, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death . . . . Applicants who according to such law would have the same status relative to taking intestate personal property as a child . . . shall be deemed such.

42 U.S.C. § 416(h)(2)(A) (2006). The Code of Federal Regulations provides:

You may be eligible for benefits as an equitably adopted child if the insured had agreed to adopt you as his or her child but the adoption did not occur. The *agreement to adopt you must be one that would be recognized under State law* so that you would be able to inherit a child's share of the insured's personal property if he or she were to die without leaving a will.

20 CFR § 404.359 (2009) (emphasis added).

Thus, federal courts have permitted an equitably adopted child to receive these benefits if the child would have been an intestate heir under the state's law. Applying New Jersey law, the Fourth Circuit ordered the trial court to grant a petition for surviving child's insurance benefits from Social Security where the mother claimed the child had been equitably adopted by her deceased husband, who initiated legal adoption proceedings prior to his death. *D'Accardi v. Chater*, 96 F.3d 97, 98, 101 (4th Cir. 1996) ("[W]hen there exists a valid and binding contract to adopt, supported by consideration, New Jersey courts will enforce the contract in equity to allow a child to occupy the status of a legally adopted child for certain purposes."); The Sixth Circuit, applying Michigan law, remanded for reward of benefits in a case where the grandmother sought Social Security benefits for equitably adopted child of a disabled wage earner. *Blair ex rel. Brown v. Califano*, 650 F.2d 840, 841, 843 (6th Cir. 1981). Alternatively, if equitable adoption is not recognized under the relevant state's law, federal courts have held that such benefits are not available. The Eighth Circuit, applying Nebraska law, denied a claim where wife of deceased wage earner sought survivor benefits for her children, who the wage earner unsuccessfully attempted to adopt—holding, in part, that Nebraska no longer recognized the doctrine of equitable adoption. *Voss v. Shalala*, 32 F.3d 1269, 1270, 1272 (8th Cir. 1994). A district court in Virginia denied a petition for insurance benefits in a case where the grandmother of a child had adopted subsequent to the death of the wage earner, her husband. *Moore v. Richardson*, 345 F. Supp. 75, 75, 77 (W.D. Va. 1972). The court found that the child was not adopted by the wage earner and stated that "only if Virginia follows the doctrine of equitable adoption in the devolution of intestate personal property may plaintiff rely upon such doctrine . . ." *Id.*

An equitably adopted child has been permitted, in a few cases, to bring an action for wrongful death of the parent. In the cases permitting the action, courts have accorded the child the status of an heir for purposes of the wrongful death statute. Missouri courts, for example, have determined that where a child, whose equitable adoption was decreed for purposes of inheritance from the deceased "mother," the statute was to provide a remedy to those who would suffer by severing of a filial bond. *Holt v. Burlington N. R.R. Co.*, 685 S.W.2d 851, 852, 857, 859 (Mo. Ct. App. 1984). The court concluded "that the legislature did not intend to preclude an equitably adopted child from bringing a wrongful death action and that allowing the action furthers the purposes of the statute . . ." *Id.* In a case where a child whose equitable adoption had been decreed by a



### B. *Traditional Theories Justifying Equitable Adoption*

Both the specific performance theory<sup>77</sup> and the estoppel theory<sup>78</sup> for justification of equitable adoption are plagued by intellectual difficulties. Each

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Utah court for purposes of inheritance from the deceased parents, and sought to bring a wrongful death action for death of the parents, the Nevada court gave full faith and credit to the Utah determination of equitable adoption. *Bower v. Landa*, 371 P.2d 657, 661 (Nev. 1962). The court determined that it saw "no justification for refusing to extend the principles of equitable adoption so as to entitle the subject thereof to maintain an action for the wrongful death of his adoptive parents" and concluded that the word "heir" in the wrongful death statute included "any person entitled to inherit the estate of a decedent." *Id.*

Other courts, even in states recognizing the equitable adoption doctrine, have determined that an equitably adopted child could not bring a wrongful death action, finding that equitable adoption does not give the child the status of heir for purposes of the wrongful death statute, but only the entitlement to inherit from the parents' probate estates. The Colorado Court of Appeals, for example, has stated that "an equitably adopted child, while an heir for purposes of intestate succession, is not an heir for wrongful death Act purposes . . ." *Herrera v. Glau*, 772 P.2d 682, 683-84 (Colo. Ct. App. 1989). Georgia, too, has held against the child in wrongful death proceedings, noting that the equitable adoption decree did not establish a parent-child relationship between the child and the parents. *Limbaugh v. Woodall*, 175 S.E.2d 135, 138 (Ga. Ct. App. 1970).

In addition to the above issues, equitably adopted children have sought other rights in fewer cases and with varying degrees of success. Courts have generally held that an equitably adopted child does not obtain the more favorable inheritance rate available to adopted children. Among them, Connecticut has held that where an equitably adopted child sought inheritance tax rate applicable to adopted children, the court would not extend equitable adoption, reasoning there was no evidence that the state legislature intended to include equitably adopted children in the group obtaining more favorable tax rate. *Lyman v. Sullivan*, 157 A.2d 759, 760-61 (Conn. 1960). A Maryland court also found, where an equitably adopted child had sought the more favorable tax rate accorded to children, equitable adoption does not give the child the status that a legal adoption would. *McGarvey v. State*, 533 A.2d 690, 695 (Md. 1987). On the other hand, courts have permitted equitably adopted children to receive life insurance benefits. *See, e.g., Foster v. Cheek*, 96 S.E.2d 545, 550 (Ga. 1957). Workers' compensation benefits, however, have been denied to the allegedly equitably adopted children of the worker. *Williams v. Freedom Trucking, Inc.*, 538 So. 2d 134, 135 (Fla. Dist. Ct. App. 1989); *Tarver v. Evergreen Sod Farms, Inc.*, 533 So. 2d 765, 767 (Fla. 1988).

Some courts have decided that equitable adoption would be grounds for granting child support. In a divorce case from Nevada, where the mother sought child support on the basis of equitable adoption, the court concluded that a support decree was appropriate since the "father" had sought to adopt and had terminated the parental rights of the biological father, thereby leaving the child without the support of the biological father. *Frye v. Frye*, 738 P.2d 505, 506 (Nev. 1987). The Supreme Court of North Dakota also decided that equitable adoption would impose child support obligation. *Johnson v. Johnson*, 617 N.W.2d 97, 111-12 (N.D. 2000). But other courts have refused to impose child support based on an equitable adoption, as it does not create an all-encompassing parent-child relationship. *See, e.g., Ellison v. Thompson*, 242 S.E.2d 95, 96-97 (Ga. 1978) (finding that the doctrine of equitable adoption does not create a parent-child relationship for all purposes, but is simply a way that equity enforces an unperformed agreement to adopt).

77. *See infra* Part I.B.1.

requires application of artificial criteria before an equitable adoption can be found,<sup>79</sup> and each excludes, on these criteria, a significant number of similarly situated children.<sup>80</sup> The doctrines are even difficult to discuss separately. As noted by one commentator, "It is often difficult to tell whether the court is proceeding on a contract analysis [(specific performance analysis)] or an estoppel analysis since the decisions commonly contain elements of both theories."<sup>81</sup>

### 1. Specific Performance of Contract to Adopt

For specific performance, a court of equity will require performance of an unperformed promise if justice so requires.<sup>82</sup> But equity will not enforce an agreement to adopt during the promisor's lifetime.<sup>83</sup> As stated by one court:

[A]doption is not a contract alone between the parties. It requires judicial determination of the advisability of permitting such action, and if a court decrees otherwise, it is not within the power of one person to adopt another. The relationship of parent and child is of the most intimate, personal nature. Equity will not ordinarily enforce a contract to create such relationship.<sup>84</sup>

Under the specific performance theory, enforcement of a sort is available against the estate of the deceased person who died intestate and made the promise to adopt but had not performed that promise. The child claiming equitable adoption is granted an intestate share of the decedent's probate estate

78. See *infra* Part I.B.2.

79. See *supra* notes 22–29, 47–66, and *infra* notes 106–13, and accompanying text.

80. See *supra* note 29 and accompanying text.

81. Rein, *supra* note 1, at 771.

82. 71 AM. JUR. 2D *Specific Performance* § 1 (1964) (footnotes omitted) provides:

Specific performance of contracts is an equitable remedy of very ancient origin. It is one of the most useful of the various equitable remedies, although it is available only to protect contract rights. . . .

. . . The purpose of the remedy is to give the one who seeks it the benefit of the contract in specie by compelling the other party to the contract to do what he or she has agreed to do—perform the contract on the precise terms agreed upon by the parties—and, hence, a decree for specific performance is nothing more or less than a means of compelling a party to do precisely what he or she ought to have done without being coerced by a court. In other words, a decree of specific performance is designed to remedy a past breach of contract by fulfilling the legitimate expectations of a wronged promisee.

83. Professor Rein notes:

Specific performance is . . . unfeasible during the lifetime of the parties for two reasons. First, it is arguable that the promisor does not breach his contract until he dies without having effected a legal adoption. Second, equity has long adhered to the rule that it will not command performance of a contract involving personal services or the assumption of an intimate relationship.

Rein, *supra* note 1, at 774.

84. *Besche v. Murphy*, 59 A.2d 499, 501–02 (Md. 1948).

because of the unperformed promise of the parent.<sup>85</sup> Except for West Virginia, courts limit a child's recovery to inheritance rights from the purported adopting parent,<sup>86</sup> and, in some cases, to other entitlements that would accrue to a biological or legally adopted child.<sup>87</sup> The child does not attain the status of an adopted child for every purpose. Most courts say that following the statutory state adoption procedure is the only method for achieving the status of an adopted child.<sup>88</sup> Thus, while the child is permitted the limited inheritance right described above, he is not permitted to inherit from the parent's relatives through the equitably adopting parent,<sup>89</sup> nor is he granted the status of adopted child for other purposes.

The precise characterization of the agreement that courts specifically enforce is unclear. To obtain relief in states that embrace the specific performance of contract theory, one must demonstrate a contract.<sup>90</sup> The contract arises from the agreement to adopt. As noted above, the parties to that agreement appear to be the biological parents of the child—or the child's legal guardian—and the party who agrees to adopt. Courts find consideration for the promise to adopt in both the relinquishment of custody of the child by the birth parents or legal guardian<sup>91</sup> and the performance of childly duties—love,

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85. Among the states using the specific performance rationale to justify the finding of an equitable adoption are Alabama, Arizona, Florida, and Georgia. *See, e.g.,* Samek v. Sanders, 788 So. 2d 872, 874 (Ala. 2000) ("In order for this Court to find that an equitable adoption exists, it must look to determine whether there was a contract to adopt between the decedent and the [children] . . . and if so, [whether that contract is] sufficient in its terms and form to allow enforcement by specific performance."); *In re Estate of Lamfrom*, 368 P.2d 318, 321 (Ariz. 1962) ("Equity will specifically enforce a contract to adopt when it appears that the child will be deprived of a child's share of the promisor's estate, which share is implicit in the promise to adopt."); *Laney v. Roberts*, 409 So. 2d 201, 202 (Fla. Dist. Ct. App. 1982) ("[Equitable adoption] seeks the specific performance of an agreement to adopt after the death, intestate, of the last surviving putative foster parent."); *O'Neal v. Wilkes*, 439 S.E.2d 490, 493 (Ga. 1994) (Sears-Collins, J., dissenting) ("I would thus not rule against [the child's] claim for specific performance solely on the ground that her paternal aunt did not have the authority to consent to the adoption.").

86. *See supra* note 75 and accompanying text.

87. *See supra* note 76 and accompanying text.

88. *See supra* note 75 and accompanying text.

89. *See supra* note 75 and accompanying text.

90. *See, e.g.,* cases cited *supra* note 85. For discussion of the contract requirement, see *infra* Part I.A.

91. The Utah Supreme Court remanded a case to the trial court for development of the child's evidence on the issue of equitable adoption, ruling that a summary judgment for the estate should not have been granted:

[W]here a child's parents agree with the adoptive parents to relinquish all their rights to the child in consideration of the adoptive parents' agreement to adopt such child, and to care and provide for it the same as though it were their own child, and such agreement is fully performed by all parties connected with such contract except there is no actual adoption, the courts will decree specific performance of such contract and thereby award

affection, chores, and other services—rendered by the child to the party agreeing to adopt.<sup>92</sup> This raises the question of whether the child is a party to the adoption contract since the child is supplying some of the consideration.<sup>93</sup> Such a position does not make sense because the child, at the time of the agreement to adopt, is usually too young to be capable of contracting effectively. When the child performs the purported consideration of supplying the people raising him those services consistent with the behavior of a child in a family, the child is simply responding to the circumstances in which the child finds himself: The child is in a family of some sort and behaves as a child in a family would behave.<sup>94</sup> Consideration also poses an issue if the child is intransigent. Some courts appear to consider whether the people raising the child have received the benefit of their bargain if the child is uncooperative or becomes estranged.<sup>95</sup>

It is possible to view the birth parents or legal guardians as agents for the child in providing consent to the agreement to adopt.<sup>96</sup> Other courts view the child as a third party beneficiary of the contract to adopt.<sup>97</sup> But in those cases, it makes no sense to view the benefits received by the promisors from the child as consideration for the contract to adopt.<sup>98</sup>

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to the child the same distributive share of the adoptive parents' estate as it would have been entitled to had the child actually been adopted as agreed.

*In re Estates of Williams*, 348 P.2d 683, 684 (Utah 1960). In another case in which a summary judgment against the child was found to have been improvidently given, a federal court applying Florida law remanded for development of the facts, stating, *inter alia*:

Virtual adoption is an established doctrine usually invoked to avoid an unfair result from the application of intestacy statutes. Its underlying theories are drawn from the realm of contract law and the relevant elements include some showing of an agreement between the natural and adoptive parents, performance by the natural parents of the child in giving up custody, performance by the child by living in the home of the adoptive parents, partial performance by the foster parents in taking the child into the home and treating her as their child, and, finally, the intestacy of the foster parent. Much of each of these elements may have to be established by circumstantial evidence for often all parties but the child are deceased. For that reason, in virtual adoption cases it is essential to have as full a record as possible containing as much relevant evidence as possible.

*Habecker v. Young*, 474 F.2d 1229, 1230 (5th Cir. 1973).

92. For an enumeration of some of the child's performances that courts consider, see *supra* note 37.

93. See Rein, *supra* note 1, at 772–73. See also *supra* notes 36–40 and accompanying text.

94. See *supra* note 62 and accompanying text.

95. See *supra* note 28 and accompanying text.

96. See Rein, *supra* note 1, at 773; *supra* notes 36–44 and accompanying text.

97. See *supra* note 40 and accompanying text.

98. A child who has entered a family at an age at which the child would have no understanding of any agreement regarding his custody or expectations for his future cannot sensibly be found to be giving consideration for a contract to adopt. See notes 36–40 and accompanying text.

A difficulty with the specific performance theory often noted by commentators is the ludicrous result that the only enforcement provided is relief against the estate of the person who failed to perform a promise.<sup>99</sup> In the words of one commentator, "[T]he notion that the contract to adopt is being specifically enforced is a fiction, because at least one of the parties to the contract—the equitably adoptive parent—is dead, and hence no longer in a position to effectuate the adoption."<sup>100</sup> Or, as another commentator put it, "A corpse cannot adopt anyone."<sup>101</sup>

A major problem with the specific performance theory, one less frequently discussed than the issues noted above, is the essential unenforceability of any such agreement to adopt because of the requirement, in a legal adoption, of satisfaction of statutory requirements for adoption.<sup>102</sup> As Professor Rein notes:

[T]he question arises whether anyone has the authority to make a legal contract designating the child's adoptor. Implicit in the cases predicated relief on proof of a contract to adopt is the assumption that the biological parents or persons *in loco parentis* have this authority. This assumption requires the qualification that the child's welfare overrides any private agreement for adoption. A biological parent might be bound by his promise to relinquish custody should the court find the relinquishment to be in the child's best interests. But no court would enforce a new custodial arrangement or agreed-upon adoption which it found to be inimical to the child's welfare.<sup>103</sup>

If the people agreeing to adopt could not do so legally, finding an equitable adoption based on the idea that the contract to adopt is being specifically enforced makes no sense. The agreeing parties could not have performed had they tried. In some cases, courts consider ineffective attempts to adopt as relevant to the finding of an equitable adoption.<sup>104</sup> Apparently, the theory is

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99. See, e.g., Higdon, *supra* note 3, at 259; Rein, *supra* note 1, at 774; Robinson, *supra* note 3, at 956; J.C.J., Jr., *supra* note 3, at 741. Courts have also noted this incongruity. See, e.g., Laney v. Roberts, 409 So. 2d 201, 202 (Fla. Dist. Ct. App. 1982) ("[This] action seeks the specific performance of an agreement to adopt after the death, intestate, of the last surviving putative foster parent, when, paradoxically, the agreement can no longer be specifically performed."); Wooley v. Shell Petroleum Corp., 45 P.2d 927, 931 (N.M. 1935) ("The relief afforded in that case is generally classified as specific performance of contract . . . but the classification is not accurate . . . [because] specific performance of a contract to adopt is impossible after the death of the parties who gave the promise.").

100. Robinson, *supra* note 3, at 956.

101. Rein, *supra* note 1, at 774.

102. See *supra* notes 36–42 and accompanying text. For a discussion of the requirements of the New York adoption statute, see *supra* note 45.

103. Rein, *supra* note 1, at 773–74 (footnotes omitted).

104. See, e.g., *In re Estate of Lamfrom*, 368 P.2d 318, 320, 322 (Ariz. 1962) (finding equitable adoption where the parents had legally adopted the child with the written consent of the child's biological father, but that the adoption was terminated because the biological father later re-adopted the child); Mize v. Sims, 516 S.W.2d 561, 563 (Mo. Ct. App. 1974) (considering

that such attempts indicate an admission of the obligation to adopt.<sup>105</sup> But if the attempt failed, that might be probative of whether the contract could be enforced specifically. How can people be required to do something that it is not legally possible for them to do? Carrying this argument to its logical extreme, there would be a distinction made between circumstances in which adoption would have been possible (equitable adoption should be found under specific performance theory) and those in which adoption would not have been possible (equitable adoption should not be found under specific performance theory). While cases do not appear to recognize this distinction, they should under the above analysis. If courts follow this analysis, they would make distinctions that would leave many children—those raised in legally unsuitable homes—without a remedy. Such a distinction would be nonsensical. At the point when equitable adoption is sought, the child has already been raised in the unsuitable environment. Why treat him differently from the child raised in the suitable environment?

Again, calling any relief given as an “equitable adoption” creates a presumption that custodial parents could have satisfied adoption criteria, something which clearly has not happened in every circumstance. The answer is to replace equitable adoption with a theory that does not suggest children have been or could have been adopted in some sense, but that calls the relationship that has developed something other than adoptive, and grants some sort of relief to all those who find that they were raised in such circumstances.

## 2. Estoppel of Denial of Adopted-Status

Estoppel is the other theory upon which equitable adoption is justified.<sup>106</sup> Texas courts have applied this theory in a number of cases,<sup>107</sup> and a Texas

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testimony that the “father” that he had previously attempted to adopt the child, but failed because he could not find the child’s mother); *Luna v. Estate of Rodriguez*, 906 S.W.2d 576, 583 (Tex. App. 1995) (finding equitable adoption upon testimony that the “father” talked about the attempt to adopt the child on numerous occasions and bemoaned that the child’s mother had not “gone through with the adoption”).

105. See cases cited *supra* note 104.

106. 17A AM. JUR. 2D *Contracts* § 109 (2004) (footnotes omitted) provides: “According to the doctrine of promissory estoppel, a promise is binding if the promisee has suffered some detriment in reliance upon it, even though such detriment was not requested as consideration. This doctrine is a substitute for consideration, or an exception to its ordinary requirements.” According to one commentator, the estoppel theory of equitable adoption “revolves around the notion that, because the child has performed his or her part of the bargain, the equitably adoptive parent—or, more accurately, the equitably adoptive parent’s estate—will be estopped from denying the status of the child as heir.” Robinson, *supra* note 3, at 957 (footnotes omitted). In *Jones v. Guy*, the court provided the following explanation of the estoppel theory of equitable adoption:

[O]ne who takes a child into his home as his own, receiving the benefits accruing to him on account of that relation, assumes the duties and burdens incident thereto, and . . . where

statute defining “child” for intestate succession purposes includes “an adopted child, whether adopted by any existing or former statutory procedure or by acts of estoppel.”<sup>108</sup> This statute has been interpreted narrowly<sup>109</sup> and extends only to the child’s right to inherit from his equitably adopting parents—a right

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justice and good faith require it the court will enforce the rights incident to the statutory relation of adoption. The child having performed all the duties pertaining to that relation, the adoption parent will be estopped in equity from denying that he assumed the corresponding obligation. In equity it will be presumed that he did everything which honesty and good conscience required of him in justification of his course. Equity follows the law except in those matters which entitle the party to equitable relief, although the strict rule of law be to the contrary. It is at this point that their paths diverge. As the archer bends his bow that he may send the arrow straight to the mark, so equity bends the letter of the law to accomplish the object of its enactment.

143 S.W.2d 906, 909 (Tex. 1940).

Among the states using the estoppel rationale to justify the finding of an equitable adoption are Missouri, North Carolina, and Texas. *See, e.g.,* *Thompson v. Moseley*, 125 S.W.2d 860, 862 (Mo. 1939) (“[The] basis [for finding equitable adoption] has been recognized to be that it is so inequitable and unjust to allow one to fail to comply with an agreement made with the parent or custodian of a child to adopt it . . . after the child has performed everything contemplated by the relation provided for, the intended adoptive parent or his heirs *will be estopped* to deny an adoption.”) (emphasis added); *Lankford v. Wright*, 489 S.E.2d 604, 607 (N.C. 1997) (recognizing that equitable adoption could be found on an estoppel theory “where justice, equity, and good faith require it”); *Spiers v. Maples*, 970 S.W.2d 166, 170 (Tex. Ct. App. 1998) (“[C]ourts will recognize a child’s right to inherit by adoption under the equitable theory of estoppel when efforts to adopt are ineffective because of failure to strictly comply with statutory procedures or because, out of neglect or design, agreements to adopt are not performed.”). In *Lankford*, the court provided the following explanation for equitable adoption by estoppel:

Equitable adoption . . . does not confer the incidents of formal statutory adoption; rather, it merely confers rights of inheritance upon the . . . child in the event of intestacy of the . . . [parents]. In essence, the doctrine invokes the principle that equity regards that as done which ought to be done. The doctrine is not intended to replace statutory requirements or to create the parent-child relationship; it simply recognizes the . . . child’s right to inherit from the person or persons who contracted to adopt the child and who honored that contract in all respects except through formal statutory procedures. As an equitable matter, where the child in question has faithfully performed the duties of a natural child to the . . . [parents], that child is entitled to be placed in the position in which he would have been had he been adopted. Likewise, based on principles of estoppel, those claiming under and through the deceased are estopped to assert that the child was not legally adopted or did not occupy the status of an adopted child.

489 S.E.2d at 606.

107. *See, e.g.,* *Heien v. Crabtree*, 369 S.W.2d 28, 30 (Tex. 1963); *Cavanaugh v. Davis*, 235 S.W.2d 972, 973 (Tex. 1951) (affirming trial court’s decision that the facts of the case did not support equitable adoption); *Jones*, 143 S.W.2d at 912 (noting equitable adoption might be found upon remand to trial court).

108. TEX. PROB. CODE ANN. § 3(b) (Vernon 1980 & Supp. 2007). For a discussion of judicial interpretation of the Texas statute, see *supra* note 75.

109. *See supra* note 75.

which is available under the doctrine of equitable adoption without any reference to a statute.<sup>110</sup>

The estoppel theory focuses on the benefits acquired from the child's services rendered to the parents, holding that the parents (through their estates) are estopped from denying the existence of an adoption.<sup>111</sup> The courts seize on the child's performance of childly duties and the parents' failure to live up to their part of the bargain—that is, to legally adopt.<sup>112</sup> Courts find some sort of detrimental reliance on the part of the child: The child was led to believe themselves to be a biological or adopted child of the equitably adopting parents, and the child relied on this belief in performance of childly duties. One court has gone so far as to call it a “fraud” on the child for the parents' failure to legally adopt.<sup>113</sup>

This theory, of course, raises a number of difficulties. First, it rests on the notion of detrimental reliance on the part of the child; but it is not clear whether the child supposedly is detrimentally relying on the original contract to adopt,<sup>114</sup> or on the false representations made by the parents about the

110. See *supra* note 75.

111. See, e.g., cases cited *supra* note 106.

112. See *supra* note 106. For a discussion of these duties performed by a child, see *supra* note 37 and accompanying text.

113. In *Jones v. Guy*, the Supreme Court of Texas, in remanding an equitable adoption case for a trial on the merits, stated:

[Equitable adoption] rests upon the adoptive parent having received the benefits of the relation fully performed by the child. The language of the rule itself as declared in the [cited case] . . . clearly shows that exercise of the equitable power of the court to grant relief to the child, against the *fraud* of the adoptive parents' neglect or design in failing to do that which he in equity was obligated to do, is not dependent or conditioned upon such adoptive parents having executed but failed to file an instrument of adoption.

143 S.W.2d 906, 909 (Tex. 1940) (emphasis added). In *Gamache v. Doering*, where the Missouri Supreme Court refused to find an equitable adoption, the attorneys for the child had argued:

Where, in this State, a court has intervened to decree equitable adoption in a case where a method pursued fell short of substantial compliance with the [adoption] statute, it has never been on the ground of mutual mistake of law, but because by the overwhelming weight of the credible evidence, it appeared to the court beyond all reasonable doubt that the child had been taken at a tender age when it had no will or choice of its own in the matter, that thereafter it had been treated and regarded as a son or daughter, and that it had performed everything contemplated by the relation of parent and child and in reliance thereon, so that it would be a palpable *fraud on the child* to permit the adoptive parent or her heirs to deny such adoption.

354 Mo. 544, 547 (Mo. 1945) (emphasis added). See also *Lynn v. Hockaday*, 61 S.W. 885, 889 (Mo. 1901) (“[F]rom the time [the child] was first taken into [the family] until the death of [the decedent, the acts of the parents] would have to be construed to be a deception and a fraud.”).

114. In *In re Baby Boy C*, a case where the “father” sought legal adoption with his wife, and revoked his consent to adopt upon his legal separation from the wife, the court refused to continue the joint adoption on the grounds of equitable adoption. The dissent argued:



child's status as biological or legally adopted.<sup>115</sup> All of those children who know that they have not been adopted would be excluded from relief.<sup>116</sup> Often,

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There was inducement, promise and *detrimental reliance* of the most profound nature. Appellant is directly responsible for the irreversible changes of position which has kept these children dangling at extreme risk and disadvantage socially, psychologically, as well as financially. Indeed, nearly six years have passed since appellant extended his welcoming hand. His about-face and rejection has put these two children into an extended parental limbo. As apparent pawns in the marital rupture between this appellant husband and his wife, the children have been already irretrievably deprived of a substantial portion of the promised parental relationship. The clock ticks and years pass as their finite childhood unfolds. *Detrimental reliance* and irretrievable change of position should, at the very least, foreclose appellant's withdrawal from the pending adoption proceeding he jointly started.

*Baby Boy C*, 638 N.E.2d 963, 971–72 (N.Y. 1994) (Bellacosa, J., dissenting) (emphasis added).

115. See, e.g., *Cubley v. Barbee*, 73 S.W.2d 72, 78 (Tex. 1934) (holding that a child was entitled to intestate share of "mother's" estate because of child's reliance on representations of her status in spite of a defective attempt to adopt). Some cases seem to indicate that reliance on both an agreement to adopt and on representations made to the child of his status are relevant in an estoppel case. See, e.g., *Price v. Price*, 217 S.W.2d 905, 906 (Tex. App. 1949) (finding no equitable adoption, though reliance on both the contract and on representations made to the child would be relevant); *Howell v. Thompson*, 190 S.W.2d 597, 599 (Tex. App. 1945) ("[T]here was plainly no showing that the adoptive-parents made a contract with the child, or her natural parent . . . and thereafter leading it . . . to believe it had been legally adopted—thereby acquiring its services and affection . . ."). The confusion in this area is captured by a Texas appellate court in a case remanded for a new trial because the evidence relied upon by the trial court in finding an equitable adoption was not unequivocal:

No Texas case has attempted to justify the requirement of a contract to adopt. Traditionally, an estoppel results from the detrimental reliance by one person on the representations of another. The representations need not rise to the dignity of a contract. Undeviating adherence to the requirement of a contract to adopt would seem to preclude the finding of an equitable adoption where the adoptive parent has merely represented to the child that a valid adoption in compliance with the statutory requirements has been accomplished in the past. In order to protect the child who has relied on such representation, a court would be required, somehow, to transform the misrepresentation as to the existence of an antecedent fact into a promise to adopt in the future. Denial of relief would also follow where the representation was to the effect that the child is the natural child of the adoptive parent. It has been suggested that the contract to adopt is essential because it reflects an intention to adopt which, once established, justifies the inference that the intention was in some way communicated to the child, thus permitting the finding of the subsequent reliance said to be essential to an equitable adoption.

*Adler v. Moran*, 549 S.W.2d 760, 762–63 n.2 (Tex. App. 1977).

116. In *Garcia v. Saenz*, 242 S.W.2d 230, 231 (Tex. App. 1951), for example, the court refused to find an equitable adoption because it determined that there had been no agreement to adopt the child, but simply an agreement to "rear and educate." The court also noted:

When he was ten years old [the child] learned that he was not the natural son of the uncle and aunt. There was no evidence presented which would show that [the child] had performed his tasks by reason of any reliance upon representations made to him which induced such performance under the belief that he was an adopted child.

because of their participation in frank family discussions regarding the need for legal adoption, or of the expense of the procedure, children know that an adoption has not occurred. Other children know that they have not been adopted because of some legal impediment, such as failure of a birth parent to give consent to the adoption. There is no sensible reason that a child should be excluded from relief because of knowledge of his status. This simply invites fabrication of evidence. If reliance on a doctrine such as estoppel is not required to grant relief—such as where a statute establishes “child” status based upon some “family member” test for purposes of inheritance—more justice would be done.

The estoppel theory is also flawed in its premise that a child performs childly duties in a family based on certain beliefs about their status in the family. A child, finding himself non-institutional living arrangement in some family unit, would behave in ways expected of a child.<sup>117</sup> Unless he is of mature years when entering the family, he will make no distinctions based on his official status.<sup>118</sup>

In sum, both theories justifying equitable adoption create difficulties and exclude many children from relief based on technical distinctions independent of policy considerations. Moreover, the requirement of a “contract to adopt” raises important issues, including the problem of giving some relief for the non-performance of such a contract, even though the original parties to the agreement would have no legal right to enter into such agreement without the sanction of authorities governing legal adoption. Before addressing the issue of intestate succession as it relates to the particular issue of the equitably adopted child and suggested changes to the doctrine, the questions of failure to comply with a promise to adopt, and the nature of the modern family and the children raised in such a family, will be discussed.

### C. *The Failure to Perform a Promise to Adopt*

There are many reasons why people who agree to raise a child, and even agree to adopt, might fail to take the steps necessary for adoption. Initially, children raised in families other than their birth families or legally adoptive families can be divided into two groups: those to whom adoption was promised or implied, and those who received no such promise—express or implied. The latter group, addressed below, would not be entitled to claim equitable adoption under current law.

When a child is delivered by their birth parents or other guardians to someone who promises to raise and to adopt the child, the people taking the child may have every intention of adopting. Suggestions that some custodial

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*Id.* at 230–31.

117. See *supra* note 62 and accompanying text.

118. See *supra* note 62 and accompanying text.

parents might promise to adopt in bad faith to receive the benefits of parenthood without ever intending to adopt, or that the extension of the equitable adoption doctrine to include more children would seriously undermine current adoption procedures, are misplaced.<sup>119</sup> With few

119. A student commentator perceives a danger in equitable adoption: "If the public becomes aware that they can achieve the equivalent of legal adoption without following the time-consuming and expensive legislative mandates, then the statutes, and the safeguards the statutes were designed to promote, will falter." Beth Ann Yount, Note, *Lankford v. Wright: Recognizing Equitable Adoption in North Carolina*, 76 N.C. L. REV. 2446, 2480 (1998). Professor Rein is opposed to the extension of the equitable adoption doctrine because she believes any extension would "risk . . . erosion of formal adoption procedures and thus sacrific[e] . . . the larger good of ensuring suitable placement for all children to the exigencies of the individual case." Rein, *supra* note 1, at 806. Professor Rein, in her rejection of extension of the doctrine, asks "[w]hy should prospective adoptors endure the investigations, trial periods, red-tape, reporting requirements, and expenses involved in formal adoption when they can achieve all the consequences of formal adoption by informal means?" *Id.* at 804. But this position seems unwise, at least with respect to including more children in the category of those who can inherit from the people who are raising or have raised them. See *infra* Part II. To deny children the remedy of equitable adoption does not wreak havoc with the formal adoption process. To give these children inheritance rights, whether from the people raising them or the relatives of such people, helps the children but will not undermine the adoption process. People do not refrain from adopting because they believe that the children raised by them will not be adequately provided for by the equitable adoption doctrine. Limitations on equitable adoption will simply punish the children who had nothing to do with the decision not to adopt.

On occasion, courts and commentators suggest that the equitable adoption doctrine might discourage people from taking children into their homes since the benevolent motive might not extend to making the child a full-fledged member of the family for inheritance purposes. Professor Gary, for example, notes that "[e]xpanding intestacy rights to include functional relationships is fraught with risks . . . . [T]he existence of a parent-child relationship does not necessarily equate to dispositive intent." Gary II, *supra* note 35, at 673-74. Professor Rein has also expressed this concern. See Rein, *supra* note 1, at 800. In *Benjamin v. Cronan*, where the court found the evidence insufficient to support equitable adoption, the court warned:

We might again call attention to the wisdom of the rule as to the character and quantum of proof required to support [equitable adoption] . . . . If this rule is relaxed, then couples, childless or not, will be reluctant to take into their homes orphan children, and for the welfare of such children, as well as for other reasons, the rule should be kept and observed. No one, after he or she has passed on, should be adjudged to have adopted a child, unless the evidence is clear, cogent and convincing so as to leave no reasonable doubt.

93 S.W.2d 975, 981 (Mo. 1936).

In *Garcia*, the court noted that "[a]cts of human kindness referable to an undertaking to rear and educate a helpless child do not prove an agreement to adopt." 242 S.W.2d at 232. Courts and commentators have also argued against extension of equitable adoption to permit the child to inherit through the alleged equitably adopting parents. See, e.g., cases cited *supra* note 75; Rein, *supra* note 1, at 800. The basis for this position is that even if the parents, by their acts with respect to the child, have created a situation in which the child should inherit from the parents, the child should not be "foisted" upon the parents' other relatives as heirs. Professor Rein asks, "Should we presume that a stranger to the informal adoption meant to include someone else's

exceptions, people who are willing to undertake the expensive and challenging task of child rearing do not do so with a devious motive to obtain the benefits of parenthood without making the child an heir. It is too easy to write a will excluding the child if such is the desire of the parent. Instead, reasons for failure to adopt are usually not sinister, and, to a large extent, parallel the reasons that people die intestate rather than writing wills: expense, fear, and neglect.<sup>120</sup>

Often, the failure to adopt is economic. The family decides that the cost of undertaking a legal adoption is simply outside of the family budget.<sup>121</sup> Moreover, some cases disclose that the family members believe that nothing would be gained by a legal adoption,<sup>122</sup> that the child has a particular status in the family, and that the family intends to raise and support the child no matter what.

People also fear involving authorities in their personal lives.<sup>123</sup> They do not want to undergo the scrutiny of the adoption procedure.<sup>124</sup> Sometimes this reluctance is based on legitimate fear of being turned down because of an impediment such as a felony criminal conviction. (What will happen to the child if they seek adoption and are turned down?)<sup>125</sup> But more often it is based on an irrational fear of authority figures or on misconceptions of the adoption process (that the child will be placed in foster care pending the adoption, for example).<sup>126</sup>

In some cases, the failure to adopt is a consequence of poor advice<sup>127</sup> or of some difficulty with the adoption, such as failure of the birth parent to give

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equitably adopted child in his private gift? . . . Should a court permit an equitably adopted child to inherit through his foster parents from their lineal and collateral kindred?" *Id.* Her response is a qualified "no." *Id.*

120. *See infra* Part II.

121. Commentators cite cost as a major disincentive to legal adoption. *See, e.g.,* Gary II, *supra* note 35, at 663 ("In some cases the expense of adoption may preclude taking the legal steps necessary to formalize the relationship."); Laura M. Padilla, *Flesh of My Flesh But Not My Heir: Unintended Disinheritance*, 36 BRANDEIS J. FAM. L. 219, 230 (1997-98) ("[M]any couples will be precluded from pursuing adoptions strictly for financial reasons . . ."). Courts in equitable adoption cases occasionally cite economic factors as a reason for failure to adopt. *See, e.g.,* Smith v. Richardson, 347 F. Supp. 265, 266 (S.D. W. Va. 1972) (noting that an adoption was not undertaken at an earlier time due to a lack of money).

122. *See supra* note 52.

123. *See supra* note 52.

124. *See supra* note 52.

125. *See supra* note 52.

126. *See supra* note 52.

127. *See, e.g.,* Peterson *ex rel.* Peterson v. Sec'y. of Health & Human Svcs., No. 83-4809, 1985 U.S. Dist. LEXIS 16337, at \*6 (E.D. Mich. Aug. 30, 1985) ("In support of this assertion [of equitable adoption, the child] . . . asserts that, but for some bad legal advice (i.e., that legal guardianship would be 'just as good as adoption'), he would have been adopted by his grandparents years ago.").

consent to the adoption.<sup>128</sup> In some cases, the custodial parents sought adoption and the effort was never completed or had failed.<sup>129</sup> In other cases, no adoption is attempted because of concern about legal requirements.<sup>130</sup> One can imagine that some people raising children do not adopt because the child was led to believe that he is the biological child of the custodial parents.<sup>131</sup> Thus, the parents do not want to suffer the child's distress upon finding out the truth because of an adoption effort. Other custodial parents allow a child to believe that they already adopted him.<sup>132</sup> Again, a subsequent effort to adopt would cause familial unrest.

Another major reason for failure to adopt,<sup>133</sup> and a reason that people often die intestate,<sup>134</sup> is procrastination and laziness. In equitable adoption cases, testimony occasionally stresses that the decedent always intended to adopt the child but never got around to it—good intentions, but no performance.<sup>135</sup>

#### *D. Modern Family Arrangements: The Traditional Nuclear Family and the Nontraditional Family Arrangement*

In a recent article, Professor Michael J. Higdon makes a strong argument in favor of extending intestate succession rights to those who have been “informally adopted.”<sup>136</sup> He notes that the traditional nuclear family—mother and father (married people of opposite sexes) and a child or children of that marriage—is not the only family model available.<sup>137</sup> Family arrangements

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128. See *supra* notes 42–43 and accompanying text.

129. See, e.g., *In re Estate of Lamfrom*, 368 P.2d 318, 321 (Ariz. 1962) (finding parents had legally adopted child, but the adoption was nullified by the readoption of the child by his biological father—by regaining custody of the child, parents did not readopt); *Pierce v. Pierce*, 645 P.2d 1353, 1355 (Mont. 1982) (noting that stepfather who sought to be child's parent decided to avoid the expense of formal adoption by having his name placed on the child's birth certificate as the child's father, though the attempt to create legal bond failed because the executed affidavits were never properly filed).

130. See *supra* note 52 and accompanying text.

131. See *supra* note 26 and accompanying text.

132. See *supra* note 26 and accompanying text.

133. See *supra* note 52.

134. See *infra* note 158 and accompanying text.

135. See *supra* note 52.

136. Higdon, *supra* note 3, at 266–75.

137. *Id.* at 226–30 (examining the “extended family” model, especially in minority communities). The following sources also discuss the modern family and the many forms that it might take: Brashier, *supra* note 3, at 94–103; Engel, *supra* note 3, at 310–14 (focusing on second marriages and stepfamilies); Foster, *supra* note 6 at 200–05, 228–35; Gary I, *supra* note 3, at 1–6; Knaplund, *supra* note 3, at 1–5 (focusing on family arrangements in which grandparents are raising grandchildren); Barbara Bennett Woodhouse, “*It All Depends on What You Mean by Home*”: *Toward a Communitarian Theory of the “Nontraditional” Family*, 1996 UTAH L. REV. 569 (1996); Carissa R. Trast, Note, *You Can't Choose Your Parents: Why Children Raised by Same-Sex Couples Are Entitled to Inheritance Rights from both Their Parents*, 35 HOFSTRA L.

often involve the extended family, including people of more than one generation related by blood or marriage.<sup>138</sup> Modern families, of course, also include same-sex couples raising children,<sup>139</sup> and various step-family arrangements in which one or both adults in the family bring children from earlier relationships to the marriage.<sup>140</sup> Professor Higdon emphasizes the position that such alternative arrangements exist, especially in poor and minority communities, and that these functional family arrangements are not given any recognition under the doctrine of equitable adoption.<sup>141</sup>

Often, especially in lower-income and minority communities, children are raised in family units that do not include their biological parents.<sup>142</sup> A child might be sent to live with a relative or friend because the birth parents cannot care for the child effectively. The birth parents might be young, impoverished, incarcerated, or incapacitated by drug addiction or some other infirmity. They

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REV. 857 (2006) (focusing on same-sex couple families). For a definition of “family” provided by two clinical psychologists, see *supra* note 53.

138. See Higdon, *supra* note 3, at 227.

139. See Brashier, *supra* note 3, at 159–62.

140. See Engel, *supra* note 3, at 310–14.

141. Higdon, *supra* note 3, at 265–69.

142. Professor Higdon notes:

[A]n African American child is four and a half times as likely as a white child to live with neither parent. For instance, according to the U.S. Census, in 2001, 9.56% of African American children lived apart from both parents. For white children, the percentage was only 3%. This statistic is important because, in considering the rate of informal adoption, an African American child who does not live with either parent has a much greater chance of being informally adopted. In fact . . . 80% of African American children not living with either parent are informally adopted.

Higdon, *supra* note 3, at 237 (footnotes omitted). These statistics demonstrate that the problem of inheritance rights of children raised in families into which they have not been born or legally adopted is a significant one. Coupled with the fact that more than 50% of Americans die without a will, a percentage which is even higher among lower income individuals, see *infra* notes 191–193 and accompanying text, about 4% of African American children and a smaller, but still significant, percent of non-minority children, would be candidates for equitable adoption relief if the doctrine were extended, as proposed, to include children “raised in a family.” See *infra* Part III.B. These statistics do not include children who are being raised in situations in which one birth parent is present, such as stepfamilies. These cases could also result in candidacy for equitable adoption if the child seeks to inherit from the stepparent. Professor Higdon has found that, in 1990, 1.6 million African American children “live[d] with and [had] been informally adopted by relatives . . .” Higdon, *supra* note 3, at 237 (footnotes omitted).

In the Hispanic community, as well, Professor Higdon found that children were being raised outside their immediate birth families in informal adoption arrangements. *Id.* at 240–50. He noted that among members of this community, the rate of legal adoption is very low, partly because of “structural obstacles” to such adoptions—lack of information, lack of bilingual social workers, reluctance to use social services—and “cultural obstacles”—such as male concern that adoption would be viewed as undermining their masculinity and cultural beliefs “that the family should take care of its own.” *Id.* at 247–48 (footnote omitted).

might be deceased or out of the country. On the other hand, the birth parents may simply believe that the child will have better opportunities if raised in another family for some period of time, or that the child needs to go into an environment in which he can receive more individual attention or supervision.

These arrangements do not fit the mold of an equitable adoption. In most cases, there is no expectation that the child will be legally adopted into the family where the child is raised—hence, no contract to adopt. The outplacement might be considered temporary, lasting only until the impediment to parenting by the biological parent(s) is eliminated. Even if the arrangement is contemplated to be long-term, frequently no adoption is anticipated. Often, the people raising the child are concerned with official involvement in their family arrangement. They are afraid that the child will go into the foster care system, or that the rights of the biological parents will be terminated upon seeking official sanctioning of the arrangement—even by seeking to become the child's legal guardian.<sup>143</sup> Culturally, they may eschew adoption as an arrangement belying the capability of the extended family to "take care of its own."<sup>144</sup>

However these arrangements come about, and for whatever reasons the arrangements are not formalized into a traditional parent-child mold through adoption, they often involve children raised outside of the nuclear unit of birth, where the equitable adoption doctrine is inapplicable. As noted above, there is usually no agreement to adopt a child living with another family, and the children usually know that they are not adopted. In representations to the outside world, the people raising the children do not necessarily term themselves biological parents or adoptive parents. If the person raising the child dies intestate, the child is left with no remedy. The child is not the biological or legally adopted child of the decedent and the equitable adoption doctrine would not apply to the child. This situation is obviously unjust, and its disproportionate impact on the poor and minorities increases the need for a change in the law.

## II. INTESTATE SUCCESSION AND EQUITABLE ADOPTION

As noted at the outset of this Article, the right to inherit by intestate succession, and indeed, the right to take property from a deceased person under a will or by intestacy, is a creature of the law.<sup>145</sup> There is no common law right

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143. See *supra* note 52.

144. Higdon, *supra* note 3, at 248 (footnote omitted). For further discussion of cultural reluctance to adopt, see *infra* note 156.

145. See *supra* notes 1–2 and accompanying text.

to testate or intestate succession.<sup>146</sup> If a person wishes to dispose of his property at his death, he must embody those wishes in a writing that complies with certain state-prescribed statutory requirements,<sup>147</sup> or he must dispose of the property through arrangements that take place during his lifetime (*inter vivos* gifts, for example)<sup>148</sup> or become effective at his death (arrangements often called testamentary substitutes, such as joint bank accounts with a right of survivorship in the co-depositors).<sup>149</sup> If a decedent dies without effectively disposing of his property by will or testamentary substitute, the state that has jurisdiction over his estate provides a plan for disposition of that property—an intestate succession law.<sup>150</sup>

#### A. *Purposes to be Accomplished by Intestate Succession Statutes*

In deciding who should inherit a decedent's property in cases where the decedent has not effectively expressed his desires by will or testamentary substitute, a state legislature almost invariably provides that the decedent's closest relatives receive the probate estate—a spouse and issue, or only issue if there is no spouse.<sup>151</sup> In situations in which neither spouse nor issue survives, the decedent's property goes to collateral relatives, with preference shown for those in the nearest degree of kinship to the decedent.<sup>152</sup> If no survivors are found in a close-enough degree of kinship to the decedent (according to the state's notion of avoidance of “laughing heirs”),<sup>153</sup> the probate property passes

146. CLARK ET AL., *supra* note 2, at 18 (“In this country, since colonial times, the ability to transmit property at death has generally been viewed as a creature of positive law rather than an inalienable natural right.”).

147. See, e.g., UNIF. PROB. CODE § 2-502 (1990) (amended 2006); N.Y. EST. POWERS & TRUSTS LAW §§ 3-2.1, 3-2.2 (McKinney 1998 & Supp. 2008).

148. JOEL C. DOBRIS ET AL., CASES AND MATERIALS ON ESTATES AND TRUSTS 47 (3d ed. 2007) (*inter vivos* gift “will not be part of [decedent's] probate estate”).

149. *Id.* at 52–62.

150. See *supra* notes 1–2 and accompanying text.

151. Professor Gary states:

Intestacy statutes have, since the first adoption of such statutes in this country, given a decedent's property to those family members closest to the decedent. Early statutes focused on bloodline, whereas revisions in the 1980s in many states increased the share going to a surviving spouse. Current statutes create a hierarchy of intestate takers based on proximity to the decedent. For takers other than the surviving spouse, the statutes determine proximity based on ties of blood or adoption. The statutes do not take into consideration whether the decedent had an ongoing relationship with the heir or even knew the heir.

Gary I, *supra* note 3, at 2–3 (footnotes omitted). For representative intestate succession statutes, see *supra* note 2.

152. See Gary I, *supra* note 3, at 2–3.

153. A recent commentator provides this explanation for the “laughing heir” doctrine:

[S]ome states' laws . . . do not allow distant relatives to be receivers. It is preferable in the eyes of the law that the state receives the property [through escheat] rather than people



to the state under the doctrine of escheat.<sup>154</sup> The notion is that very remote relations were not involved in the decedent's life in any meaningful way, so they would not be troubled by the decedent's death. Moreover, if a decedent wished to benefit such a person, the decedent could have written a will.

Several justifications are suggested for determinations that state legislatures make in devising intestate succession statutes. Three are discussed here. The first is that the statutory provisions effectuate the decedent's intent. That is, one of the functions of an intestacy statute is to distribute a decedent's property as the decedent would have wanted had the decedent written a will.<sup>155</sup>

who were more distant relatives of the giver. These relatives are called "laughing heirs" because they laugh all the way to the bank and do not grieve for the giver. The exclusion of laughing heirs in favor of the state also stresses the importance of inheritance as bringing together givers and receivers. It seems that the law prefers an indifferent, cold and non-relational body[, the state,] to a cheerful receiver.

Shelly Krecizer-Levy, Article, *The Mandatory Nature of Inheritance*, 53 AM. J. JURIS. 105, 112. (2008) (part of a Ph.D. dissertation).

154. DOBRIS ET AL., *supra* note 148, at 95 ("When decedent dies intestate and without heirs, the estate typically escheats to the state, or to a governmental entity designated by statute."). The doctrine of escheat is not favored: "Courts often strain to avoid escheat." *Id.* at 95. Occasionally, the choice in an equitable adoption case is between the child who claims to have been equitably adopted and escheat. See, e.g., *Calista Corp. v. Mann*, 564 P.2d 53, 58 n.7 (Ala. 1977) (quoting 43 U.S.C. § 1606(h)(2) (2006)); *Bd. of Educ. v. Browning*, 635 A.2d 373, 380 (Md. 1994) (refusing to apply equitable adoption to permit inheritance through the parent from the parent's sister, with property escheating to the board of education as a result); *In re Adoption of Baby T*, 705 A.2d 1279 (N.J. Super. 1997) (finding that a child, who died pending finalization of the adoption while in custody of parents, had been adopted and that the parents had standing to sue the child's physician for malpractice); *Boulger v. Unknown Heirs*, No. 951, 1983 Ohio App. LEXIS 13562, at \*9 (Ohio App. July 1, 1983) (finding no agreement to adopt supporting the claim of equitable adoption and ruling, therefore, that the property escheated to the state of Ohio); *Heien v. Crabtree*, 369 S.W.2d 28, 32 (Tex. 1963) (Greenhill, J., dissenting) (refusing to use equitable adoption to permit the child's parents to inherit from the child—as a consequence, the child's estate escheated to the state of Texas); *Whitchurch v. Perry*, 408 A.2d 627, 630, 632 (Vt. 1979) (refusing equitable adoption to permit the child's parents to bring a wrongful death action for death of the child—as a consequence, the proceeds of any such action would escheat to the town in which the child resided). One might suppose that where the options are permitting inheritance as opposed to escheat, decedent, had he been consulted, would have preferred inheritance. The same argument might apply to cases in which the options are to permit the child that the decedent has raised to inherit or to let the property pass to the decedent's more remote relatives.

155. See, e.g., Gary I, *supra* note 3, at 7 ("The most commonly identified goal of intestacy statutes is to create a dispositive scheme that will carry out the probable intent of most testators."); E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255, 269 (2002) [hereinafter Spitko I] ("There is widespread acceptance among succession law scholars that it is and should be an important goal of any intestacy scheme to further the donative intent of the intestate property owner."). According to the authors of a research survey printed in the *American Bar Foundation Research Journal*, the "goal [of the drafters of the Uniform Probate Code] was to design a statute

Of course, this is simply a legislative guess as to what an “average” intestate would want. Studies have established that most people are not aware of the provisions of their state intestacy statutes,<sup>156</sup> that most would prefer different dispositions (to some extent) from the ones provided in their state intestacy statutes,<sup>157</sup> and that most people do not die intestate because they are aware of the provisions and satisfied with their state intestacy statutes. Rather, they die intestate because of inadvertence, procrastination, laziness, fear, or inadequate funds to pay for a will.<sup>158</sup> Many believe that they have an insufficient estate to

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that reflects the dispositive wishes of persons who die without wills.” Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. BAR FOUND. RES. J. 321, 323 (1978). The researchers continued:

Testamentary freedom should include the right not to have to execute a will in order to have accumulated wealth pass to natural objects of the decedent’s bounty. Moreover, unless the statutory scheme invoked in the absence of a will conforms to the likely wishes of a person who dies without having executed a valid will, it creates a trap for the ignorant or misinformed.

*Id.* at 323–24.

156. The American Bar Foundation researchers concluded that “most citizens do not know who will inherit their property and are not relying on existing intestacy statutes [to accomplish testamentary goals].” *Id.* at 340.

157. *Id.* at 340–87. The researchers noted, for example, that “[c]ontrary to the majority of intestacy statutes, respondents preferred that both parents and siblings share in the estate.” *Id.* at 347. In respect of situations in which the decedent is survived by a spouse and children of that marriage, “a majority of the respondents favor[ed] . . . giving the entire estate to the surviving spouse rather than permitting the children to share,” again in contravention of most intestate succession statutes. *Id.* at 359. The report concluded with six suggestions that would bring these statutes into line with the intentions of the majority of the respondents. *Id.* at 386–87.

158. According to the research study, “63.6 percent [of those interviewed who did not have a will] cited laziness as the primary reason.” *Id.* at 339. Another fifteen percent “had never thought about it before the interview.” *Id.* In terms of the demographics of those who did not have a will as opposed to the individuals who did, the researchers confirmed the results of earlier studies that younger, less wealthy, less well-educated individuals did not have wills. *Id.* at 327–32. “Fear” as a factor in not writing a will is different from the type of fear underlying some failures to adopt. As noted above, people are afraid to undertake legal adoption because they are fearful that they will be found unsuitable, they are fearful of the scrutiny that will be imposed on them, or they are fearful that the result of an adoption will be to cut off the rights of the birth parents. In failing to write a will, the kind of “fear” identified is twofold: (1) a desire, sometimes irrational, to avoid probate and (2) a superstitious fear that writing a will is “bad luck” and will lead to imminent death. See *supra* notes 45 & 52. Avoiding probate can be an affirmative dispositional plan, with people electing will substitutes, especially *inter vivos* (living) trusts, over wills. A commentator recently noted, “There are many legitimate reasons for wanting to avoid probate . . . such as eliminating potentially costly and lengthy court proceedings at death, privacy, and immediate access to assets by beneficiaries at death.” Terry L. Turnipseed, *Why Shouldn’t I Be Allowed to Leave My Property to Whomever I Choose at My Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 784 (2006). Other people, however, fear probate simply because they have become convinced, for some reason, that probate is bad. For a discussion of the *inter vivos* trust as a probate avoidance technique, often used by

warrant a will, and that their family members will simply divvy up their property.<sup>159</sup>

One suggested reason to limit the scope of the equitable adoption doctrine is that a person who has not adopted a child under his care does not intend that the child inherit.<sup>160</sup> One commentator opined that if the equitable adoption doctrine were more generous in its scope, people might be more reluctant to bring children into their homes:

A benevolent person may, of course, take in a homeless child without intending to adopt him. Courts fear that if they relaxed the standard of proof [for finding an equitable adoption] a person could not help out a needy child without having a de facto adoption foisted upon him after death.<sup>161</sup>

The simple response is that the decedent is actually basing his decision to take the child into his home on the possibility of future inheritance rights, and is free to write a will at any time providing that the child not inherit if this is their wish. It is just as likely to suppose that the failure to adopt had nothing to do

those who have no reason to avoid probate, see Angela M. Vallario, *Living Trusts in the Unauthorized Practice of Law: A Good Thing Gone Bad*, 59 MD. L. REV. 595 (2000). One might surmise that with some individuals, the desire to avoid probate, especially to avoid some sort of official inquiry into their assets, takes the form of a failure to write a will, which failure is not coupled with some sort of testamentary substitute, thus leading to an intestate estate. Not understanding that their estates would still be subject to probate, some might assume that if they do not write wills, “their ‘famil[ies]’ would get their assets automatically.” Gary I, *supra* note 3, at 19. Then there are the people who have psychological reasons for not writing a will. Professor Adam Hirsch provides the following fascinating comment on the subject:

For centuries now, would-be testators have harbored the fear that if they executed their wills, the documents would become relevant in short order. . . .

. . . Studies demonstrate that humans alleviate [the] terror [of death] in a variety of ways, such as by overestimating their longevity, underestimating their vulnerability to life-threatening illness, and by maneuvering to avoid situations that would bring thoughts about mortality consciously to mind. Estate planners’ anecdotal observations about self-deceptive foot-dragging and their uphill struggle to get clients actually to present themselves in a law office—where, of course, they would directly confront their mortality—fits neatly with the psychologists’ findings in other settings. . . .

In short, psychological barriers accompany transaction costs, conspiring to impede the testamentary process. What is more, theory predicts that those psychological barriers should not be evenly distributed across society. Wealthier benefactors . . . remain more open to the process of testation, just as they are better able to bear its costs. . . . On top of that, studies suggest that more successful persons are less susceptible to these psychological forces and hence should be less prone to resist testation in the first place. . . . [R]icher, better educated persons prove less superstitious, in general, than poorer, unschooled persons; learning and credulity are inversely correlated.

Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1048–1050 (2004) [hereinafter Hirsch II].

159. Fellows et al., *supra* note 155, at 339–40.

160. See *supra* note 119.

161. Rein, *supra* note 1, at 782. See *supra* note 119 and accompanying text.

with inheritance and that the decedent would have wanted the child that he raised and supported to be his heir.

In sum, while effectuating the decedent's intent is often a major justification for the particulars of an intestate succession scheme, these schemes frequently do not comport with a decedent's intent (if one could be discerned). And a decedent's intent vis-à-vis an unadopted child that has been raised by the decedent would more likely be to benefit the child than not, especially in the situations where, if the child does not inherit, the property will go to remote collateral relatives<sup>162</sup> or even escheat to the state.<sup>163</sup>

Another goal of intestate succession schemes—one viewed as an alternative approach in drafting intestate succession statutes—is to serve “society's interests.”<sup>164</sup> Because it is not possible to identify the intent of a decedent who has not written a will, the goal of accomplishing social purposes seems more defensible. These social benefits do not depend on identifying a decedent's intent, but rather on external circumstances. Chief among these benefits is supporting those who were financially dependent on the decedent;<sup>165</sup> people who relied on the decedent for maintenance and support should be supported by the decedent's estate. This makes sense in light of the

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162. In *Estate of Ford*, an equitable adoption finding would have permitted inheritance by the child whom the parent had raised from an infant and had been an integral member of the parent's family. 82 P.3d 747, 749–50 (Cal. 2004). The court refused to find an equitable adoption because the court determined that the parents had no intent to adopt. *Id.* at 755. Consequently, the property passed to the father's nephew and niece, neither of whom had any contact with the father for fifteen years and neither of whom had attended the father's funeral. *Id.* at 749.

163. See *supra* note 154 and accompanying text.

164. The authors of the American Bar Foundation study identify an “alternative defensible rationale for adoption of a particular distributive pattern in an intestacy statute [to be] that it serves society's interests.” Fellows et al., *supra* note 155, at 324. The authors go on to identify four community aims: “(1) to protect the financially dependent family; (2) to avoid complicating property titles and excessive subdivision of property; (3) to promote and encourage the nuclear family; and (4) to encourage the accumulation of property by individuals.” *Id.*

165. See, e.g., Gary I, *supra* note 3, at 11 (“Intestacy statutes . . . provide support for dependent family members.”); Trast, *supra* note 137, at 861 (“A primary objective [of intestate succession statutes] is to protect dependent family members.”). As to a possible conflict between this goal and the desire to effectuate the decedent's intent, Professors Dobris, Sterk, and Leslie suggest:

Perhaps fortunately, the potential conflict between decedent's intent and social policy is more imagined than real. The vast majority of people—both those who write wills and those who do not—prefer to have their property pass to close family members, the very people most likely to be dependent on that property, and the very people most likely to have contributed to accumulation of that property.

DOBRI ET AL., *supra* note 148, at 64. For discussion of the “accumulation of wealth” rationale for intestate succession plans that benefit the decedent's closest relatives, see *infra* note 181 and accompanying text.

concern that those dependants might become a burden on the state.<sup>166</sup> Providing that a spouse and/or issue inherit from the decedent identifies as heirs those people who were most likely to have been dependent on the decedent. Moreover, the argument continues, the spouse and issue are the people most likely to have been involved in the accumulation of the wealth of the decedent, either by direct involvement in the money making efforts of the family unit or in the provision of an environment that made the acquisition of wealth by the decedent a possibility.<sup>167</sup> Without direction of a decedent's will, the default position is to assume that the spouse and issue were dependent on the decedent. Identifying them as heirs also has the salutary emotional benefit of providing the recognition of status for the grieving family members.<sup>168</sup> Even if the decedent's issue are self-supporting adults, the inheritance would still be justifiable on the bases of participation in the wealth accumulation of the family and the psychological benefits of recognition of status.

A child who was raised by the decedent in the decedent's home and was dependent on the decedent for emotional and financial support would have a good claim to share in the estate under the dependent justification. The legal status of the child, nonbiological and un-adopted, should not matter. Presumably, the child was not dependant on anyone else—so the child's claim

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166. One student commentator noted:

Protection of financially dependent family members benefits not only an intestate's dependents who inherit under well-crafted intestacy statutes, but also other family members and the public at large, upon whom the burden of supporting the dependents would otherwise fall if the statutes did not adequately permit dependents to inherit.

Cristy G. Lomenzo, Note, *A Goal-Based Approach to Drafting Intestacy Provisions for Heirs Other than Surviving Spouses*, 46 HASTINGS L.J. 941, 947 (1995).

167. In arguing in favor of inheritance by close family members over more remote family members, Professor Spitko notes that "distant heirs are less likely to have contributed to the decedent's accumulation of wealth and are less likely to have provided for the decedent's well-being as contrasted with more closely-related heirs." E. Gary Spitko, *Open Adoption, Inheritance, and the "Uncleing" Principle*, 48 SANTA CLARA L. REV. 765, 803 (2008) [hereinafter Spitko II]. In a separate writing, discussing a possible statutory scheme which would provide inheritance rights for unmarried domestic partners, Professor Spitko notes that "the intestacy scheme should seek to reward or compensate those committed partners who assisted the intestate in the accumulation of . . . wealth or who provided for the intestate's physical, emotional or financial needs." Spitko I, *supra* note 155, at 270–71.

168. Professor Gary maintains:

[F]or families facing the death of a family member, emotional support is also an issue. An intestacy statute provides emotional support to family members simply by identifying them as persons entitled to a distribution from the decedent's estate. By doing so, the statute validates their relationship with the loved one who has died.

Gary II, *supra* note 35, at 652. In a separate article, Professor Gary suggests: "Recognition of family through distribution of property following the death of a family member carries with it not only economic benefits, but also, and perhaps as important, psychological benefits." Gary I, *supra* note 3, at 12.

under the intestate statute would be justifiable. And it is likely that a decedent would want the child to inherit, rather than more remote relatives or the state.<sup>169</sup> Moreover, in many cases—especially concerning children raised on a farm or in a family that owns a business—the child will have contributed to the acquisition of wealth by the family, either by directly participating in money-making activities,<sup>170</sup> or by providing services in the family that promoted the well-being of the family unit.<sup>171</sup> Finally, providing such a child the status of an heir would promote his psychological well-being, especially if he is learning for the first time that he is not the biological or adopted child of the family.<sup>172</sup>

Another important justification to an intestate succession plan is administrative ease providing an orderly plan for succession to the decedent's property.<sup>173</sup> This is why statutory distinctions are sometimes made with respect to nonmarital children inheriting from their birth fathers. The claims of nonmarital children, which must be substantiated in ways not required for the claims of legally adopted children or marital biological children, can interfere with the expectations of succession,<sup>174</sup> especially if the decedent was involved

169. See *supra* notes 154 and accompanying text.

170. See, e.g., cases cited *supra* note 37.

171. See, e.g., cases cited *supra* note 37.

172. As argued by Professor Rein, "Any child who grows up with the belief that he is a natural child of the only parents he knows is bound to be distressed when he learns that society views him as a legal stranger to his family." Rein, *supra* note 1, at 778. One would suppose that a child who believed he had been adopted into the family would suffer similarly. Certainly, the status of "heir" would be an improvement over no status at all. Moreover, one could argue that a child, raised in a family and aware of his status as neither born-into nor adopted-into the family, would still have formed a psychological relationship with the people raising him, and that such relationship should be honored at least by an heir.

173. See, e.g., Gary II, *supra* note 35, at 651–52 ("[Another] goal . . . of intestacy statutes include[s] . . . ease of administration of the probate system."); Spitko I, *supra* note 155, at 269 (stating, in proposing an inheritance plan including unmarried committed partners, that ease of administration is one of the "principal values" of an "intestacy scheme"). Professor Gary continues:

[E]ase of administration of the probate system, must serve as a check on any changes to the intestacy system. The system should be easy to understand and apply, so that those who wish to rely on intestate distribution can do so. Further, the intestacy scheme should not unduly burden the probate courts that will be responsible for administering the estates.

Gary II, *supra* note 35, at 653. Thus, any changes to the intestate succession statutes to add those children "raised in a family" to the definition of "child" would need to be easy to administer and not add to the burden of probate courts. As discussed below, Professor Gary's plan would actually lighten the burden of the relevant courts, by providing simple criteria that can, in most cases, be applied by administrators without the need of judicial intervention. See *infra* notes 189–90, 231–33, 303–07 and accompanying text.

174. *Lalli v. Lalli* challenged the New York statute that required a nonmarital child seeking to inherit from his father to prove paternity by the requirements of the statute—a condition not imposed on children born into or adopted into the father's family. 439 U.S. 259, 261 (1978). The Court found a legitimate state interest in treating such children differently from those born-into or

in several nonmarital relationships. Respecting this function, intestate succession rights under the judicially created equitable adoption doctrine are disruptive to the ease of administration of estates. People other than those born into or adopted into a family can claim to be entitled to inherit. This is disruptive of intestate succession because the one claiming to be the equitably adopted child of the decedent makes a claim and such claims have to be adjudicated on a case-by-case basis.<sup>175</sup> Under the statutory solution proposed below,<sup>176</sup> however, a large measure of uncertainty would be removed from these situations. There would be definite criteria to be applied by the administrator of an estate, and a court would be involved only in troublesome cases.

In sum, in view of the functions to be accomplished by intestate succession statutes, broadening the availability of inheritance to include nonbiological unadopted children raised in a family if the children meet certain statutory criteria would not impair the policies underpinning intestate succession statutes. The “dependant” justification is stronger than the “intent” justification, which is merely a guess as to what an average decedent would have wanted. Moreover, it is likely that an average decedent would want to benefit children raised by him. And whatever administrative difficulties would be incurred by broadly defining “child” to include those raised by families into which they were not born or adopted could be minimized in the drafting of the statutory provision.

#### *B. The Failure to Write a Will: People who Die Intestate*

The issue of inheritance from someone who has not written an effective will affects more people than might be expected. More than half of the people who die in the United States die intestate.<sup>177</sup> As noted above, the reasons for

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adopted-into a family. *Id.* at 268–71. The Court recognized that “[t]he primary state goal underlying the challenged aspects of [the New York statute] is to *provide for the just and orderly disposition of property at death.*” *Id.* at 268 (emphasis added). The current version of the New York statute under review is found at N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 1998 & Supp. 2008).

175. Even if an administrator, on his own motion, decides to honor the parent-child relationship established in a traditional equitable adoption scenario (an unlikely prospect) the disappointed heirs (those who would have taken, or taken more, if the child had not been found to be an heir) will object to the intestate distribution to the child and such objection will end up in court.

176. See *infra* Parts III–IV.

177. Professor Higdon, in reviewing the results of recent surveys, asserts:

[T]he majority of Americans die each year without a will. Furthermore, studies reveal that a large percentage of those who die intestate are people with modest estates. In fact, one study found that 72.3% of those whose estates were valued at between \$0 and \$99,999 did not have wills.

Higdon, *supra* note 3, at 253–54 (footnotes omitted).

failure to write a will are similar to the reasons for failure to adopt:<sup>178</sup> expense, fear, and neglect. Many people believe that the cost of obtaining a legal will is beyond their means.<sup>179</sup> They often have no significant assets and believe a will would not be worth the money because their family members can simply divvy up their property.<sup>180</sup>

People are fearful of writing wills for a number of reasons. Some are superstitious: They believe that if they write wills, misfortunes or death might befall them.<sup>181</sup> Others are afraid to trust an attorney with the details of their wealth.<sup>182</sup> Still, others fear the probate process, believing that one should plan one's life to avoid probate.<sup>183</sup>

Finally, there is the group of individuals who simply never get around to writing a will. Perhaps they are young and unconcerned about inheritance,

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178. See *supra* notes 52 & 121 and accompanying text.

179. One student commentator recently reflected, "Some people might choose not to undertake the expense of a will if they believe that intestacy closely reflects their preferred disposition of their estates." Christine A. Hammerle, Note, *Free Will to Will?: A Case for the Recognition of Intestacy Rights for Survivors to a Same-Sex Marriage or Civil Union*, 104 MICH. L. REV. 1763, 1771 (2006). See also Hirsch II, *supra* note 158, at 1047.

180. The authors of a 1985 survey regarding estate administration determined that, in the states covered by the survey, "the average percentage of decedents' estates that underwent estate administration proceedings ranged from twenty percent in California to thirty-four percent in Massachusetts." Robert A. Stein & Ian G. Fierstein, *The Demography of Probate Administration*, 15 U. BALT. L. REV. 54, 61 (1985). In their conclusion to the survey, the authors commented:

The estate administration process in the United States is not used by the survivors of most decedents. Only a minority of decedents leave property of a kind and amount that requires the judicial involvement of the estate administration process, a finding that suggests that a significant amount of property passes outside of the legal process designed to facilitate wealth transfer at death. In some cases, this is because the estate of the decedent is so small or liquid that it easily can be transferred informally.

*Id.* at 104. Hammerle, *supra* note 179, at 1771 ("Some people might choose not to undertake the expense of a will if they believe that intestacy closely reflects their preferred disposition of their estates."). See also *supra* 159 and accompanying text. Unfortunately, people who do not consult lawyers are often unaware of the possibility that they will have more assets at death than they anticipate. The proceeds of a wrongful death action might significantly increase the value of an estate. Moreover, the person might not anticipate that, later in life, he will inherit money from another. These individuals often do not understand the need for probate of an estate if real property or personal property to which official title must be demonstrated (such as an automobile or a bank account) is involved. See DOBRIS ET AL. *supra* note 148, at 46.

Obviously, the equitable adoption question does not arise if no probate of an estate is sought. Thus, it cannot be established, simply from the number of cases on the doctrine, how many children are being raised in circumstances that might lead to the finding of an equitable adoption. And perhaps, with respect to these unnumbered children, some of them have participated in the informal divisions of the decedents' properties. Such an inquiry is beyond the scope of this article.

181. See *supra* note 158.

182. See *supra* note 158.

183. See *supra* note 158.



viewing death as a remote prospect. Others simply procrastinate until it is too late. But whatever the reason for such failure it should not be viewed as probative of a desire that relations and dependants not inherit.

### III. A PROPOSED SOLUTION TO THE DILEMMA OF THE INEQUITABLE EQUITABLE ADOPTION DOCTRINE

#### A. *General Discussion*

As demonstrated above, the equitable adoption doctrine is inadequate, inequitable, and irrational. Moreover, referring to the remedy as an “adoption” suggests that the doctrine corrects only those situations in which an adoption could have been achieved. It does not. The doctrine is neither equitable nor does it lead to an adoption in the sense the word is used in legal contexts. The doctrine does not, in any way, require that the people found to have equitably “adopted” be people who would have been able to satisfy the legal criteria for an adoption. Rather, the remedy appears to have been devised as a stopgap to remediate a few unfair situations. A large number of children, however, find themselves in the situation of having been raised apart from their biological parents, and many of them cannot be aided by the traditional doctrine for failure to meet its specific criteria. For economic and social reasons, many children are raised outside of their immediate birth families, and, in many instances, the people raising them will not dispose of their property by an effective will or by testamentary substitute. The studies discussed above show that fewer than half of all people in the United States die with a will in place, and the percentage may be higher in the impoverished minority communities where many of these children are raised.

Expanding the definition of “child” in intestate succession statutes would ameliorate these problems. The statute should include biological and legally adopted children as well as those raised in a family as a “family member.” Unlike the Texas statute, which defines “child” to include children legally adopted and adopted “by estoppel,”<sup>184</sup> this new statutory category of “child” should not include any reference to “adoption.” As noted above, any use of the term “adoption” suggests that the child could have been brought into the family situation through legal adoption had the people raising the child sought to adopt.

Many children, however, are raised in situations where legal adoption is not an option. In some cases, the birth parents will refuse or simply be unable to agree to adoption. In other cases someone relinquished custody without having the legal capacity to place the child up for adoption. And, in a third category of cases, the people raising the child might be barred from a legal

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184. TEX. PROB. CODE ANN. § 3(b) (Vernon 1980 & Supp. 2007).

adoption because of family or personal circumstances. What is sought here is a term that would embrace the many different circumstances in which children are being raised today. There is no reason to make distinctions based on circumstances outside of the child's control. Nor is there reason to take issue with these circumstances upon the death of an intestate family member. The child would have been raised in whatever circumstance he found himself, whether that circumstance would pass statutory criteria for adoption or not.

By broadening intestate succession statutes to include children raised in a family under some sort of "family member" test, many of the inequities of the current equitable adoption doctrine would be eliminated. The decision to include the child as an heir of the decedent would not depend on finding an unperformed contract to adopt. Thus, children placed in custody without any expectation that an adoption would occur (a much greater number of children than those to whom the traditional equitable adoption doctrine would apply) would not be deprived of an opportunity to inherit if the situation proved to be a permanent arrangement. Children who meet the criteria for traditional equitable adoption would still be heirs, but many additional children could benefit.

Moreover, the finding of "child" status for purposes of inheritance would not depend on artificial distinctions, such as whether the child believed that he had been adopted or believed that he was the birth child of the family in which he was raised.<sup>185</sup> Children who knew they had not been adopted or born into a family because they had been privy to that information would still be able to inherit. Thus, a premium would not be placed on finding some sort of misrepresentation to the child or to the outside world. The child could still inherit even if the people raising him were honest about his legal status. Other factors that would be irrelevant include what the child called the people raising him, what the people raising the child called him, how the child was represented to the outside world by the people raising him, and so forth. Again, honest assertions about the child's legal status would not deprive the child of the opportunity to inherit.

Using a "family member" test to include those who were raised in but not born or adopted into a family would also promote the goals of intestate succession statutes. One of the purposes of such statutes is to provide for the support of those individuals that received support from the decedent during his lifetime. Whether a child is born into, adopted into, or simply raised in a family, the family head(s) (parent(s)) usually provide financial and emotional support. Moreover, the children oftentimes have participated in the family's acquisition of wealth. By whatever method a child ended up in a family, the child's contributions to the family unit are probably comparable. At least, any

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185. See *supra* note 26 and accompanying text.

distinctions based on the level of support given to the child or the number of contributions made by the child to the welfare of the family unit does not depend on how the child came into the family.

A final aspect of support, noted above,<sup>186</sup> is the importance of the intestate succession statute in recognizing a relationship to the decedent. For a child who has been raised in a family and was not born into or adopted into it, this status is uniquely important: the child may have only recently learned that he is not an “official” family member. Giving the child the status of an heir of the decedent will help the child deal with the loss of the decedent.

Of course, another stated purpose of intestate succession statutes is to effectuate an average decedent’s intent, to the extent that such intent can be identified. As noted above, the best that legislators can do is make an educated guess at what a decedent would have wanted—and studies have shown that legislators do not always have it right.<sup>187</sup> Had the decedent formed a decided opinion on this matter, there would be a will. At present, however, the perception is that the decedent would have wanted to benefit his closest family members—those who most likely depended on the decedent and who probably contributed to the functioning of the family. Thus, there is really no conflict between the desire to give the decedent what he most likely wanted and the desire to protect his dependents. And again, there appears no reason to exclude from decedent’s presumed intent those children who had been raised by the decedent but had not been born into or adopted into the family. It seems more likely than not that the decedent would have wanted to benefit those whom he had supported during his lifetime and those who were participants in the family that he headed.<sup>188</sup>

As to the intestate succession statute’s identified goal of providing ease of administration of an estate and an orderly plan of succession for a decedent’s property,<sup>189</sup> the proposed statutory addition would not so undermine this goal as to be undesirable. The proposed “family member” test would not substantially add to the litigation in this area. First, the test would only be relevant in the case of a child claiming to have been raised in a family, but not born or adopted into that family, and only in an intestacy situation. Second, the test would be easily applied in most circumstances so that the administrator

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186. See *supra* notes 168, 172 and accompanying text.

187. See *supra* notes 156–58 and accompanying text.

188. At present, intestate succession statutes do not make provision for children to inherit from their legal guardians who are not their adoptive or biological parents. See, e.g., statutes cited *supra* note 2. The proposed broadening of intestate succession statutes to include children raised in a family would not be inconsistent with this practice. If the child had been raised by the legal guardian, the child would come within the proposed statutory definition of “child” and would inherit. If the child had not been raised by the legal guardian, the child would not inherit from the guardian.

189. See *supra* notes 168–71 and accompanying text.

of an intestate estate could identify those children fitting under the definition. Litigation should only arise in marginal cases. Since equitable adoption as it currently exists requires a judicial determination in every case in which the doctrine is applied,<sup>190</sup> the burden on the courts should not be increased but, rather, decreased. It is not the purpose of this proposal to increase litigation and uncertainty regarding intestate estates, but only to broaden the reach of intestacy statutes to include the many children who are being raised in families other than those of their birth or legal adoption.<sup>191</sup>

Adding this new category of child to intestate succession statutes might resolve the issue of whether children raised in a family into which they had not come by birth or legal adoption could inherit from relatives of the parents *through* their parents. As noted above, this issue has arisen from time to time in cases in which a child claimed to be equitably adopted and then sought to inherit from blood-relatives of the parents. Except in West Virginia, where an equitably adopted child was permitted to inherit from the birth-child of his parents (the child's "sibling" in terms of the equitable adoption relationship established),<sup>192</sup> courts have been unwilling to extend the equitable adoption

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190. Equitable adoption is an equitable remedy. It is granted, on a case-by-case basis, by courts using their equitable powers. Because the court must consider many factors in determining whether to find an equitable adoption, and to make such a determination requires the development of a detailed factual record, *see, e.g.*, *Lankford v. Wright*, 489 S.E.2d 604 (N.C. 1997) (reversing summary judgment because equitable adoption cases require full development of factual record), each situation must be decided on a case-by-case basis (as would be the situation in the granting of any equitable relief). *See also* Katie A. Fougerson, Note, *Equitable Considerations for Families with Same-Sex Parents: Russell v. Bridgens*, 264 Neb. 217, 647 N.W.2d 56 (2002), and *the Use of the Doctrine of In Loco Parentis by Nebraska Courts*, 83 NEB. L. REV. 915, 931 (2005) ("[C]ourts in Nebraska should apply the equitable doctrine of *in loco parentis* to cases involving families with same-sex parents in order to properly provide for the child's best interests on a case-by-case basis . . .") (emphasis added); Jessica A. Shoemaker, Comment, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729, 784 (proposing "equitable distribution" determined on a "case-by-case basis" with respect to allocation of Native American lands).

191. To this end, the proposal does not include any measure of discretion over the amount of the inheritance as do the maintenance-type intestate statutes of the United Kingdom and Canada. As to the difference between the fixed, more easily administered, intestacy statutes of the United States and family maintenance intestate succession schemes, Professor Gary observes:

In the United States, probate law in general and intestacy laws in particular have long relied on fixed rules and limited discretion. By contrast, a system developed in New Zealand and now in use in the states of Australia, in England and in most of the Canadian provinces provides for a substantial degree of judicial discretion. Testator's family maintenance provides that the court can rearrange the decedent's estate plan, either an intestate distribution or a will, pursuant to a petition by any person provided for under the statute.

Gary I, *supra* note 3, at 67 (footnotes omitted). Certainly, any such scheme would be more difficult to administer than current statutes in the United States.

192. *First Nat'l Bank v. Phillips*, 344 S.E.2d 201 (W. Va. 1985).

doctrine to include such inheritance.<sup>193</sup> The argument usually raised in opposition to such inheritance is that the parents, by not adopting the child as promised, and by raising the child, have set the stage for the equitable adoption; no behavior on the part of the parents' relatives contributed to the situation. Thus, the child as heir would be "foisted" on these relatives. This argument is specious. When a person decides to create a family by birth or legal adoption, that person's relatives usually do not participate in the decision. Arguably, every child is "foisted" on his ancestors and collateral relatives as an heir. Thus, this proposal would make the child who fits into the new category of "child" an heir for all inheritance purposes, not merely an heir of the immediate family heads who raised the child.

As criticism of this plan, critics may raise the issue of its potential for dual inheritance. If a child is raised in a family that is not his adopted or birth family, and that child inherits from the head of that family, the child might also, at some time, inherit from his birth parents or other biological kindred. With a legal adoption, in most states, the child's relationship with the birth family is severed, the child is transplanted into the adoptive family, and the child inherits only from adoptive kindred (and only adoptive kindred inherit from the child).<sup>194</sup> With the proposed plan, since there is no effect on the birth relationship of the child being found to be a "family member" of the "raising family" for inheritance purposes, the child could inherit both from the "raising family" and from his biological family members. The potential for such dual inheritance concerns commentators in other contexts, especially regarding a legally adopted child.<sup>195</sup> Such a situation is deemed "unfair" to others who have the opportunity to inherit in only one family.<sup>196</sup>

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193. See *supra* notes 74–75 and accompanying text.

194. See, e.g., Gary II, *supra* note 35, at 656. Regarding inheritance rights, Professor Gary states that "adoption cuts off the right of inheritance as between the adopted child and the biological relatives." *Id.* Some statutes make exceptions in special circumstances, such as where a child is adopted by a stepparent subsequent to the death of the child's parent; inheritance from the biological family of the deceased parent is not cut off. See, UNIF. PROB. CODE § 2-114 (amended 1990); N.Y. DOM. REL. LAW § 117 (McKinney 1999 & Supp. 2008).

195. Professor Rein observed:

The courts that permit [a legally adopted child] to inherit from his blood relatives are actually assuming that natural filiation must survive adoption. The upshot of this assumption is that the adoptee is given dual sources of inheritance. This right to inherit from two sets of relatives, natural and adoptive, affords the adoptee an advantage denied biological children.

Rein, *supra* note 1, at 725 (footnote omitted). Another commentator on the adoption issue states, "dual inheritance is contrary to public policy." Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 607 (2001).

In a different context, some of the issues arising in the complicated area of post-mortem conception, a recent commentator opined:

But there is an alternative view of the issue. First, it is not likely that the child will be inheriting from or through his birth parents. In few cases will a birth parent, who was unable to raise the child himself, be in a position to have a significant probate estate. Members of the extended birth family might have some assets, and it is possible that the child will inherit from them; but the cases in which the child would also have inherited from such comparable relatives in the raising family would probably be few in number. Moreover, under traditional intestate succession statutes, a child may inherit from parents and from other family members as well.<sup>197</sup> So, current inheritance law contemplates inheriting from parents and “other relatives.” Only the possibility that the “others” would be in the birth family, and the parents would be in the raising family, would be different. It would be unusual, indeed, for the child contemplated by the proposal to inherit from nonparental members of both families. Of course, the statutory inclusion of a person raised in a family for purposes of inheritance could be limited to inheritance *from* and not *through* the raising parents, as is the current scope of equitable adoption in nearly every jurisdiction employing the doctrine.<sup>198</sup> While this is not an ideal proposal for inheritance *through* the parents of the raising family, there would then be no possibility of inheriting from two sets of nonparent relatives. There

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[A]ttention should be paid to the consequences of recognizing both the deceased genetic father and the mother's new partner as legal parents. Is the child entitled to dual sets of rights? If not, what is the standard for determining whom she inherits from and on whose account she is eligible for Social Security survivor's benefits? . . . I believe it possible to recognize the child as the heir of both men. Dual inheritance is not unprecedented, having been recognized in adoption situations; and it seems even more justified here, given the legal recognition of both men's paternity.

Ruth Zafran, *Dying to Be a Father: Legal Paternity in Cases of Posthumous Conception*, 8 HOUS. J. HEALTH L. & POL'Y 47, 100 (2007) (footnotes omitted).

196. A student commentator offered the following:

At first glance, dual inheritance may appear to be favorable to the adopted child. The potential disharmony and resentment that may result, however, may strain the adoptee's acceptance into the new family. An adopted child may be treated as an object of jealousy by the other biological children in the adoptive family because of this extra inheritance capacity. Moreover, one adoption objective is to provide the adoptee with equal social and economic resources rather than to put the adopted child in an advantageous position. Therefore, dual inheritance by an adoptee is incongruous with the goals of modern adoption law.

Timothy Hughes, Comment, *Intestate Succession and Stepparent Adoptions: Should Inheritance Rights of an Adopted Child Be Determined by Blood or by Law?*, 1988 WIS. L. REV. 321, 38–39 (footnotes omitted).

197. See, e.g., N.Y. EST. POWERS & TRUSTS § 4-1.1(a) (noting that the order of death and the existence of wills determines whether a child could inherit from parent, grandparents, and other siblings).

198. See *supra* notes 71–75 and accompanying text.

would still be, however, the possibility of inheriting from two sets of parents—the biological parents and the parents raising the child.

The equitable adoption doctrine, as established in those jurisdictions that recognize the doctrine, does not preclude inheritance from both the equitably adopting parents and the birth parents.<sup>199</sup> Remedying the inequity of the child not inheriting from those people who raised him is deemed important enough to permit the (probably remote) potential for dual inheritance. While the proposed statutory enlargement of the category of “children” would increase the potential for such dual inheritance because more children would be entitled to inherit from the people raising them, it would not create a situation that does not already exist.

Second, from an emotional, nonlegal standpoint, the child raised by people other than his birth parents has been deprived of the opportunity to be raised by those parents, a loss that cannot be quantified. Moreover, a child who has not been adopted by those people raising him will suffer an additional loss—the loss of official status in the family—whether the child is aware of his lack of status while in the family or only learns of this lack at the time of the decedent’s death.<sup>200</sup> To deny that child the right to inherit from the people who raised him would compound any psychological injury that he has suffered. Thus, he should be entitled to inherit from the people raising him, even if it means that he will also inherit as the child of his biological parents. Any unfairness perceived by biological children of the family in which the child is raised is more than mitigated by the losses that the child has suffered.

The proposed addition to the definition of “child” for intestate succession, which proposes to include children raised in a family, would also have the salutary effect of avoiding any issue of whether the child had acquired, through equitable adoption, the status of an adopted child for other purposes.<sup>201</sup>

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199. While there are no apparent commentaries or cases discussing this particular issue, it seems clear from the cases that an equitable adoption, if found, establishes only the entitlement of the equitably adopted child to inherit *from* (and in one jurisdiction *through*) the equitably adopting parents, and, in some cases, to obtain other benefits which would accrue to a child of such parents. The equitable adoption does not have any impact on the child’s status due to the child’s birth parents.

200. For a discussion of the role of intestate succession in validating a family member’s relationship to the decedent, see *supra* note 172 and accompanying text.

201. See *supra* notes 73–76 and accompanying text. Commentators have suggested that extending the equitable adoption doctrine to provide these children with a status akin to that of legally adopted children would wreak havoc with traditional adoptions, because people could get all of the benefits of an adoption without following the expensive, intrusive, and time-consuming procedures required by adoption statutes. See *supra* note 119. Whether this perception is correct is not an issue here, because this article does not propose to give such a child the status of a legally adopted child. It seems that simply extending inheritance rights to include more children than those currently served by the equitable adoption doctrine would not promote the avoidance of formal adoption proceedings. From an examination of the cases on equitable adoption, it

Because the relationship would not be labeled an adoption, and because the statute would only apply to inheritance situations, the child could not use the finding in other contexts.<sup>202</sup>

### B. *The Proposal*

As indicated above, the remedy suggested for eliminating of many of the problems raised by the current equitable adoption doctrine and for providing inheritance rights for a much broader group of children than those currently aided by the equitable adoption doctrine is an amendment to state intestate succession statutes. They should include in the definition of “child,” for intestate succession purposes, biological children, legally adopted children, and “children raised in a family.” As discussed earlier, one state, Texas, does have a statutory definition of “child” for intestate succession purposes, which includes “an adopted child, whether adopted by . . . statutory procedure or by acts of estoppel.” The Texas statute, however, has been interpreted narrowly to only apply in cases in which the equitable adoption doctrine would apply anyway, essentially nullifying the statutory provision.<sup>203</sup> The proposed definition would not include any reference to “adoption” in the definition of the additional children to be served by the amendment and would permit greatly expanded inheritance rights, both with respect to numbers of children aided and in respect of the rights afforded these children. Moreover, it would not rely on the finding of a contract or a justification, such as specific performance or estoppel, thus eliminating the sometimes nonsensical underpinnings of the equitable adoption doctrine.

In *Wheeling Dollar Savings & Trust Co. v. Singer*,<sup>204</sup> the West Virginia Supreme Court went some way toward adopting a new test for equitable adoption. The court rejected the traditional grounds for finding an equitable adoption, dispensing of the need to infer a contract where the existence of a written or oral contract could not be proved, and established a “family member” test for finding an equitable adoption.<sup>205</sup> As noted above, this test required that “[t]he equitably adopted child . . . prove by clear, cogent and convincing evidence that he has stood from an age of tender years in a position

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appears that people decide not to adopt children they are raising because they are not in a position to adopt—they lack funds, could not meet statutory adoption criteria, or have not gotten custody of the child from a person who could legally consent to an adoption. Or, as several cases have revealed, people fail to adopt because they never get around to doing it. Nowhere has it been established that people choose not to adopt because they know that the children raised by them will be able to *inherit* from them.

202. Whether benefits other than inheritance should be extended to include children raised in a family is beyond the scope of this writing.

203. See *supra* note 75.

204. 250 S.E.2d 369 (W. Va. 1978).

205. *Id.* at 371.



exactly equivalent to a formally adopted child.”<sup>206</sup> The court then listed “[c]ircumstances which tend to show the existence of an equitable adoption.”<sup>207</sup> Such circumstances included many of the factors considered by courts of other jurisdictions as relevant to the finding of an equitable adoption: on the issue of the existence of a contract as circumstantial evidence from which the existence of a contract to adopt can be inferred,<sup>208</sup> on the issue of specific performance as possible consideration for the contract or as evidence of the child’s performance of his part of the bargain; or on the issue of estoppel as proof that the child and people surrendering custody performed, the decedent received the benefit of the services of the child in the family, and the child detrimentally relied on the decedent’s promise to adopt and, thus, the decedent and his estate should be estopped from claiming that an adoption had not occurred. These factors included evidence about the services performed by the child, about the representations concerning status made to and about the child, about the relationship between the child and the people raising the child, and the like. The court also indicated that certain factors, such as abandonment of the people raising the child, might weigh against the finding of an equitable adoption.<sup>209</sup>

The designation of “family member” is attractive as a potential category for children who would come within the proposed expanded definition of child for intestate succession purposes. This proposal does not adopt, whole cloth, the *Wheeling Dollar* test. Of course, as argued above, the finding that a child was entitled to inherit would not be called an “equitable adoption” because, among other things, the term “adoption” connotes a situation in which, had the people raising the child attempted to adopt the child, they would have been successful. This is not necessarily the case; the family head(s) might not have been able to meet the statutory criteria for adoption. Moreover, using the term “adoption” suggests that the environment in which the child had been raised was a suitable setting to raise a child. Again, because no one investigated the environment to make such a determination, it is possible that the environment was unsuitable. If equitable adoptions depended on a finding that all statutory requirements for statutory adoption were satisfied when adoption is sought, even fewer equitable adoptions would be found. This goal is not to limit relief to such circumstances, but simply to note that calling the relief any sort of “adoption” conveys a false impression.

Next, while the decision in *Wheeling Dollar* should result in granting relief to more children than those to whom relief would be granted under the

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206. *Id.* at 373.

207. *Id.* For the list of circumstances identified by the court, see *supra* note 66.

208. See *supra* notes 28–34 and accompanying text and notes 52–63 and accompanying text.

209. 250 S.E.2d at 374. For a discussion of cases considering the probative value of certain “negative” circumstances, see *supra* note 28.

traditional equitable adoption doctrine because of its rejection of the need for finding a contract to adopt,<sup>210</sup> the *Wheeling Dollar* test fails to include most of the children who deserve relief. Many children would not fall within the requirement that the child occupy a position “exactly equivalent to a formally adopted child.”<sup>211</sup> The remedy should be available in many situations in addition to those in which the child’s experience has been “as if” legally adopted. Many cases involve situations in which a legal adoption would not have been possible.<sup>212</sup> Moreover, the “circumstances” of many children are quite different from those contemplated by the *Wheeling Dollar* court,<sup>213</sup> yet those children should be able to inherit from the people who raised them or are currently raising them.

In any family arrangement recognized by the new statutory designation as providing the potential for a child to be entitled to inheritance rights, there will have to be at least one head of the household. It is that person, or those persons (if more than one head of household can be identified), from whom (and through whom)<sup>214</sup> the child will be entitled to inherit. In most arrangements, this will be one male and one female person, married to or committed to one another, who will be raising one or more children.<sup>215</sup> In other cases, however, the household could be headed by a grandparent or other blood relative of the children being raised,<sup>216</sup> a same-sex couple<sup>217</sup> raising children born to one of the partners, adopted by one of the partners, or neither born to nor adopted by either of the partners but being raised by them, or a single person raising children who were not born to or adopted by that person.<sup>218</sup> For ease of administration,<sup>219</sup> the statutory plan would not extend to situations in which no person could be identified as the head of household, the putative parent. Thus, an arrangement of adults living together communally and raising their children communally would not be included.

The statute would also require that the child live in the family unit for some period of time during the child’s minority. It would not require that the

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210. *Wheeling Dollar Sav. & Trust Co. v. Singer*, 250 S.E.2d 369 (W. Va. 1978).

211. 250 S.E.2d at 373.

212. See *supra* notes 44–47 and accompanying text and note 52.

213. For the enumeration of the “circumstances” considered relevant by the West Virginia court, see *supra* note 75.

214. For a discussion of inheritance *through* the parent in an equitable adoption situation, see *supra* notes 80–85 and accompanying text.

215. Included in this group would be most stepparent situations. See Engel, *supra* note 3.

216. See Knaplund, *supra* note 3; Higdon, *supra* note 3.

217. See Trast, *supra* note 137; Woodhouse, *supra* note 137.

218. See Brashier, *supra* note 3; Foster, *supra* note 6.

219. For a discussion of the fact that one of the identified purposes of intestate succession statutes is to provide ease of administration and a plan for orderly succession to property.

child have lived in that arrangement “from tender years;”<sup>220</sup> sometimes cases involve children who have lived in more than one custodial arrangement during their youths.<sup>221</sup> The test should be whether the child lived in the family full-time for more than half of his minority. If the child is over the age of eighteen at the death of the household head from whom the child seeks to inherit, the child will have had to live in the family for more than nine years. If the child is under the age of eighteen at the time of the death, then the child will have had to live in the family for more than half of his life. This provision would avoid the difficulty of the child claiming to be a family member of several families. He would be able to claim only the family with which he spent more than half of his childhood. Of course, this eliminates from statutory coverage those children who have not resided with any family for such an extended period of time.<sup>222</sup> The statutory protection, however, is not designed for such situations because a child that changed custody several times in his life arguably may not have become a “family member” of any unit. However desirable it might be to help all children raised outside their birth or adoptive families, a line must be drawn somewhere. To avoid claims of membership in two or more families,<sup>223</sup> the statute should require that the child have been in the situation for more than half of his childhood.

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220. *Wheeling Dollar Sav. & Trust Co. v. Singer*, 250 S.E.2d 369, 373 (W. Va. 1978).

221. *See, e.g., O’Neal v. Wilkes*, 439 S.E.2d 490 (Ga. 1994) (noting that the child lived in several different custody arrangements between ages eight and twelve).

222. For example, unfortunately, the proposed statutory definition would not provide inheritance rights for the child in *O’Neal*, because the child resided with her ultimate family, the family from whose member she sought to inherit, starting at the age of twelve. *Id.* This requirement would also exclude a child brought into a family as an infant if the parent or parents died shortly after the child’s arrival and before the child had doubled, in his residence with the family, his time on earth, and before he could be legally adopted into the family. To cover those cases in which adoption had been anticipated and the adoptive parents had moved, in a timely manner, to finalize the adoption, but such finalization had not yet occurred at the time of the death, the statute might include an exception to the “half childhood” rule. This would be necessary because the initiation of an adoption would require the consent of the birth parents, thereby cutting off from the child a potential alternative source of support. The exception would include only those situations in which a formal adoption had been initiated but not yet completed.

223. Permitting a child to claim membership in more than one family into which he had neither been born nor adopted would compromise the goal of intestate succession statutes promoting ease of administration of estates. This is not to suggest, however, that the child not be permitted to inherit from his family of birth. *See supra* notes 194–97 and accompanying text. The ability of the child to inherit from the family raising the child would not give the child the status of an adopted child, and thus, the child would still be a member of his birth family unless his connection with the birth family had been severed by some sort of termination of the parental rights of the birth parents. Unless legislatures and courts are willing to recognize some alternative status to legal adoption, which would give the child the same status in the raising family as would be given to a legally adopted child, the anomaly of the child being able to inherit in the family raising the child and still be a member of his birth family for various purposes will

Another sensible constraint would require that the child be a member of the family from which he wishes to inherit at the time of the decedent's death or at the time the child reaches his majority, whichever is earlier. Exceptions could exist for children who were temporarily living outside the family because of exigent circumstances. But the requirement that the child be a family member up to the time of his majority, or that he have spent more than half of his life being a member of the family, and that he is a family member at the time of the death of the person from whom he wishes to inherit, avoids the problem of a child who was no longer a member of the family seeking to inherit. For example, if the child left the family permanently because of a foster care placement with another family, he would not be considered a child of the prior family for purposes of inheritance. But after a child reaches majority while in the custody of a particular family, he should remain a member of that family for purposes of inheritance, regardless of his living arrangements. A child who has been raised in his birth family or in his legally adoptive family, and who has achieved his majority, is entitled to inherit regardless of the relationship he maintains with his family subsequent to reaching his majority.

The statutory inclusion would eliminate any consideration of issues such as how the child behaved in the family, what the child was called, what the child called the family head, how the child was represented to the outside world, what representations were made to the child about his relationship to the family, and so forth. The traditional equitable adoption doctrine is burdened with such inquiries because of the premise that the child has been disappointed by the parents—the child did all that was required of a child, maybe even believing that he was a biological child or an adopted child of the family in which he was raised, but was not adopted by the people raising him. The proposed statutory plan would not place a premium on falsehood and misrepresentation. Whatever the child's belief, whether he knew he was not adopted, or whether he believed that he was, the child's situation is the same. He has been raised in a family, and the head of that family died without having a will in place. Why should the fact that he was fooled make any difference? Moreover, a child in a family of birth or legal adoption does not have to meet performance criteria—calling his parents “Mom” and “Dad,” doing household chores, attending to his parents in their old ages—to inherit. He can act in any number of ways and still inherit. Only if the parent decides to write a will that does not include the child will the child fail to take from the parent's estate. The requirements should be the same for the “child raised in a family.”

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continue. The lack of status in the family raising the child is particularly troubling where the rights of the birth parents have been terminated. Any proposal to remedy such a situation is beyond the scope of this writing, however.

This is not to say that there should be no tests other than living in the family for more than half the child's minority. Any test, however, should relate to how, given the purposes of the intestate succession statutes, these purposes would be achieved by permitting the child to inherit and whether the family unit in which the child was raised would be considered a family for purposes of the statute. This inquiry would involve an examination of the functioning of the family unit to determine whether it acted as a family—a group of people living together and working together to accomplish joint goals. For purposes of the statutory inclusion of “child raised in a family,” however, there would be the further limitation that the family unit had a recognized head or heads, the parents, from whom the child would be seeking to inherit.<sup>224</sup>

Of course, very little inquiry would be required if the setting in which the child was raised mimicked the traditional family structure of mother, father, and children being raised by mother and father, with the only reason for relief sought under the statute being that the child had not been adopted into or born into the immediate family raising him. Step-families, single parent families, and same-sex partner families should also not require much scrutiny, because most of these arrangements are structured along traditional lines. Moreover, most cases of relatives raising children who are not their birth children would also be easily resolved if these families followed the traditional pattern. In situations that are less traditional, so long as a family “head” could be identified, the statutory definition could still be employed.<sup>225</sup>

Including children raised in families other than in their immediate birth families, or in adoptive families, the definition of “child” is consistent with the recognized purposes behind intestate succession statutes. As to the question of the decedent's intent, of course, the decedent has not expressed his individual intent since he failed to write a will. The best that can be done is to try to accomplish the intent of the “average intestate decedent.” As noted above, studies of still living people tend to show that a person expects that his property would go to his spouse, primarily, and then to his children.<sup>226</sup> Most people are concerned that the individuals who have depended on them during

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224. See *supra* note 165 and accompanying text.

225. See *supra* note 72 and accompanying text. Many of these family situations, such as step families, could involve the possibility of dual inheritance if the child is permitted to inherit from a person raising the child who is not the child's biological or adoptive parent. For example, a stepparent married to one of the child's biological parents, and potentially from both of the child's biological parents. In fact, as discussed above, the potential for dual inheritance is present in equitable adoption situations as the doctrine is currently applied. But the potential for dual inheritance under the proposed scheme should not be a reason to deny inheritance rights to children raised in a family, and is simply a by-product of the fact that the child, who has not achieved the *legal* status of an adopted child of the family in which the child is being raised, still has legal ties to his birth parents.

226. See *supra* note 151 and accompanying text.

their lives will be taken care of after their deaths. This attitude could reasonably be extended to children who were raised by them, even though the children had not been formally adopted into the family. Any person who would want a succession scheme in which such children are not included (or a scheme in which his property did not descend and be distributed to those people for whom he had some responsibility during his lifetime) would need to write a will.

The intestate succession statute's purpose of effectuating a decedent's probable intent to provide for those who depended on the decedent during his lifetime parallels a community purpose of ensuring that dependents are able to survive financially after the death of a family head. In general, society benefits from current statutes that send the decedent's money to his spouse and children, because these family members likely depended on the decedent for financial support and/or participated in the accumulation of family wealth by performing their family functions.<sup>227</sup> To fail to recognize this dependence and/or contribution would be unfair and could lead to impoverished surviving family members who would then become dependent on the government for their welfare.<sup>228</sup> Moreover, failure to recognize indirectly, through inheritance laws, the contributions and status of close family members could cause psychological difficulties in survivors who are already struggling with their grief.<sup>229</sup> A statute that would include children raised in a family would be consistent with the accomplishment of these social goals. The child will ordinarily have been dependent on the decedent during the decedent's lifetime (at least, during the child's minority), and the child, who participated in the functioning of the family arrangement, would suffer emotional damage were he to be excluded from sharing in the decedent's estate. This, of course, might be most evident in situations in which the child believed that he had been born or adopted into the family raising him. But any child who has been raised in a family would be upset by being excluded from inheritance from the decedent's estate.

Finally, in view of ease of administration of estates and an orderly plan of succession to property, adding children raised in a family to the definition of "child" for intestate succession purposes would not seriously undermine this goal. While it is true that the claims of such children would require the administrator of an estate to scrutinize these claims to determine whether they should be included, most cases would be easily decided on the basis of the number of years the child spent in the family and the nature of the family. Difficult cases might lead to litigation, but the current common law doctrine of equitable adoption necessarily leads to litigation in every case in which such a

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227. See *supra* notes 164–166 and accompanying text.

228. See *supra* note 166 and accompanying text.

229. See *supra* note 168 and accompanying text.

claim is made.<sup>230</sup> An administrator cannot, at present, include a child in the participation of an estate on the basis of equitable adoption without a judicial determination that the child satisfies the criteria of the doctrine.<sup>231</sup> The proposed statutory amendment would give the administrator authority to include such children in an intestate distribution without judicial intervention. In many cases, it is expected that the case will not require a trial because no one will object to the inclusion of the child as an heir, especially after such a statute was implemented and people's expectations would fall into line with its requirements. Moreover, in a number of cases in which equitable adoption is sought, there are no competing interests of biological or adopted children, but only the claims of more remote blood relatives, or of the state in an escheat<sup>232</sup>—claims which most likely would not be pursued if the statute were in place.<sup>233</sup>

A natural consequence of the proposed statutory resolution inheritance rights of children raised in, but not born or adopted into, a family would be that the child not only becomes an heir of the parents but also relatives of the parents in appropriate circumstances. The child would be permitted to inherit *through* the parents as well as *from* the parents.<sup>234</sup> Since the child would be a "child" for all intestate succession purposes (as would be biological and adopted children), the child would have all inheritance entitlements of any other child.

#### IV. CONCLUSION

The common law doctrine of equitable adoption is inequitable (treating similarly situated children differently based on arbitrary criteria), underinclusive (excluding children who had not been members of traditional families), and poorly named (suggesting, by its name, that the people involved in the family circumstances at issue could successfully undertake a legal adoption had they attempted to do so). Moreover, the legal theories upon which the doctrine is justified—specific performance and estoppel—are not defensible and lead directly to the inequity of the doctrine.

There must be a solution to the surprisingly frequent situation in which a child has been raised in a family into which the child has not been born or

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230. See *supra* notes 189–91 and accompanying text.

231. See *supra* note 190–91.

232. See *supra* note 119 and accompanying text.

233. In a traditional equitable adoption case, the administrator of the decedent's estate will have identified the decedent's heirs according to the intestate succession statute. Then the child will have to petition a court to be declared an heir, necessitating judicial intervention. If the child's status as heir is provided in the statute, it is not as likely that other potential heirs, especially those of more remote degree, would initiate an action.

234. For discussion of this issue, see *supra* note 75 and accompanying text.

legally adopted, and then seeks to inherit from the family head by intestate succession. Such children are not currently included in intestate succession statutes.<sup>235</sup> The definition of “child” or “issue” in such statutes should be amended to include “children raised in a family.” Adopting a “family member” test for such situations would make relief available to many deserving individuals without doing disservice to current statutory schemes.

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235. See *supra* note 75.