

**EXPANDING THE STATUTORY DEFINITION  
OF "CHILD" IN INTESTACY LAW: A JUST  
SOLUTION FOR THE INHERITANCE  
DIFFICULTIES GRANDPARENT  
CAREGIVERS' GRANDCHILDREN  
CURRENTLY FACE**

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*Grandparents taking on a parental role in raising their grandchildren is a growing trend, and some grandparents assume that a grandchild who they have reared as they would their own child would be entitled to a share of their inheritance upon their death. However, without a will, inheritance rights are controlled by intestacy law, which does not recognize the grandparent caregivers' grandchildren as their heirs. Instead, the grandparent's inheritance passes to the deceased's spouse or children. Further, many grandparent caregivers neither create a will nor formally adopt their grandchild because of the substantial costs involved. This Note examines the effect that current intestacy law has on those raised by grandparent caregivers. The Note discusses the currently existing equitable adoption doctrine, which protects the inheritance rights of an individual who was not the decedent's "child" as defined in intestacy law, but nonetheless had a parent-child relationship with the decedent. The author recommends legislatively amending intestacy statutes to incorporate equitably adopted grandchildren of grandparent caregivers into the definition of "child," giving these grandchildren equal inheritance rights to those of biological or adopted children.*

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## I. Introduction

A fifty-one-year-old grandmother, Tess, and her husband, Frank, are raising their granddaughter, Gina, as their own child.<sup>1</sup> Gina was not safe with her father, a drug addict, due to his unstable and hazardous lifestyle which threatened Gina's life.<sup>2</sup> Hence, the grandparents felt it was their duty to protect their grandchild.<sup>3</sup> In an interview Tess said, "I spent \$28,000 in court battling for Gina, . . . and she was worth every cent."<sup>4</sup> Unfortunately, the stressful court confrontations had a toll on Tess because she developed health problems and lost her job.<sup>5</sup> Tess and Frank are among the millions of reported grandparents who are the primary caregivers for their minor grandchildren.<sup>6</sup> Tess's story demonstrates that such grandparent caregivers have a clear intent to raise their grandchildren as their own children due to the immense amount of love and care they have toward them.<sup>7</sup> However, the current intestacy statutes do not recognize such nontraditional parental relationships unless the grandparent caregiver legally adopts the grandchild;<sup>8</sup> thus, the grandchild is left without any inheritance rights upon the death of a grandparent caregiver if the grandchild's parent is still alive.<sup>9</sup> Spending \$28,000 to gain full legal custody of a grandchild is not enough to secure inheritance rights for grandchildren because the definition of a "child" in intestacy law currently only includes biological and legally adopted children.<sup>10</sup>

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1. Chris Weygandt Alba, *Gaining Legal Custody of Your Grandkids: Some Grandparents Must Weigh the Cost of Saving Their Grandkids from Troubled Parents*, [http://www.focusonthefamily.com/parenting/parenting\\_stages/parenting\\_grandchildren/gaining\\_legal\\_custody\\_of\\_your\\_grandkids.aspx](http://www.focusonthefamily.com/parenting/parenting_stages/parenting_grandchildren/gaining_legal_custody_of_your_grandkids.aspx) (last visited Mar. 29, 2009).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. FRONTIER EDUC. CTR., ISSUES BRIEF: GRANDPARENTS RAISING GRANDCHILDREN: CARING FOR CHILDREN IN THE FRONTIER 6 (2004), <http://frontierus.org/documents/Grandparents.doc> [hereinafter ISSUES BRIEF] ("Grandparents often take on the responsibility of caring for grandchildren out of love and sense of familial duty, preventing many from seeking or accepting outside assistance programs.").

8. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 (1999).

9. Kristine S. Knaplund, *Grandparents Raising Grandchildren and the Implications for Inheritance*, 48 ARIZ. L. REV. 1, 22 (2006).

10. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 (1999).

Taking on a full parental obligation could start a chain of events that may ultimately contribute to a grandparent caregiver's untimely death, but the area of law which is expected to somewhat ease such solemn occasions, intestacy law, only amplifies the difficult situation for the grandparent caregivers' beloved grandchildren that are left behind. Intestacy law intensifies a grandchild's difficult situation because "the informally adopted, while mourning the loss of someone important in her life, is told that legally her relationship to the person was unnatural."<sup>11</sup> As demonstrated by little Gina's situation, grandparent caregivers' health may diminish due to stress from taking on a parental role at an elderly age.<sup>12</sup> Some health problems that have been attributed to grandparent caregivers' duties include "depression, insomnia, back and stomach problems, and hypertension."<sup>13</sup> The reason untimely death contributes to the existing problem in intestacy law regarding grandparent caregivers' grandchildren is because it is less likely for a younger grandparent to leave behind a will.<sup>14</sup> Without a will, inheritance rights are controlled by intestacy law, which does not recognize grandparent caregivers' grandchildren as their heirs.<sup>15</sup> Grandparent caregivers are also likely to die without a will because they are most likely part of the lower socioeconomic class,<sup>16</sup> which includes undereducated individuals<sup>17</sup> and those from minority racial groups.<sup>18</sup> Furthermore, legal adoption of the grandchildren may not be an option for the grandparent caregivers because "financial strain

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11. Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 WAKE FOREST L. REV. 223, 271 (2008).

12. Alba, *supra* note 1.

13. TAMMY L. HENDERSON & MICHELLE L. STEVENSON, VA. COOP. EXTENSION, GRANDPARENTS REARING GRANDCHILDREN: RIGHTS AND RESPONSIBILITIES 1-3 (2009), available at <http://www.pubs.ext.vt.edu/350/350-255/350-255.pdf> (discussing the reasons grandparents rear grandchildren, the rewards grandparents reap, and the challenges they face).

14. Michelle Harris, *Why a Limited Family Maintenance System Could Help American "Grandfamilies": A Response to Kristine Knaplund's Article on Intestacy Laws and Their Implications for Grandparents Raising Grandchildren*, 3 NAELA J. 239, 244 (2007).

15. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 (1999).

16. Contemporary Studies Project, *A Comparison of Iowans' Dispositive Preferences with Selective Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1072 (1978).

17. ISSUES BRIEF, *supra* note 7, at 7.

18. Meredith Minkler & Esme Fuller-Thomson, *African American Grandparents Raising Grandchildren: A National Study Using the Census 2000 American Community Survey*, 60B J. GERONTOLOGY, PSYCHOL. SCI. & SOC. SCI., S82, S85-87 (2005).

may be greater for grandparents with fixed incomes or at risk of poverty. Court costs and lawyers' fees will vary with the complexity of the case."<sup>19</sup>

One proposed solution to this problem is to implement a limited form of a family maintenance system into intestacy law for the purpose of recognizing inheritance rights of financially dependent minors of a grandparent who dies without leaving behind a spouse.<sup>20</sup> This Note rejects the family maintenance system proposal; instead, the Note recommends legislatively amending intestacy statutes to incorporate equitably adopted grandchildren of grandparent caregivers into the definition of "child." This modification will give the grandchildren in such a nontraditional family dynamic equal inheritance rights to those of biological or adopted children. In support of the recommendation, this Note will discuss the benefits of the currently existing equitable adoption doctrine, how to avoid the criticisms that courts have addressed in applying the equitable adoption doctrine, why the proposal meets the important goals of intestacy law, and why such a change will harmonize intestacy law with the movement away from recognizing strictly nuclear family relationships in the family law setting.

Part II provides background on the increasing practice of grandparent caregivers raising their grandchildren, why currently no remedy exists in intestacy law for inheritance rights of the grandchildren, and what fragment of the population is most affected by this issue. Part III analyzes why a recently recommended family maintenance system is not a good solution to the existing dilemma, why the movement in family law toward recognizing nontraditional families should be a catalyst for implementing change in intestacy law, and why the existing equitable adoption doctrine can be the starting point for the recommendation advocated in this Note. Finally, Part IV contains a recommendation to statutorily incorporate equitable adoption elements into the definition of "child" in intestacy statutes, which encompasses factors from equitable adoption case law and an academic proposal.

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19. HENDERSON & STEVENSON, *supra* note 13, at 3.

20. Harris, *supra* note 14, at 248.

## II. Background

While one imagines a typical grandparent as someone who visits his or her grandchildren, spoils them, plays with them, sometimes babysits them, and then returns to a peaceful life as a retiree, grandparent caregivers face a far different reality. According to the *Wall Street Journal*, "about one in six grandparents has cared for a grandchild for at least six months. About six million grandparents live with their grandchildren, while 2.5 million are raising grandkids on their own. Countless more grandparents play an unofficial parenting role, providing regular day care and other support for their grandkids."<sup>21</sup> The Census Bureau's 2005 American Community Survey similarly reported that 2,458,806 grandparents in America are responsible for their grandchildren who are under the age of eighteen.<sup>22</sup> Moreover, grandparents are taking care of approximately 4,657,517 grandchildren in America.<sup>23</sup> Today, an increasing number of grandparents take on a full parental role by devoting all of their time, their finances, their home, and their unconditional love to their grandchildren.<sup>24</sup> Unfortunately, upon the death of the grandparent caregiver, the grandchild will learn that she did not acquire any inheritance rights unless the grandparent left a will<sup>25</sup> or legally adopted the grandchild.<sup>26</sup>

As probate law stands now, if a grandparent caregiver dies intestate, the grandchild has no statutory inheritance rights absent a le-

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21. Tara Parker-Pope, *Encore (A Special Report): Health Matters: Yes, Raising Kids Can Be Hard, but Try Raising Grandchildren*, WALL ST. J., Dec. 12, 2005, at 10.

22. UNITED STATES CENSUS BUREAU, 2005 AMERICAN COMMUNITY SURVEY TABLE B10050: GRANDPARENTS LIVING WITH OWN GRANDCHILDREN UNDER 18 YEARS BY RESPONSIBILITY FOR OWN GRANDCHILDREN BY LENGTH OF TIME RESPONSIBLE FOR OWN GRANDCHILDREN FOR THE POPULATION 30 YEARS AND OVER BY AGE OF GRANDPARENT, [http://factfinder.census.gov/servlet/DTable?\\_bm=y&-state=dt&-context=dt&-reg=DEC\\_2000\\_SF4\\_U\\_PCT036:001%20002%20004%20006%20400;&-ds\\_name=ACS\\_2005\\_EST\\_G00\\_-CONTEXT=dt&-mt\\_name=ACS\\_2005\\_EST\\_G2000\\_B10050](http://factfinder.census.gov/servlet/DTable?_bm=y&-state=dt&-context=dt&-reg=DEC_2000_SF4_U_PCT036:001%20002%20004%20006%20400;&-ds_name=ACS_2005_EST_G00_-CONTEXT=dt&-mt_name=ACS_2005_EST_G2000_B10050) (last visited Oct. 5, 2009).

23. UNITED STATES CENSUS BUREAU, 2005 AMERICAN COMMUNITY SURVEY TABLE B09003: HOUSEHOLD TYPE AND RELATIONSHIP TO HOUSEHOLD FOR CHILDREN UNDER 18 YEARS IN HOUSEHOLD, [http://factfinder.census.gov/servlet/DTable?\\_bm=y&-state=dt&-context=dt&-reg=DEC\\_2000\\_SF4\\_U\\_PCT036:001%002%004%006%400;&-ds\\_name=ACS\\_2005\\_EST\\_G00\\_-CONTEXT=dt&-mt\\_name=ACS\\_2005\\_EST\\_G2000\\_B09003&-keyword=children&-tree\\_id=305&-redoLog=false&-all\\_geo\\_types=N&-caller=geoselect&-geo\\_id=01000US&-search\\_results=01000US&-format=&-lang=en](http://factfinder.census.gov/servlet/DTable?_bm=y&-state=dt&-context=dt&-reg=DEC_2000_SF4_U_PCT036:001%002%004%006%400;&-ds_name=ACS_2005_EST_G00_-CONTEXT=dt&-mt_name=ACS_2005_EST_G2000_B09003&-keyword=children&-tree_id=305&-redoLog=false&-all_geo_types=N&-caller=geoselect&-geo_id=01000US&-search_results=01000US&-format=&-lang=en) (last visited Oct. 5, 2009).

24. See HENDERSON & STEVENSON, *supra* note 13, at 1.

25. See Knaplund, *supra* note 9, at 5 ("If the caregiver dies unexpectedly and has no will, all his or her assets pass automatically through intestacy law to the child's parent and none goes to the child.").

26. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 (1999).

gal adoption by the grandparent if the grandchild's parent is still alive.<sup>27</sup> When an individual dies intestate, without a will, "[t]he intestacy scheme represents 'the will which the law makes,' if and only if the decedent fails to make her own."<sup>28</sup> "The intestacy laws in every United States jurisdiction provide that, once the spouse of the deceased (if such spouse exists) has been provided for out of the estate, the rest of the estate passes to the children and issue of the deceased[.]"<sup>29</sup> According to *Restatement Third of Property*, the definition of "child" in intestacy law only includes a child of a genetic parent or a legally adoptive parent.<sup>30</sup> Stepchildren who are not legally adopted are not considered their stepparents' "children," and foster children are not considered the foster parents' "children."<sup>31</sup> Grandparent caregivers often die without a spouse, thus there is a high probability that the biological parent of the grandchild, the decedent's child, will inherit the grandparent's entire estate.<sup>32</sup> "Strict inheritance rules such as those found in the United States . . . tend to pigeonhole family members into rigid categories of 'eligible' versus 'ineligible' to inherit, without taking a closer look at their individual circumstances and relationships with the decedent."<sup>33</sup> In all likelihood, grandparent caregivers might not even realize that their grandchildren will not have a right to inherit upon their death because "[o]ur family centered society presumes that bonds of love and loyalty will prevail in the distribution of family wealth along family lines, and only by affirmative action, i.e., writing a will, may this presumption be overcome."<sup>34</sup> Grandparent caregivers devote their elderly years to raising their grandchildren because of their love toward their grandchildren,<sup>35</sup> and they likely would have wanted their grandchildren to inherit at least some portion of their estate, but the current strict intestacy law will not allow it.

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27. Knaplund, *supra* note 9, at 22.

28. Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 *FORDHAM L. REV.* 1031, 1032-33 (2004) (citation omitted).

29. JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 73 (7th ed. 2005).

30. *RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS* § 2.5 (1999).

31. *Id.*

32. Harris, *supra* note 14, at 246-47.

33. *Id.* at 259.

34. James R. Robinson, *Comment: Untangling the "Loose Threads": Equitable Adoption, Equitable Legislation, and Inheritance in Extralegal Family Arrangements*, 48 *EMORY L.J.* 943, 960 (1999).

35. *ISSUES BRIEF*, *supra* note 7, at 6.

**A. Reform in Intestacy Law Is Necessary to Solve the Grandchildren's Inheritance Rights Issue Because Many Grandparent Caregivers Die Without a Will**

The focus of this Note is on altering intestacy law because grandparent caregivers often die without a will. This section details a few of the reasons why intestacy law particularly affects this group. "Three and a half million co-resident grandparents (who are often, but not always, grandparent caregivers) in the year 2000 were younger than age 60, while 2.3 million were age 60 or older."<sup>36</sup> Typically, it is more likely that the very elderly will die testate rather than a younger grandparent.<sup>37</sup> Also, due to the grandparent caregivers' financial difficulties and likelihood of poverty, it is more likely that they will die intestate.<sup>38</sup> "In fact, one study found that 72.3% of those whose estates were valued at between \$0 and \$99,999 did not have wills. In contrast, only 15.4% of those with estates valued between \$200,000 and \$1 million did not have a will."<sup>39</sup> An AARP survey found that one of the reasons those over fifty do not have a will is due to "limited assets to pass on to heirs."<sup>40</sup> Nevertheless, "[t]he caregiver, like many Americans, has no will but may have a few valuable assets, such as a car, a bank account, some furniture, or a house";<sup>41</sup> thus, recognizing grandchildren's inheritance right under intestacy law, even for a nominal estate, may be of significant financial or symbolic value to the grandchild.<sup>42</sup>

**B. The Current Intestacy Law Does Not Create Viable Avenues for the Population Most Affected by This Issue**

The only available option under the current intestacy law would be for the grandparent caregivers to obtain formal adoption of their

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36. Harris, *supra* note 14, at 243.

37. *Id.* at 244.

38. Contemporary Studies Project, *supra* note 16, at 1072; *see also* Hirsch, *supra* note 28, at 1047 ("Affluent benefactors are better able to bear the transaction cost connected with will-drafting than those who are straitened. Likewise, affluent benefactors are better able to bear the higher fees demanded by an experienced drafter, who is less apt to leave accidental gaps in a will.")

39. Higdon, *supra* note 11, at 253–54.

40. Knaplund, *supra* note 9, at 5.

41. *Id.*

42. Hirsch, *supra* note 28, at 1054 ("[I]ntestacy law again comprises a social default, albeit of a special sort—one that benefits society not because of the wealth transfers that result from it, but because of their symbolic impact on third parties.")

grandchildren.<sup>43</sup> However, grandparents often do not seek formal adoption because sensitive family matters are involved. Additionally, grandparents either assume that the living arrangement is temporary, or they do not want to deprive their children of legal parental rights.<sup>44</sup> Some of the sensitive family issues that cause grandparents to take on parental responsibilities include "[i]ncreasing drug abuse among parents, teen pregnancy, divorce, the rapid rise of single parent households, mental and physical illnesses, AIDS, crime, child abuse and neglect, incarceration"<sup>45</sup> and military deployment.<sup>46</sup> Moreover, the court may not always grant adoption, even if the court acknowledges that the grandchild's best interests will be served by remaining with the grandparent, in order to salvage the already difficult relationship between the biological parent and the grandparent.<sup>47</sup> Additionally, although an adoption process will give the grandparents full, legal parental rights, it will also cause the grandparents to face a loss of some financial assistance,<sup>48</sup> and it will involve stressful courtroom confrontation.<sup>49</sup> Those parents who are drug addicts or who have other serious problems that can severely endanger the lives of their children are not always willing to give up their legal parental rights; in these cases, grandparents may get involved in extremely costly legal battles.<sup>50</sup> Legal adoption is not a viable option for many grandparent caregivers because sensitive family issues are involved,<sup>51</sup> legal adoption court proceedings may get excessively costly and stressful,<sup>52</sup> grandpa-

43. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 (1999).

44. See Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACKLETTER L.J. 39, 64 (1993).

45. Lynne M. Casper & Kenneth R. Bryson, *Co-resident Grandparents and Their Grandchildren: Grandparent Maintained Families* (U.S. Bureau of the Census, Working Paper No. 26, 1998), available at <http://www.census.gov/population/www/documentation/twps0026/twps0026.html> (discussing different types of grandparent-maintained families and what kind of effect the family composition has on the grandchildren's well-being and the family's financial situation).

46. ISSUES BRIEF, *supra* note 7, at 1.

47. Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of Exclusive Family*, 6 AM. U. J. GENDER & L. 505, 512-13 (1998).

48. ISSUES BRIEF, *supra* note 7, at 6.

49. HENDERSON & STEVENSON, *supra* note 13, at 3.

50. See *id.* One of the reasons these cases may get costly is because of the high burden of proof grandparent caregivers face. "Grandparents seeking visitation or custody must prove that the parents are unfit or that the grandparents' custody serves the best interest of the child. Often, proof refers to physical or sexual abuse allegations, which are difficult to confirm. Courts tend to favor parents' rights to custody and care of their children." *Id.*

51. See Fenton, *supra* note 44, at 64.

52. HENDERSON & STEVENSON, *supra* note 13, at 3.



rents may lose the existing financial government assistance that they have acquired,<sup>53</sup> and the biological parents are not willing to entirely give up their legal parental rights.<sup>54</sup>

Moreover, if the grandparents try to gain guardianship or custody it only means that they are responsible for the grandchild's care, which is not equivalent to the acquired parental rights under legal adoption, and such child-custody arrangements are not recognized for inheritance purposes under intestacy laws.<sup>55</sup> Grandparent caregivers' lack of initiative to gain some form of legal right to the child does not preclude the fact that they nevertheless intended to function as permanent parents.<sup>56</sup> A grandparent's intent to raise a grandchild as one's own is exemplified by the story in the introduction section about the little girl Gina.<sup>57</sup> Unfortunately, even though the grandparents spent \$28,000 to gain legal custody of Gina,<sup>58</sup> legal custody did not create inheritance rights for the grandchild because it is not recognized under intestacy law.<sup>59</sup> Despite not obtaining legal rights to the grandchildren, when informal or private kinship providers (family member caregivers, including grandparents) were interviewed in an empirical study, "62.7% of the eighty-three kinship caregivers interviewed 'reported that they [expected] to [be raising] the child in their care until the child reached . . . adulthood [or independence]," thus verifying the permanency of the parental role that most grandparent caregivers provide.<sup>60</sup> The permanency of the parental role provided by the grandparents is akin to that of the legally adoptive parents; thus, to extend inheritance rights to the grandchildren raised by their

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53. See ISSUES BRIEF, *supra* note 7, at 6.

54. See Alba, *supra* note 1. Despite the father's drug addiction he was not willing to give up his parental rights of his daughter to the grandparents; thus, the grandparents had to spend \$28,000 to prove that it was in the best interest of the grandchild to live with them.

55. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 (1999).

56. See Sacha Coupet, *Wells Conference on Adoption Law: Swimming Upstream Against the Great Adoption Tide: Making the Case for "Impermanence,"* 34 CAP. U. L. REV. 405, 441 (2005).

57. Alba, *supra* note 1.

58. *Id.*

59. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 (1999).

60. Coupet, *supra* note 56, at 441 (alteration in original) (citing Sacha Marie Elizabeth Coupet, *Cognitive Appraisals and Family Dynamics as Predictors of Adjustment and Well-Being in Elderly Black Kinship Caregivers* 21 (1997) (unpublished Ph.D. dissertation, The University of Michigan)).

grandparents should not be a great leap, because intestacy law currently recognizes inheritance rights for legally adopted children.<sup>61</sup>

Due to many grandparent caregivers' socioeconomic class, they may have neither the knowledge<sup>62</sup> nor the financial means to utilize the existing options for ensuring inheritance rights for the grandchildren they are raising.<sup>63</sup> Grandparents who contemplate gaining some form of legal rights over their grandchildren oftentimes cannot because the financial strain of going to court is too great for elderly with fixed incomes or at risk of poverty.<sup>64</sup> According to an Urban Institute<sup>65</sup> study, one-third of the grandparent caregivers did not finish high school and over 60% do not have a college education.<sup>66</sup> Without proper education, grandparent caregivers may never contemplate estate planning or know who their heirs will be upon death. They may simply assume that their grandchildren will be eligible to automatically inherit. This assumption may be logical because they raised the grandchildren as their own children, but intestacy law does not acknowledge such parental relationships.<sup>67</sup>

Grandparent caregivers' inadequate financial means to secure inheritance rights for the grandchildren is evidenced by "[a] 2003 study by the Urban Institute . . . [which] found that among grandparents responsible for raising children, 37% had incomes below the federal poverty threshold, and 66% were low-income (less than twice the poverty level)."<sup>68</sup> Grandparent caregivers' financial situations worsen when they accept the responsibility of raising their grandchild because "[t]he expense of raising a grandchild can wipe out retirement savings or further exacerbate already difficult financial situations."<sup>69</sup> Also, grandmothers that take care of their grandchildren are less likely to be married than male caregivers, thus grandmothers are less likely to continue working because they need to be at home to take care of

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61. *Id.*

62. See *Skipping a Generation: Grandparents Raising Grandchildren*, ECONOMIST, June 16, 2007, at 39 (noting that one-third of grandparent caregivers do not have a high school diploma).

63. See Harris, *supra* note 14, at 244.

64. HENDERSON & STEVENSON, *supra* note 13, at 3.

65. *Skipping a Generation: Grandparents Raising Grandchildren*, *supra* note 62, at 39 (Urban Institute is a "center-left think-tank").

66. *Id.*

67. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 (1999).

68. *Skipping a Generation: Grandparents Raising Grandchildren*, *supra* note 62, at 39.

69. ISSUES BRIEF, *supra* note 7, at 6.

the children.<sup>70</sup> Consequently, grandmothers experience extreme financial hardships.<sup>71</sup> Grandparent caregivers' financial situations will be deteriorating as they raise their grandchildren due to additional costs for education, health care, and other needs of the grandchildren.<sup>72</sup> Typically individuals at or around the poverty level may even have a difficult time providing their families with food, shelter, and other basic needs.<sup>73</sup> People in that kind of financial situation plausibly cannot afford court expenses solely for the purpose of having the law recognize the grandparent caregivers' relationships with their grandchildren as valid parental relationships, even though such recognition may be important and desired by both the grandparents and the grandchildren.

Lack of inheritance rights for grandchildren of grandparent caregivers affects African-Americans the most,<sup>74</sup> as the phenomenon of grandparents raising their grandchildren is much more prevalent in African-American communities.<sup>75</sup> Part of the reason African-Americans are affected the most is because they are more likely to die without a will due to their poverty level;<sup>76</sup> in 2004, the poverty level for African-Americans was 16.2% higher than the rate for non-Hispanic whites.<sup>77</sup> "Extended Care Systems" in which family members help raise their relatives' children, although less common than in the African-American community, are also common in Asian-American, Latino, and Native American cultures.<sup>78</sup> "Nine percent of African American children under age 18 were living in grandparent-headed households compared with 6% of Hispanic children and 4% of non-Hispanic White children."<sup>79</sup> African-Americans are more likely to raise their grandchildren than grandparents of other races because the reliance on extended family and informal adoption is central to the

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70. Minkler & Fuller-Thompson, *supra* note 18, at S85.

71. *Id.* at S88.

72. *Id.* at S89.

73. *See id.*

74. *Id.* at S82.

75. *See id.*

76. Press Release, U.S. Census Bureau News, Income Stable, Poverty Up, Numbers of Americans with and Without Health Insurance Rise, Census Bureau Reports (Aug. 26, 2004), [http://www.census.gov/Press-Release/www/releases/archives/income\\_wealth/002484.html](http://www.census.gov/Press-Release/www/releases/archives/income_wealth/002484.html).

77. Harris, *supra* note 14, at 245.

78. Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 245 (2001).

79. Minkler & Fuller-Thomson, *supra* note 18, at S82.

African-American community's practices.<sup>80</sup> African-Americans "constantly face the reality that they may need the help of kin for themselves and their children. As a result, they anticipate these needs, and from year to year they have a very clear notion of which kinsmen would be willing to help."<sup>81</sup> The African-American community has created its own implied set of rules based on familial ties, despite the fact that the American legal system may not recognize this behavior as forming legally valid relationships.<sup>82</sup> In an African-American community, when a grandmother takes a child from the natural mother it is implied to last a lifetime.<sup>83</sup> The grandmother takes on most of the parental tasks, and the child does not have the same claims and affective ties to his or her natural mother as do the children that the natural mother actually raises.<sup>84</sup> For all practical purposes, the relationship between the grandparents and the grandchild looks like an adoption relationship which would confer inheritance rights to the adopted child. Unfortunately, again, a legal adoption relationship is typically not established, and there is no will left behind by the grandparent caregiver to acknowledge the grandchild's inheritance rights, thus the grandchild is left with no protection under the current intestacy law.<sup>85</sup>

**C. The Solution to the Current Problem of Underinclusiveness in Intestacy Law, with Regards to Grandparent Caregivers, Should Strive to Meet All the Vital Objectives of Intestacy Law**

Intestacy law in America is premised on four key objectives,<sup>86</sup> the majority of which are largely related to the legal definition of family, or more specifically "child," as interpreted in the probate codes. The first of these objectives is "to carry out the probable intent of the average intestate decedent."<sup>87</sup> Regardless of who else stands to inherit part of the estate, a deceased grandparent caregiver would have wished for the grandchild to inherit at least a portion of the estate because of

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80. Fenton, *supra* note 44, at 43–44.

81. CAROL STACK, *ALL OUR KIN* 67 (1974).

82. *See id.*

83. *Id.* at 47.

84. *Id.*

85. *See* Harris, *supra* note 14, at 245–46.

86. Marissa J. Holob, Note, *Respecting Commitment: A Proposal to Prevent Legal Barriers from Obstructing the Effectuation of Intestate Goals*, 85 *CORNELL L. REV.* 1492, 1500 (2000).

87. Harris, *supra* note 14, at 248 (internal footnote omitted).

symbolic reasons or for practical financial support,<sup>88</sup> and such wishes would be protected under the primary policy behind the intestacy statutes.<sup>89</sup> The second goal is to "ensur[e] the fair distribution of property among family members."<sup>90</sup> This goal is closely related to the definition of family in the intestacy statutes because the fair distribution of the estate will depend on who is eligible to inherit under the statute's definition of "child."<sup>91</sup> Absent the restrictive definition of family, it would seem intuitively fair to distribute a portion of the property to a child who relied on the grandparent's emotional and financial support until his or her adulthood.<sup>92</sup> The third objective, to "protect[] the financially dependent family,"<sup>93</sup> is also seemingly linked to the definition of family. If the intestacy statutes were to include grandparent caregivers' grandchildren, this third objective would surely anticipate financially protecting the grandchildren, who were dependent on the deceased grandparents in many facets of life. Also, the grandchildren may place a heavier financial burden on the state if the inheritance rights are not recognized.<sup>94</sup> The fourth goal, "to promote and encourage the nuclear family,"<sup>95</sup> is questionable due to the radical changes in the definition of family.<sup>96</sup> "The concern is that by excluding non-traditional units, the nuclear family does not reflect the reality of many, if not most, people's lives. Furthermore, it masks and devalues other forms of family which are in fact quite functional and socially valuable."<sup>97</sup> By and large, the traditional concept of family has begun to evolve in family law to reflect changes in society.<sup>98</sup> On the other hand, intestacy law has remained unchanged,<sup>99</sup> which has created a rift in the necessary cohesion of these two areas of law.

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88. *See id.* (noting that grandparent caregivers raise their grandchildren because they genuinely care about them and the decedent's probable intent should correspond with those feelings).

89. *See id.*

90. Holob, *supra* note 86, at 1500.

91. Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 644-55 (2002).

92. *See* Coupet, *supra* note 56, at 441 (implying that grandchildren relied on their grandparents to take care of them until adulthood if the caregivers said that they anticipated to take care of them until they reach the age of majority).

93. Holob, *supra* note 86, at 1500 (footnote omitted).

94. Harris, *supra* note 14, at 248.

95. Holob, *supra* note 86, at 1501 (footnote omitted).

96. *Id.*

97. Young, *supra* note 47, at 510.

98. David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 125 (2006).

99. Holob, *supra* note 86, at 1501.

A suggestion that has been proposed by Michelle Harris, the author of a note in the *National Academy of Elder Law Attorneys Journal*, is to implement a limited form of a family maintenance system under which inheritance rights will be established via a court proceeding after the death of a grandparent caregiver who dies intestate.<sup>100</sup> The system would be limited to only financially dependent minors of decedents who do not leave behind a spouse.<sup>101</sup> One of Harris's arguments for proposing a change is that "[i]t is counterintuitive . . . to assume that most such grandparents would want to see their estates pass to parents [the decedent's children] who are unable or unwilling to care for the grandchildren, with no monetary provision for the dependent grandchildren themselves."<sup>102</sup> Although it is a strong reason why change needs to occur in this area of law, overall the family maintenance system is not the best solution to the current problem. The sole purpose of her system is to provide financial support to dependent minors out of the decedent's estate, not to provide legal recognition of a parental relationship that automatically gives rise to inheritance rights irrespective of age and financial status.<sup>103</sup> A more appropriate solution would amend the definition of "child" in the intestacy statutes to recognize a parental relationship between a grandparent caregiver and a grandchild. Hence, giving grandchildren inheritance rights by amending intestacy statutes will fulfill multiple goals of intestacy law and will recognize a nontraditional parental relationship in the eyes of the law.

### III. Analysis

The analysis section will describe the recently proposed family maintenance system and the problems associated with implementing such a system to correct the current intestacy law dilemma regarding inheritance rights for grandparent caregivers' grandchildren. Next, this section will discuss case law and doctrines, which address the emerging trend to move away from the strict nuclear family model toward recognizing nontraditional families in the family law setting. Such changes in family law are inconsistent with the outdated definition of "child" in intestacy law; thus, the modern movement in family

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100. Harris, *supra* note 14, at 265.

101. *Id.* at 260-62.

102. *Id.* at 248.

103. *Id.* at 265.

law should inspire a change in intestacy law to recognize grandparent caregivers' relationships with their grandchildren as legitimate relationships granting inheritance rights to the grandchildren. The family law doctrine of equitable adoption may be the basis for finding a solution to the current intestacy law problem if the goals of intestacy law are preserved and the current criticisms of the doctrine are addressed.

#### A. History and Elements of Harris's Proposed Maintenance System

Harris's proposed suggestion for establishing inheritance rights for grandchildren of grandparent caregivers stems from the maintenance system in New Zealand.<sup>104</sup> It was the first common-law country that adopted the family maintenance system, under which "courts were at liberty to allow certain family members not provided for by a testator to take such portion of the testator's estate as needed to provide for their maintenance or support."<sup>105</sup> Due to the broad scope of the system abroad, American scholars have been skeptical that it infringes too much on testamentary freedom by being available to any family member in need of maintenance and overriding the decedent's will, if one was made.<sup>106</sup> Harris suggests that the maintenance system in the American legal landscape should only apply to the following: intestate estates, financially dependent minors or incompetents, and decedents who do not leave behind a spouse.<sup>107</sup> Harris also proposes that "[i]n order to protect against high costs that can deplete a small estate, the system should incorporate automatic review of intestate cases via appointment of guardians *ad litem*."<sup>108</sup> Although Harris addresses weaknesses of the system, she believes that giving judges the discretion to decide inheritance rights for grandchildren in such situations is the best solution to the present problem.<sup>109</sup>

#### B. Problems with the Family Maintenance System

As the title of Harris's article suggests, the main focus of the family maintenance system is on preserving the economic well-being of

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104. *Id.* at 249.

105. *Id.*

106. *See id.* at 252–55.

107. *See id.* at 260–62.

108. *Id.* at 262.

109. *See id.* at 265.

the family members, which is one of the goals of intestacy law, but not the most important goal.<sup>110</sup> The major criticism of Harris's suggestion is that the system does not necessarily meet the other goals of intestacy law, which, as stated earlier, are to "carry out the probable intent of the average intestate decedent"<sup>111</sup> and to "ensur[e] the fair distribution of property among family members."<sup>112</sup> In all probability, grandparent caregivers treated their grandchildren as if they were their adopted children,<sup>113</sup> and under the current intestacy law adopted children are automatically eligible for inheritance.<sup>114</sup> Hence, it does not seem like a "fair distribution of property among family members"<sup>115</sup> if similarly situated relatives are not equally considered to be heirs solely because they do not fit Harris's age or financial dependency requirement.<sup>116</sup> Harris does not acknowledge that the deceased grandparent caregiver's "probable intent"<sup>117</sup> would most likely have been to confer the same inheritance rights as are currently conferred on legally adopted children.<sup>118</sup> Under her proposed system, the inheriting requirements imposed on the grandchildren would differ from those currently imposed on the legally adopted children.<sup>119</sup> She recommends that experts in the field of child support and maintenance come up with a guideline for what portion of the estate the grandchildren would be eligible.<sup>120</sup> It may be the same portion that the "children" of the decedent would be eligible for under intestacy statutes, but it also may be the amount necessary to maintain the grandchildren in the lifestyle they were accustomed to with their grandparents.<sup>121</sup> If it is the latter, the fair distribution goal<sup>122</sup> is not met under Harris's system because under the current intestacy law, other heirs do not receive a

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110. Holob, *supra* note 86, at 1500.

111. DUKEMINIER ET AL., *supra* note 29, at 62.

112. Holob, *supra* note 86, at 1500.

113. See Coupet, *supra* note 56, at 441.

114. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 (1999).

115. Holob, *supra* note 86, at 1500.

116. Harris, *supra* note 14, at 260–61.

117. DUKEMINIER ET AL., *supra* note 29, at 62.

118. Harris, *supra* note 14, at 260–61. One example of how Harris's system differs from current inheritance rights for adopted children is that it would only apply to "financially dependent minors or incompetents . . . perhaps only in situations in which the decedent does not leave behind a spouse who is also related to and willing to care for the dependant." *Id.*

119. See DUKEMINIER ET AL., *supra* note 29, at 73.

120. Harris, *supra* note 14, at 262 n.146.

121. *Id.*

122. Holob, *supra* note 86, at 1500.



portion of the decedent's estate based on the amount necessary to maintain their lifestyle.<sup>123</sup>

Under Harris's system, if other relatives wish to take on the caretaking responsibilities upon the death of the grandparent, the court will appoint a guardian *ad litem* to decide if a minor dependent is eligible for a portion of the inheritance.<sup>124</sup> Hence, someone being cared for by a family member will be less likely to receive a portion of the inheritance compared to a child that will be in the care of the state because it will be assumed that the new caregivers will provide financially for the dependent child.<sup>125</sup> Although Harris's recommendation is financially rational, it does not account for the fact that an average decedent's intent is also based on noneconomic reasons.<sup>126</sup> Despite whether the grandchild was taken in by another family, the decedent may have wanted the grandchild to be able to inherit what a child of the decedent would be eligible to inherit purely based on their emotional bond and the significant role that they played in each other's lives.<sup>127</sup> If the decision to allow grandchildren to inherit from their grandparent caregivers is left up to the discretion of the courts or to the guardian *ad litem*, it would still tie up the court system and deplete the state's funds.<sup>128</sup> Such costs may be justifiable if the proposed maintenance system met all the goals of intestacy law and the benefits of the system had a significant positive impact on promoting the cohesion between family law and intestacy law in the legal system.

Also, Harris might not have considered another unintended consequence of the maintenance system. Due to its discretionary nature and lack of specific requirements, implementing this system may open the flood gates to family members who were not intended to be covered under such a system but are requesting inheritance rights.<sup>129</sup> Harris's system does not set out elements for what it means to be a "financially dependent" minor;<sup>130</sup> consequently, minors who may have occasionally received financial support from the decedent may bring frivolous claims alleging that they qualify as dependent minors. Family members might either try to argue that they are minor dependents

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123. Harris, *supra* note 14, at 264.

124. *Id.* at 263.

125. *See id.* at 262–63.

126. *See* Robinson, *supra* note 34, at 954.

127. *See id.* at 960.

128. Harris, *supra* note 14, at 262–63.

129. *See id.* at 253.

130. *Id.* at 261.

who are eligible for inheritance rights or try to apply some equitable doctrine to show that, similar to dependent minors, they should be eligible for a portion of the estate.

Furthermore, under the current intestacy law the court does not ask if the biological child or the legally adopted child is a dependent or in need of maintenance;<sup>131</sup> these parties automatically have a legal right to inherit.<sup>132</sup> Thus, the proposed maintenance system would create an unfair inconsistency in the law by requiring an analysis of the grandchild's dependency and her need for maintenance, despite the fact that the grandparents held themselves out as parents for all practical purposes, akin to legally adoptive parents. Similarly, the current intestacy statutes do not restrict inheritance of a child to that of a minor child.<sup>133</sup> An adult child can automatically inherit after the spouse of the deceased had inherited a portion of the estate assigned to a spouse under an intestacy statute.<sup>134</sup> Given that one of the significant goals of intestacy law is to implement the donative intent of an average decedent, it is logical to conclude that grandparent caregivers who informally adopt grandchildren have the same intent for their grandchildren to inherit as the grandparent caregivers who legally adopt their grandchildren.

Harris argues that "if the goal is to protect the most vulnerable members of our society—including grandchildren dependent upon grandparent caregivers—then there is no reason to expand the system to allow competent adult children to apply for maintenance."<sup>135</sup> Harris's statement addresses one of the goals of intestacy law, and it is a good public policy to protect the vulnerable members of our society, but the statement is not entirely accurate because the policy of intestacy law is not solely concerned with protecting the financially dependent family.<sup>136</sup> Likewise, her statement is not accurate because there is

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131. Foster, *supra* note 78, at 208 ("[I]t does not matter whether one [heir] is rich and another poor; one a minor, one not; one blind and destitute, [and] another not—they share equally in the estate.").

132. DUKEMINIER ET AL., *supra* note 29, at 73; Foster, *supra* note 78, at 206 ("The decedent's closest relatives by blood, adoption, or marriage automatically inherit, irrespective of their actual relationship with the decedent.").

133. Foster, *supra* note 78, at 208.

134. DUKEMINIER ET AL., *supra* note 29, at 73.

135. Harris, *supra* note 14, at 261.

136. See DUKEMINIER ET AL., *supra* note 29, at 62–64 (indicating that although it is true that the secondary intent of the intestacy statutes is to protect the economic health of the family, the protection of the financial well-being of the family does not translate into the decedent taking on the heavy burden and the duty to protect the most vulnerable members of the society).

a reason "to expand the system to allow competent adult children to apply for maintenance."<sup>137</sup> The reason is that an average decedent's donative intent most likely does not strictly depend on the successor's financial status, but rather is based on familial ties and the desire to leave a piece of herself with her loved ones.<sup>138</sup> Because a decedent's donative intent is intertwined with the decedent's love and familial ties to the successors, the problem should be resolved by modifying this area of law to recognize the emerging nontraditional family composition, thereby maintaining consistency in the definition of family among different areas of law. By doing so, Harris's public policy concern regarding protecting financially dependent children will be met as well.

**C. The Importance of the Emerging Movement away from the Traditional Nuclear Family Model in Family Law Setting and the Impact the Changes in Family Law Should Have on the Outdated Intestacy Law**

A shift in family law, which bears a relationship to the current need to modify intestacy law, can be traced back to 1977. In 1977 the United States Supreme Court in *Moore v. City of East Cleveland* recognized the abundant existence of nontraditional family households in America and held that the Housing Code of the city of East Cleveland, Ohio, was unconstitutional on the basis of the Due Process Clause of the Fourteenth Amendment.<sup>139</sup> Under the East Cleveland Housing Code, a grandmother was permitted to live with her son and his dependent child, but she broke the law by also taking into her household her other grandson whose mother had passed away.<sup>140</sup> The Court reprimanded East Cleveland for "slicing deeply into the family itself"<sup>141</sup> because "[i]n particular, it makes a crime of a grandmother's choice to live with her grandson in circumstances like those presented here."<sup>142</sup> Because intestacy law is so entangled with family law, changes in the

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137. Harris, *supra* note 14, at 261.

138. See Robinson, *supra* note 34, at 960.

139. 431 U.S. 494, 506 (1977) ("Whether or not such a household is established because of personal tragedy, the choice of relatives in this degree of kinship to live together may not lightly be denied by the state.").

140. *Id.* at 497.

141. *Id.* at 498.

142. *Id.* at 499.

family law setting should have an impact on intestacy law;<sup>143</sup> thus, in the words of the United States Supreme Court, intestacy law should not be allowed to “slic[e] deeply into the family itself”<sup>144</sup> by prohibiting grandchildren to inherit from their grandparents, who raised them as their own children. The significance of *Moore* is that the Court acknowledges the importance of family and that it “is deeply rooted in this Nation’s history and tradition,”<sup>145</sup> but yet it rejects the notions of “standardizing its children and its adults by forcing all to live by certain narrowly defined family patterns.”<sup>146</sup> Recognizing inheritance rights for grandchildren who are raised by grandparent caregivers might be a few steps removed from the Supreme Court’s recognition of nontraditional families. Nevertheless, a logical progression of the legal system would imply that the totality of the changes in court decisions and family law doctrines would lead to implementing changes in provisions of the intestacy statutes that deal with an outdated definition of family.

Before addressing changes in family law, which further prove a movement away from a strict nuclear family, it is important to address a case that on its face may seem to cut against the argument that family law is moving away from a strict interpretation of family that connotes solely traditional nuclear family. A United States Supreme Court case, *Troxel v. Granville*, addresses a family conflict regarding whether a mother’s parental rights outweigh the grandparents’ visitation rights.<sup>147</sup> After the mother said she wished to limit the grandparents’ visitations to one short visit per month, the grandparents petitioned for visitation rights of their grandchildren and the mother opposed the petition.<sup>148</sup> One might argue that the holding in *Troxel* forecloses the importance of grandparents’ rights because they are trumped by the traditionally recognized parental rights.<sup>149</sup> The Court held that a Washington statute, which allowed anyone to petition for

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143. See Foster, *supra* note 78, at 200–01 (noting that the inheritance system still relies on notions of traditional nuclear families despite the evolving definition of family in other areas of law. “Several authors have recognized that American inheritance law is rooted in a family paradigm.”).

144. *Moore*, 431 U.S. at 498.

145. *Id.* at 503.

146. *Id.* at 506.

147. 530 U.S. 57 (2000).

148. *Id.* at 60–61.

149. *Id.* at 72 (holding that the visitation order in favor of the grandparents “was an unconstitutional infringement on Granville’s fundamental right to make decisions concerning the care, custody, and control of her two daughters.”).

visitation rights, violated the mother's "due process right to make decisions concerning the care, custody, and control of her daughter" based on the facts of the particular situation.<sup>150</sup> Although the *Troxel* Court gave deference to the parent,<sup>151</sup> the grandparent caregivers' non-traditional parental relationship with their grandchild can still be legally recognized. As David Meyer, a professor of law at the University of Illinois and a well-known scholar in family law, states, "the Justices' obvious desire to leave flexibility in future cases so that the traditional prerogatives of parents might be accommodated with the weighty interests in non-traditional, 'parent-like' relationships suggests that parental rights are not as robust and clearly defined as some state court decisions assume."<sup>152</sup>

To begin with, Justice Sandra Day O'Connor comments in *Troxel* on the modern family composition by saying that the "demographic changes . . . make it difficult to speak of an average American family."<sup>153</sup> Meyer supports Justice O'Connor's argument by reporting that "[t]he traditional ideal of a 'nuclear family,' made up of a married couple raising their children, is fading, down from 40 percent of all households in 1970 to less than a quarter by 2000."<sup>154</sup> Furthermore, one result of nontraditional families in America is that a nonparent who provides care-giving functions has been recognized as the "de facto parent" and has been granted custody or visitation rights over the objection of the legal parent.<sup>155</sup> Specifically, in *V.C. v. M.J.B.*, a cohabitating lesbian couple in New Jersey had a child by way of artificial insemination.<sup>156</sup> They took care of the child, shared parental functions equally, and established their commitment to one another in a commitment ceremony.<sup>157</sup> The couple split up, and the New Jersey Supreme Court did not apply a parental preference for the woman that gave birth.<sup>158</sup> The court held that

[t]hird parties who live in familial circumstances with a child and his or her legal parent may achieve, with the consent of the legal parent, a psychological parent status vis-à-vis a child . . . . When there is a conflict over custody and visitation between the legal

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150. *Id.* at 75.

151. *See Meyer, supra* note 98, at 142.

152. *Id.*

153. *Troxel*, 530 U.S. at 63.

154. *Meyer, supra* note 98, at 132.

155. *Id.* at 133-34.

156. *V.C. v. M.J.B.*, 748 A.2d 539, 542 (N.J. 2000).

157. *Meyer, supra* note 98, at 133.

158. *Id.*

parent and a psychological parent, the legal paradigm is that of two legal parents<sup>159</sup> and the standard to be applied is the best interests of the child.

The holding in *V.C.* and other similar cases, which digress from traditional notions of family, are catalysts for recognizing that the definition of family in intestacy law needs to keep up with the modern times. Such court decisions also increase the likelihood of the inference that the decedent anticipated that his or her estate would pass on to certain beloved family members other than the relatives currently enumerated as automatic heirs in the intestacy statutes.

Even more pertinent to the grandparent caregiver's intestacy issue is that "courts have begun to confer legal parenthood in the absence of an adoption decree, marriage license, or any pretense whatsoever of genetic relation."<sup>160</sup> In certain jurisdictions, like California, unmarried men have assumed full parental responsibility for genetically unrelated children by willingly conceding paternity.<sup>161</sup> The Supreme Court of California believes that "[a] man who has lived with a child, treating it as his son or daughter, has developed a relationship with the child that should not be lightly dissolved . . . . This social relationship is much more important, to the child at least, than a biological relationship of actual paternity."<sup>162</sup> Similarly, grandparent caregivers who have developed a strong relationship with their grandchildren by performing daily parental functions equivalent to grandparents who legally adopt their grandchildren should have legal rights under the intestacy statutes to automatically bequeath their inheritance to their grandchildren. "Without any clear sorting of parenthood's essential determinants, the law is clearly coming to accept a broader and more fluid conception of what it means to be a parent";<sup>163</sup> thus, intestacy statutes, which greatly depend on the definition of family, should be modified to reflect the modern definition of "child."

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159. *V.C.*, 748 A.2d at 555.

160. Meyer, *supra* note 98, at 135.

161. See *In re Nicolas H.*, 46 P.3d 932, 941 (Cal. 2002).

162. *Id.* at 938 (citation omitted).

163. Meyer, *supra* note 98, at 136.

**D. A Family Law Doctrine of Equitable Adoption May Be the Key to Solving Intestacy Law Problems If It Can Be Implemented in a Way that Will Preserve Intestacy Law Policies and If It Will Not Clash with Overarching Legal Concepts and Goals**

Some jurisdictions have begun to recognize a modern meaning of family and parenthood in the realm of intestacy law by judicially recognizing a family law doctrine of equitable adoption. "[E]quitable adoption is designed to protect the inheritance rights of an individual who, believing himself to be the child (whether biological or adopted) of the decedent, nonetheless lacks the legal status of 'child' as defined in the intestate succession statutes."<sup>164</sup> Unfortunately, almost one-third of the courts in America that considered the equitable adoption doctrine have discarded it because adoption is exclusively governed by statute.<sup>165</sup> "As of 1997 thirty-nine jurisdictions had considered the equitable adoption doctrine. While twenty-seven jurisdictions have clearly recognized the doctrine, at least twelve have not."<sup>166</sup> The equitable adoption doctrine could be an effective remedy in making intestacy law more inclusive,<sup>167</sup> and accordingly benefitting the grandchildren of grandparent caregivers, if only the obstacle that adoption is governed by statute could be overcome.

More specifically, the recovery under the equitable adoption doctrine is currently recognized by jurisdictions either under the specific performance of an unperformed contract to adopt between natural and foster parent or under an equitable estoppel of one's ability to deny the grandchild the status of an adopted child.<sup>168</sup> The problem with the contract approach is that the courts require the existence of a contract between the biological parent and the grandparent caregiver.<sup>169</sup> The Supreme Court of Arizona said that one of the requirements is that "the promisor must promise in writing or orally to adopt the child."<sup>170</sup> The existence of such a contract is very difficult to prove, especially in informal kin care, which African-Americans are often in-

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164. Higdon, *supra* note 11, at 256.

165. Brent R. Drake, Note, *Status or Contract? A Comparative Analysis of Inheritance Rights Under Equitable Adoption and Domestic Partnership Doctrines*, 39 GA. L. REV. 675, 681 (2005).

166. Higdon, *supra* note 11, at 261 n.230 (internal citation omitted).

167. *Id.* at 261.

168. William G. Reeves, *Inheritance by Equitable Adoption: An Overview of Theory and Proof*, 57 J. MO. B. 130, 130 (2001).

169. Higdon, *supra* note 11, at 258.

170. *In re Estate of Lamfrom*, 368 P.2d 318, 321 (Ariz. 1962).

involved in as part of their culture.<sup>171</sup> Because the practice of grandparent caregivers raising grandchildren is most prevalent in the African-American community,<sup>172</sup> it is important that the approach adopted for solving this problem is the most suitable remedy for the affected families. Additionally, it is impossible to produce a contract in cases where the biological parent refuses to allow the grandparent to legally adopt the grandchild, but nevertheless for all practical purposes the grandparent takes on a permanent parental role. Also, another problem with the contract approach is that "specific performance of a contract to adopt is impossible after the death of the parties who gave the promise."<sup>173</sup>

On the other hand, the equitable estoppel theory of recovery under equitable adoption focuses on the need to protect the grandchildren of grandparent caregivers from being left with nothing at the grandparents' death, after the grandchild performed everything contemplated by the parent-child relationship.<sup>174</sup>

Where one takes a child into his home as his own, thereby voluntarily assuming the status of parent, and by reason thereof obtains from the child the love, affection, companionship, and services which ordinarily accrue to a parent, he is thereafter estopped to assert that he did not adopt the child in the manner provided by law.<sup>175</sup>

Equitable estoppel has three requirements that must be met: "(1) a promise or representation of fact; (2) actual and reasonable reliance on the promise or representation; and (3) resulting detriment."<sup>176</sup> It may be argued that the third prong is difficult to satisfy in the grandparent caregiver context because the child had shelter, food, and financial support from the grandparent, thus it appears that there is no detriment to the child.<sup>177</sup> On the contrary, there might be psychological detriment because despite the grandchild's parent-child relationship with the grandparent caregiver, "society views [the grandchild] as a legal stranger to his family."<sup>178</sup>

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171. See STACK, *supra* note 81, at 47.

172. Minkler & Fuller-Thomson, *supra* note 18, at S82.

173. *Wooley v. Shell Petroleum Corp.*, 45 P.2d 927, 931 (N.M. 1935).

174. Higdon, *supra* note 11, at 256.

175. *Id.* at 259 (citation omitted).

176. 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, 776 (1984).

177. *Id.*

178. *Id.* at 778.



It is comforting to know that although it is hard to overcome the strict requirements of both the contract approach and the equitable estoppel approach, courts using both approaches have allowed advocates to use circumstantial evidence to prove the existence of an adoption agreement.<sup>179</sup>

This evidence typically includes such things as (1) whether the child was taken into the decedent's home at a young age; (2) whether the child maintained a relationship with his natural parents after being taken in by the decedent; (3) whether the decedent held the child out publicly as his own child; and (4) whether the decedent provided the child with any inter vivos or testamentary gifts that would signify the decedent's recognition of the child as his own.<sup>180</sup>

Although circumstantial evidence seems to loosen the strict requirements, it actually does not because courts have said that such evidence must be "consistent only with the existence of the equitable adoption and inconsistent with any other reasonable hypothesis leaving nothing to conjecture."<sup>181</sup> Thus, intention to adopt is not enough to recognize equitable adoption, and promise to adopt must be proven,<sup>182</sup> but as stated earlier it is a difficult hurdle to overcome.<sup>183</sup>

West Virginia was bold enough to recognize the equitable adoption doctrine in an intestacy law setting without the contract requirement.<sup>184</sup> *Wheeling Dollar Savings & Trust Co. v. Singer (Wheeling)* held that

[w]hile 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 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.<sup>185</sup>

The court's holding shifts the focus from the contractual obligation theory to the importance of the parental relationship between the ca-

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179. *Id.* at 780.

180. Higdon, *supra* note 11, at 263.

181. *Coon v. Am. Compressed Steel, Inc.*, 207 S.W.3d 629, 634 (Mo. Ct. App. 2006) (citation omitted).

182. *See King v. Heirs & Beneficiaries of Watkins*, 624 S.W.2d 252, 257 (Tex. App. 1981).

183. *See Higdon, supra* note 11, at 258.

184. *Wheeling Dollar Sav. & Trust Co. v. Singer*, 250 S.E.2d 369, 374 (W. Va. 1978).

185. *Id.*

regiver and the child, indistinguishable from the relationship arising under legal adoption, thus drawing attention to the element of equitable adoption theory that satisfies the decedent's donative intent. The court enumerated some of the circumstances that prove the existence of equitable adoption:

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.<sup>186</sup>

The approach this court takes in recognizing equitable adoption is progressive and the most compatible with the modern, evolving, non-traditional family model. Additionally, because many African-American families cannot meet the contract requirement enforced in most jurisdictions,<sup>187</sup> countless grandchildren who have been raised by their grandparents cannot seek to obtain inheritance from their grandparents unless an approach similar to *Wheeling's* approach is adopted.

Despite equitable adoption making intestacy law more inclusive by providing inheritance rights to those whom the decedent would have wanted to be heirs, some critics might fear that equitable adoption will destroy the predictability that current intestacy statutes provide.<sup>188</sup> It is true that judicial decisions in intestacy law which recognize the nontraditional family, like those recognizing equitable adoption, will diminish the predictability of inheritance, but the existing law has provided predictability at the expense of donative intent. Michael J. Higdon, the author of an article in the *Wake Forest Law Review*, rightly pointed out that "in terms of the goal of creating certainty and predictability in the intestate scheme, these concerns should not outweigh the benefits of guarding donative intent, protecting a decedent's surviving family, and creating a nondiscriminatory inheritance scheme."<sup>189</sup> The best approach to this problem would be to implement a change that would maintain a certain level of predictability, but

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186. *Id.* at 373-74.

187. See STACK, *supra* note 81, at 47 (indicating that the cultural understanding of kin care in African-American communities does not contemplate a contractual requirement).

188. Higdon, *supra* note 11, at 271.

189. *Id.*

would simultaneously account for the donative intent of the decedent and protect the financial well-being of the family.

Most courts that have rejected the equitable adoption doctrine nonetheless believe that inheritance rights of certain people, like equitably adopted children, should be recognized, but still the judges feel like their hands are tied.<sup>190</sup> Courts have said that the matter should be taken into legislative hands.<sup>191</sup> Thus, if the current intestacy law is going to be modified it must be done via the legislative process to include equitable adoption under the definition of "child." If the modification of intestacy statutes will recognize the donative intent of the decedent, provide financial security for the decedent's family members, and fairly apportion the estate among the heirs, then the best solution to the problem presented, as implied by the judicial branch, would be to legislatively include equitable adoption in the intestacy statutes in the interest of justice.

#### IV. Recommendation

To begin with, as stated above, the best solution to the current problem of equitably adopted children being denied inheritance rights is to legislatively modify intestacy statutes to include equitably adopted children in the definition of "child." A scholar in this area of law, Professor Mary Louise Fellows, would likely support this proposal because she opines that "[t]estamentary freedom should include the right not to have to execute a will in order to . . . pass [wealth] to natural objects of the decedent's bounty."<sup>192</sup> By not providing inheritance rights to the grandchildren of grandparent caregivers under in-

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190. See *Urick v. McFarland*, 625 So. 2d 1253, 1254 (Fla. Dist. Ct. App. 1993) ("As family structure becomes less traditional, it is likely that the time-honored rules of intestacy will frequently fail to accommodate a decedent's true testamentary intent. It is possible that section 732.103 could be amended to grant an intestate share to stepchildren of long-term marriages even when those children have not been legally adopted. This, however, is a legislative function and not one for the judiciary. In the meantime, the members of such families would be well-advised to prepare wills.").

191. *Id.* at 1254; see also *Higdon*, *supra* note 11, at 275 ("By expanding the existing intestacy statutes to permit a functional approach to defining the parent-child relationship, these states would seemingly no longer have any objection to allowing informally adopted children to petition the court for inheritance rights equal to a formally adopted child.").

192. Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 321, 323 (2006).

testacy law, the law “creates a trap for the ignorant or misinformed,”<sup>193</sup> which may describe many grandparent caregivers. The scope of this proposal may reach beyond providing inheritance rights for grandchildren of grandparent caregivers, which may have its own benefits and drawbacks, but this Note only focuses on the recommendation as it applies to grandchildren of grandparent caregivers. Because probate law is controlled by state law,<sup>194</sup> it might be a good idea to first introduce the change of incorporating the equitably adopted grandchildren into the definition of “child” in the *Uniform Probate Code*. One of the underlying purposes of the *Uniform Probate Code* is “to make uniform the law among the various jurisdictions.”<sup>195</sup> Therefore, a good start to promoting an amendment to state legislation in an intestacy law context is to first encourage the writers of the *Uniform Probate Code* to amend the definition of “child” in the code. Currently the *Uniform Probate Code’s* definition of “child” explicitly excludes grandchildren.<sup>196</sup>

The equitable adoption proposal does not completely eliminate the exclusion of grandchildren in the definition of “child,” it only applies to grandparent caregivers’ grandchildren. Grandchildren generally can still be excluded under intestacy law because otherwise intestacy law will be overinclusive. The proposal advocates that the *Uniform Probate Code* should allow grandchildren to inherit only in exceptional situations where a grandparent caregiver’s parental role is identical to that of a legally adoptive parent. The judiciary system acknowledges that the change must come from the state legislature, because “adoption is purely a creature of statutory law”;<sup>197</sup> therefore, judges’ recommendations are incorporated into this proposal.

Reformers of intestacy law have addressed this issue on a bigger scale by stating that the definition of “family” as a whole, not just the definition of “child,” should be changed in intestacy law.<sup>198</sup> One reformer stated that the current definition of “family” in intestacy law “may be underinclusive because it excludes many currently existing family groups . . . . [Simultaneously,] [t]he definition may be overin-

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193. *Id.* at 324.

194. Ronald J. Scalise, Jr., *Section II: Civil Law, Procedure, and Private International Law: New Development in United States Succession Law*, 54 AM. J. COMP. L. 103, 103 (2006).

195. UNIF. PROBATE CODE § 1-102(b)(5) (1969).

196. *Id.*

197. Drake, *supra* note 165, at 681.

198. Foster, *supra* note 78, at 228.

clusive because legal ties do not necessarily create familial ties."<sup>199</sup> The problem of underinclusiveness would be addressed, with regard to this specific intestacy law issue, under statutory adoption because the new definition of "child" would account for the current nontraditional families in which grandparents take on the parental role. The problem of overinclusiveness would be addressed, with regards to this specific problem in intestacy law, because inheritance rights would no longer be based exclusively on legal ties. Despite lack of legal ties between the grandchildren raised by grandparent caregivers, the wishes of the decedent to leave a part of the estate to a beloved family member would be properly carried out. Statutory equitable adoption would satisfy an important goal of intestacy law, which is to fulfill an average decedent's intent.<sup>200</sup> Unlike the maintenance system proposed by Harris, equitable adoption would not be limited to only one of the goals of intestacy law, to protect financially dependent family members.<sup>201</sup> Presumably, an average decedent in the grandparent caregiver's shoes would have wanted to provide for grandchildren that he or she nurtured as if they were legally adopted children.

**A. Legislative Amendment to Intestacy Law Should Outline Specific Requirements That Must Be Met by Equitably Adopted Grandchildren of Grandparent Caregivers**

Drafting a functional scheme for the definition of a decedent's "child" in the intestacy statutes might be an overwhelming process for the legislature. One scholar, Susan Gary, has proposed a statutory change in intestacy law that incorporates "children of the new families such as stepchildren, children of gay and lesbian families, and children in families headed by opposite-sex, unmarried partners."<sup>202</sup> One major objective behind incorporating equitably adopted grandchildren of grandparent caregivers into intestacy statutes should be to advance the legal definition of family beyond the narrowly recognized nuclear family model. Similarly, Susan Gary recognizes that intestacy law must be modified, despite some progress that has been made, to remedy the problem of intestacy laws continuing to abide by the nuc-

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199. Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 *LAW & INEQ.* 1, 41 (2000).

200. Harris, *supra* note 14, at 248.

201. Holob, *supra* note 86, at 1500.

202. Gary, *supra* note 199, at 80.

lear family norm.<sup>203</sup> Although the factors she proposed do not completely conform to all the elements that are useful in establishing the existence of an equitable adoption relationship between a grandparent caregiver and a grandchild, by removing the third factor and adding certain other elements enumerated in *Wheeling*, the statute should adequately address the current issue.<sup>204</sup> I propose that the following language and requirements, used in Gary's proposal, be specified in intestacy statutes to establish the existence of inheritance rights for grandchildren of grandparent caregivers:

(a) An individual is the child of another individual and an individual is the parent of another individual if the person seeking to establish the relationship proved by clear and convincing evidence that a parent-child relationship existed between the two individuals at the time of the decedent's death . . . .

(b) [Factors] Although no single factor or set of factors determines whether a relationship qualifies as a parent-child relationship, the following factors are among those to be considered as positive indications that a parent-child relationship existed:

(1) The relationship between the parent and child began during the child's minority. The younger the child, the greater the weight to be given to this factor;

(2) The duration of the relationship was sufficient for the formation of a parent-child bond;

. . . .

(4) The parent held the child out as his or her child, referring to the child as his or her child or treating the child as his or her child;

(5) The parent provided economic and emotional support for the child; the child provided economic and emotional support for the parent;

(6) Treatment of the child by the parent was comparable to the decedent's treatment of his or her [biological or adoptive] children; and

(7) The decedent named the child or parent as a beneficiary to receive property at the decedent's death through a nonprobate transfer.<sup>205</sup>

I would also suggest implementing a minimum number of years requirement for the factor relating to whether the "duration of the relationship was sufficient for the formation of a parent-child bond."<sup>206</sup> The minimum number of years should be based on psychology

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203. *Id.* at 5.

204. *See Wheeling Dollar Sav. & Trust Co. v. Singer*, 250 S.E.2d 369, 374 (W. Va. 1978).

205. Higdon, *supra* note 11, at 278-79.

206. *Id.* at 278.

and/or sociology studies done on this topic to avoid an arbitrary cut-off point. Such limitation might provide a clearer standard for the proponents and for the judges. Susan Gary intentionally does not include the *Wheeling* requirement that "the foster parent treat or hold out the child as a 'formally adopted child,'"<sup>207</sup> but instead "describes the test as 'comparable to the decedent's treatment of his or her legal children.'"<sup>208</sup> She rejects the formal adoption standard because "this practice may be foreign or even disdainful to many Americans in minority ethnic communities."<sup>209</sup> On the contrary, I would include both factors because the language of the amendment would set out that no single factor is conclusive; therefore, if the "formally adopted child" standard is unfamiliar to applicants, they can alternatively prove that they were treated like the decedent's legal children. Additionally, the following factors that were utilized in *Wheeling*, and that were enumerated earlier in the analysis section, should be added to the statutes as supporting circumstantial evidence of the parental relationship. But again, no single factor should be conclusive:

- (8) The benefits of love and affection accruing to the adopting party;
- (9) The performances of services by the child;
- (10) The surrender of ties by the natural parent;
- (11) The society, companionship and filial obedience of the child;
- (12) An invalid or ineffectual adoption proceeding;
- (13) Reliance by the adopted person upon the existence of his adoptive status;
- (14) The representation to all the world that the child is a natural or adopted child.<sup>210</sup>

Some of the factors from *Wheeling* that I propose should be utilized in the amendment to the statutes overlap with the factors that are enumerated by Susan Gary. Nevertheless, it might be useful to incorporate them into the statutes because they provided more comprehensive examples of circumstances that would qualify grandchildren to

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207. *Id.* at 279.

208. *Id.*

209. *Id.*

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

be recognized under intestacy law as equitably adopted by their grandparents. I did not include the factor from *Wheeling* that requires “the rearing of the child from an age of tender years by the adopting parents,”<sup>211</sup> because it is practically identical to the first factor listed under Susan Gary’s suggestion.

**B. Although the Proposed Amendment to the Current Intestacy Statutes May Not Be a Flawless Solution, It Eliminates Many Problems That Harris’s Maintenance System Poses**

Contrary to Michelle Harris’s proposed maintenance system, which would only provide inheritance rights to dependent minors,<sup>212</sup> the benefit of this proposal is that the amended statutes will allow equitably adopted grandchildren to inherit without an evaluation of their financial status or their age. The proposal this Note advocates will bring the grandchildren’s legal status closer to that of a biological or legally adopted child because under the current intestacy statute a legally adopted child or a biological child can inherit without an inquiry into her financial status or age.<sup>213</sup> Under Harris’s system, the law will not view the child that inherits via the maintenance system and the “child” currently recognized by statute as equals.<sup>214</sup> On the other hand, if equitable adoption was included in the definition of “child” in the intestacy statutes, in the eyes of the law, the equitably adopted children would be seen as possessing equal inheritance rights to the biological children and the legally adopted children. Consequently, children recognized under equitable adoption would be able to recover past the age of majority as well.<sup>215</sup> Additionally, unlike Harris’s proposal, by providing inheritance rights to equitably adopted children identical to those already provided to biological and adopted children, the proposal is aiding in maintaining an “efficient system for liquidating the estate of the decedent”<sup>216</sup> by eliminating the burden on the court to figure out what portion of the inheritance the children are eligible to receive.

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211. *Id.* at 374.

212. See Harris, *supra* note 14, at 260–61.

213. DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 240 (2006) (“Intestacy laws provide that the children take equally, without regard to their age or other condition.”).

214. See Harris, *supra* note 14, at 260.

215. Tracey Bateman Farrell, Annotation, *Modern Statutes of Law as to Equitable Adoption or Adoption by Estoppel*, 122 A.L.R. 5TH 205 (2004).

216. UNIF. PROBATE CODE § 1-102(3) (1969).



Also, it was stated earlier that if equitable adoption was implemented as a case-based doctrine, it might decrease the certainty and predictability of intestacy law,<sup>217</sup> but if equitable adoption was to be incorporated into intestacy statutes, the amendment might be more accessible to the public and the predictability of intestacy law would remain as is. Unlike Harris's proposal to grant certain grandchildren inheritance rights through the family maintenance system by adopting the system via case law, the proposal to amend the definition of "child" in intestacy law would be enacted legislatively. Common practice would imply that if the equitable adoption concept in intestacy law was promulgated by case law, rather than if it was officially on the books, the general public would be less likely to know about it.<sup>218</sup>

Furthermore, because there is no consistency in the way courts currently apply the equitable adoption doctrine, a candidate for equitable adoption would not have a clear standard to follow without statutory adoption, and the decision would be left up to the discretion of the court.<sup>219</sup> Some courts acknowledge equitable adoption based on the contract approach and others based on the equitable estoppel approach,<sup>220</sup> hence the requirements are different and the court decisions vary among jurisdictions. The factors suggested above could be proof of either the contract theory, the equitable estoppel theory, or both. If equitable adoption was incorporated into the statutes, the courts would no longer need to decide whether the doctrine is based on the contractual approach of specific performance or equitable estoppel because the court would simply have to apply the relevant statute.<sup>221</sup> "A statutory scheme would be capable of providing a single, more specific standard."<sup>222</sup> Also, if Harris's family maintenance system was to be adopted by the American legal system, the courts would lack any certainty and predictability in the enforcement of the maintenance system because it leaves a high level of discretion to the court and does not specify uniform statutory requirements.<sup>223</sup> Although the discretionary element is true of most doctrines developed by case law, intesta-

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217. See *supra* Part III.B.

218. MICHAEL SINCLAIR, GUIDE TO STATUTORY INTERPRETATION (2000).

219. See *supra* Part III.D.

220. Reeves, *supra* note 168, at 130.

221. Higdon, *supra* note 11, at 277.

222. *Id.*

223. *Id.* at 265.

cy law strives to preserve an efficient and standardized system,<sup>224</sup> and this goal can be achieved by implementing statutory requirements.

Nevertheless, it needs to be acknowledged that statutory equitable adoption will not completely eliminate predictability problems because grandchildren will not automatically know if they are successors upon the grandparent's death, but at least they will be able to anticipate with a greater certainty that they have a right to inherit because specific requirements will be set out in the intestacy statutes. Most importantly, unlike in Harris's maintenance system,<sup>225</sup> grandchildren's inheritance rights will not depend on whether they are dependent minors or incompetents, whether their grandparent died leaving behind a spouse, or whether another family member will accept the responsibility to raise them. The grandchildren will be on equal footing with legally adopted children, who are currently recognized under intestacy law, after the probate court acknowledges that they were equitably adopted. Once the grandchildren meet the threshold requirements which demonstrate that they were equitably adopted by their grandparents, the intestacy laws will treat them identically to the legally adopted children. Subsequently, the grandchildren will be apportioned their share of the inheritance based on the current apportionment provision for children of the decedents under the intestacy law.

Again, the proposed change is not flawless, and it may increase the probate court's docket when disagreements arise as to whether a grandchild meets the requirements for equitable adoption, but it seems that in order to accomplish the donative intent of the decedent certain sacrifices must be made. Due to the possible court docket increase, the proposal may hinder the policy "to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors," which is identified in the *Uniform Probate Code*.<sup>226</sup> To move this process along faster and to not deplete the already small estates of the decedents, it may be wise to adopt Harris's suggestion of addressing the inheritance rights issue automatically by using the appointed guardians *ad litem* for minor dependent grandchildren<sup>227</sup> and minors that will be cared for by other family members. Because the proposed statutory equitable adoption grants

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224. UNIF. PROBATE CODE § 1-102(3) (1969).

225. Harris, *supra* note 14, at 260–62.

226. UNIF. PROBATE CODE § 1-102(3) (1969).

227. Harris, *supra* note 14, at 262–63.

inheritance rights to grandchildren of all ages and financial statuses, Harris's guardian *ad litem* suggestion will not be applicable to grandchildren that have reached the age of majority, who would be eligible for inheritance rights under my proposal as well. On the other hand, because it will be a statutorily recognized doctrine, other family members that stand to inherit might not want to get involved in the litigation process against the equitably adopted grandchildren over a small estate. If other successors will be willing to consent to the grandchild fitting in to the equitably adopted statutory definition, the estate will be apportioned according to the law without litigating the grandchild's inheritance eligibility.

**C. The Proposed Amendment to the Definition of "Child" in Intestacy Statutes Will Maintain the Overarching Goals of Intestacy Law and Advance the Movement Toward Accepting Nontraditional Families**

An additional rationale for recognizing equitable adoption in intestacy law is that the grandchild's probate case, which also triggers child-support issues, can be consolidated into one matter, thus reducing the family court docket. In situations where the grandparent has some form of legal relationship with the grandchild, besides legal adoption, the biological parent may continue to retain parental obligations, depending on what type of legal rights the grandparents gained and depending on the jurisdiction.<sup>228</sup> "The law in many states formally provides that child support and custody are not linked and that the obligation to pay child support cannot be conditioned on the noncustodial parent's ability to visit the child."<sup>229</sup> For example, "the Minnesota de facto custodian statute expressly provides that parents remain liable for support even while the child is in the custody of a de facto custodian."<sup>230</sup> Presumably, a biological parent that did not want to

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228. David L. Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614, 1614 (1982). See generally Leslie Harris et al., *Making and Breaking Connections Between Parents' Duty to Support and Right to Control Their Children*, 69 OR. L. REV. 689 (1990) (addressing the jurisdictional disagreement regarding the extent to which the government should get involved in imposing child support obligations).

229. Symposium, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 462.

230. MINN. STAT. ANN. § 257C.02(b) (West 2007); Elizabeth Barker Brandt, *De Facto Custodians: A Response to the Needs of Informal Kin Caregivers?*, 30 FAM. L.Q. 291, 294 n.14 (2004).

raise the child prior to the grandparent caregiver's death will not want to assume the parental role upon the grandparent caregiver's death, unless the parent's situation has changed. Some jurisdictions recognize inheritance as an "income";<sup>231</sup> hence, the court can order the biological parent who inherited from the grandparent to pay child support out of his or her inheritance.<sup>232</sup> Because one of the overarching goals in the American legal system is to reduce the burden on the courts, by enacting the statutory equitable adoption the additional child-support court proceedings could be avoided, and the money would go directly to the grandchildren under the amended intestacy law.

Another strong reason for supporting the proposed statutory amendment to intestacy law is because it advances the initiative to recognize nontraditional families under the legal system. Michelle Harris's suggestion to adopt the family maintenance system advances the objective of recognizing nontraditional families only as an unintended consequence of her system because her main focus is on providing financial support for the dependent minors and incompetents in certain situations.<sup>233</sup> Most of the time the grandparent caregivers leave little or no inheritance because they lived at or below the poverty line,<sup>234</sup> so it is not rational for Harris to put such great emphasis on the financial aspect of the maintenance system and for her to believe that she is curing the state's problem of supporting dependent minors.<sup>235</sup>

Statutory equitable adoption meets three goals of intestacy law and modifies the fourth goal.<sup>236</sup> First and foremost, statutory equitable adoption will carry out the decedent's donative intent because if the grandchildren can prove that they were equitably adopted, they will be treated as if the decedent actually adopted them. The current intestacy statutes acknowledge that an average decedent intended for his or her adopted children to inherit;<sup>237</sup> thus, the logical conclusion is that the decedent similarly intended for the equitably adopted children to

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231. ABRAMS ET AL., *supra* note 213, at 599.

232. *See id.*

233. Harris, *supra* note 14, at 260–62.

234. *Skipping a Generation: Grandparents Raising Grandchildren*, *supra* note 62, at 39.

235. *See* Harris, *supra* note 14, at 261.

236. *See* Holob, *supra* note 86, at 1500–10.

237. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 (1999).

inherit. Although statutory equitable adoption will not only apply to dependent grandchildren, the financial goal of intestacy law to provide for the dependent family members<sup>238</sup> will be met if the grandchild turns out to be dependent. Next, the goal of providing a fair distribution among family members<sup>239</sup> will be met because the law already concedes that it is fair to distribute a portion of the estate to the children of the decedent. Therefore, when the grandchildren are included in the definition of "child" via equitable adoption, the law will have to apportion a fair distribution of the inheritance to the grandchildren.

The fourth goal of promoting nuclear families<sup>240</sup> is outdated because it is no longer the norm, and traditional families are no longer necessarily considered to be the healthiest environment for the children.<sup>241</sup> Hence, the goal should be altered to focus on promoting family relationships and fostering a healthy family setting, even if it does not comply with the traditional notions of family. The proposal is based on a "functional" approach to redefining, which focuses on "the quality of the relationship between the claimant and the decedent,"<sup>242</sup> rather than focusing on strict family member classifications. As stated earlier, intestacy law cannot avoid the crucial changes going on in family law, which were motivated by the emerging development of nontraditional families in America.<sup>243</sup> American society is constantly evolving and changing; hence, intestacy law needs to keep up with it to eliminate laws that hurt, rather than help, society. Statutory equitable adoption would be in the best interest of the grandchild because society would no longer view the grandchild as "a legal stranger to his family."<sup>244</sup> If grandchildren of grandparent caregivers were awarded inheritance rights by other means than changing the statutory definition of "family," like Harris's suggested maintenance system, they would still be assigned to "second-class status."<sup>245</sup> "In so doing, [Harris's system] fails to 'remove the badge of inferiority' on those excluded from the family paradigm, the badge that shapes both how so-

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238. Holob, *supra* note 86, at 1500.

239. *Id.*

240. *See id.* at 1501.

241. *See Foster, supra* note 78, at 208 (noting that the traditional family definition recognized under the current intestacy law is overinclusive because it grants inheritance rights despite "reports of escalating violence, abuse, and neglect within the American family").

242. *Id.* at 232.

243. *See supra* Part III. D.

244. *See Rein, supra* note 177, at 778.

245. *Foster, supra* note 78, at 257.

ciety views such individuals and how they view themselves.”<sup>246</sup> Despite the criticisms of the proposed change, such strong incentive should be the principal motivation for broadening the scope of the definition of “child” in intestacy law to include grandchildren of grandparent caregivers.

## V. Conclusion

Over the years the practice of grandparent caregivers raising their grandchildren as their own children has been growing, but intestacy law has been disregarding such family dynamics by not providing any inheritance rights to the grandchildren upon the caregiver’s death. Unless the grandparent caregiver dies leaving a will, legally adopts the grandchild, or the grandchild’s parents are not alive at the time of the grandparent caregiver’s death, the grandchild has no legal right to any portion of the decedent’s estate. I have suggested rejecting the application of Harris’s family maintenance system in intestacy law as a resolution to solving the current dilemma. Instead, the legislature should amend the definition of “child” in intestacy statutes to include grandparent caregivers’ grandchildren who were equitably adopted by the caregivers when they were alive. Such an amendment will provide the grandchildren with inheritance rights, but more importantly the recommendation will recognize in the eyes of the law and society<sup>247</sup> the grandchild’s status in a nontraditional family dynamic as one equivalent to that of a biological or legally adopted child. Millions of grandchildren, like little Gina,<sup>248</sup> who are raised by their grandparents will no longer have to suffer additional psychological trauma upon their grandparent caregivers’ death due to being legally excluded from their nontraditional family. At last, nonnuclear family composition would be more accepted socially and legally, and the grandchildren would be recognized as their grandparent caregivers’ heirs.

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246. *Id.*

247. Hirsch, *supra* note 28, at 1053 (“To the extent the message is directed toward the community at large, a rule of intestacy ostensibly serves to promote moral acceptance of relationships not otherwise culturally countenanced.”).

248. Alba, *supra* note 1.