

STEPFAMILIES & INTESTACY LAW:

A PROPOSAL FOR STEPPARENT AND STEPCHILD INHERITANCE

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I. INTRODUCTION

It is becoming more common for people in the United States to die without a

will. According to a Gallup Poll conducted in May of 2016, only 44% of Americans reported that they had executed a will.¹ That percentage is lower than in previous polls.² With an increase in the number of people living without a will, comes an increase in the importance of intestacy laws throughout the country. More people are going to have to rely on intestacy laws to distribute their estate after they die. Commentators maintain that the primary goal of intestacy law is intent effectuation,³ but there is one area where intestacy laws across the country likely fall short of this policy goal: stepfamilies.

Although stepfamilies have always existed, their number has grown dramatically in the United States over the last four or five decades due to the increasing divorce rate.⁴ Between 2009 and 2011 roughly 1.7 million children under the age of eighteen were found to have a stepparent.⁵ Studies show that roughly “17% of all children live in a stepfamily household.”⁶ Despite the growing number of stepfamilies throughout the country, intestacy laws have remained stagnant in their treatment of stepchildren. In forty-nine states stepchildren do not inherit with blood descendants from intestate stepparents.⁷ As a result, in almost all states, there is a chance that “distant collateral heirs may take the estate to the exclusion of the person who had the closest relationship with the decedent,”⁸ notwithstanding donative intent. California is the first, and only, state to enact a law allowing stepchildren or foster children to inherit from a step or foster-parent as if they are blood descendants.⁹

Other areas of the law, however, have adapted to the growing number of stepfamilies in the United States. For example, many states have changed their laws regarding wrongful death, workers compensation, and custody and visitation to “include persons beyond legally married spouses and legal children.”¹⁰ As these areas of the law adapt to societal change, so too should

intestacy law. The policy of intent effectuation cannot be realized if the intestacy laws of nearly all states ignore the probable intent of a significant portion of the population.

In this paper, I will examine the only intestacy law in the United States that allows a stepchild to inherit from an intestate stepparent as if they were a blood descendant and I will explore other areas of the law that have changed in response to the growing number of stepfamilies in the United States. Further, I will propose an intestacy law that uses a three-requirement test to determine whether a stepchild should inherit from a stepparent who has died intestate and vice versa. This three-requirement test is based on studies that have looked at stepfamilies and the stepparent-stepchild relationship as well as the online empirical study I conducted on the donative intent of stepparents.¹¹ Finally, I will advocate for a nationwide adoption of the proposed law and I will explain how nationwide adoption of this intestacy law will require the pretermitted child statutes across the country to also be revised.

II. OTHER AREAS OF THE LAW THAT HAVE ADAPTED

Even as intestacy laws have remained static, many other areas of the law have become more inclusive when defining the word “child.” One area that has made some of the biggest changes is family law with regard to visitation, child support, and child custody arrangements. In most states, the family law codes have moved away from the idea that only biological and adopted children count as “children,” with many family law codes now considering “functional children as children for child support, visitation, and parental decision-making purposes.”¹² For example, many states now use the doctrine of *in loco parentis* to determine whether a person is entitled to visitation rights with regard to a child that is neither the person’s biological or

adoptive child.¹³ The *in locos parentis* doctrine looks at whether someone “not related by blood or adoption to the child” has been acting as a parent would to that child.¹⁴

Moreover, many states have adapted their worker’s compensation laws to reflect how common stepfamilies are becoming. For example, Oregon’s worker’s compensation statutes define a “‘child’ of an injured worker” as not only a biological or adopted child, but also “[a] child toward whom the worker stands in loco parentis” and “[a] stepchild, if the stepchild was, at the time of the injury, a member of the worker's family and substantially dependent upon the worker for support.”¹⁵

This disparity between different areas of the law means that a stepchild is going to receive different treatment in different venues. In a family law court, a judge may determine that there was a parent-child relationship between the stepparent and stepchild and allow the stepparent visitation rights after divorcing the biological parent. In a worker’s compensation case, a stepchild would likely be able to claim benefits as a beneficiary of their stepparent. However, if instead the stepchild was in front of a probate court because his or her stepparent had passed away without a will, a judge would not allow that stepchild to inherit from the stepparent’s estate. This difference in treatment of stepchildren could mean that a stepchild who has been living with his or her stepparent because the stepparent was granted full custody would be barred from inheriting if the stepparent dies intestate. It makes little sense to find a functional parent-child relationship when working within one area of the law, but then to ignore that same parent-child relationship when working within another.

III. ONLINE SURVEY OF STEPPARENTS AND THEIR INHERITANCE PREFERENCES

To help determine what the strongest indicators are for a parent-child relationship

between a stepparent and stepchild, and thus to help determine what requirements the court should implement under my proposed intestacy law, I conducted a survey of stepparents in the form of an online questionnaire.¹⁶ To do so I worked with Qualtrics, a market research firm that has partnered with the University of San Diego to conduct empirical studies.¹⁷ This survey questioned 1,050 Americans; of those 1,050 respondents, 109 answered that they have either biological or adopted children as well as stepchildren, or only stepchildren. Only responses from those 109 individuals have been considered for the purpose of this paper. Of those 109 respondents, men and women were represented fairly evenly, with 51 men and 58 women. The average age of respondents with stepchildren was 50.61 years old but ranged from 23 years old to 78 years old.

Three questions were posed to the group. The first asked whether the respondent has (1) no children, either biological or adopted, and no stepchildren, (2) a child or children, either biological or adopted, but no stepchildren, (3) a stepchild or children, but no children, either biological or adopted, or (4) a stepchild or stepchildren, and a child or children, either biological or adopted. Those who chose response one or two did not proceed with the survey.

The second question asked whether respondent's stepchildren (1) was/were, or is/are being raised, in their household, (2) was/were, or is/are being raised part of the time in their household and part of the time in the other parent's household, (3) was/were, or is/are being raised all of the time in the other parent's household, or (4) different answers apply to different stepchildren.

Finally, the third question asked respondents what they would want their stepchild or stepchildren to inherit from their estate if they were to die without a will. For this question, respondents could choose (1) nothing, (2) less than a biological or adopted child, (3) the same

amount as a biological or adopted child, (4) more than a biological or adopted child, (5) different answers apply to different stepchildren, or (6) not sure.

Roughly 46% of those respondents with stepchildren indicated that they would want their stepchild or stepchildren to inherit the same amount as any biological or adopted children. About 11% indicated that they would want their stepchild or stepchildren to inherit more than their biological or adopted children, and about 15% responded that they would want their stepchild or stepchildren to inherit less than a biological or adopted child. Thus, about 57% of respondents with stepchildren indicated that they would want their stepchild to be treated equal to, or better than, a biological or adopted child with regard to inheritance (See Table I).

TABLE I

	I want my stepchild to inherit the <i>same</i> as a biological or adopted child	I want my stepchild to inherit <i>more</i> than a biological or adopted child
I have: Stepchildren, but no biological or adopted children (29 respondents)	16	3
I have: Stepchildren and biological or adopted children (80 respondents)	34	9
Total Respondents: 109	50	12

When the data is filtered based on the gender of the respondent, only 31% of women with stepchildren answered that their stepchildren grew up, or are currently growing up, full time in their household; whereas roughly 51% of men with stepchildren responded as such. This makes sense when you consider that in 2014, “about five of every six custodial parents were mothers.”¹⁸ Thus, stepmothers are less likely to live in the custodial household because the biological mother has a higher chance of being awarded custody of the children. By the same token, stepfathers are more likely to live in the custodial household because they are married to the biological mother. About 40% of women and 53% of men answered that they would want their stepchildren to

inherit the same amount as their biological or adopted children. About 5% of women and 18% of men answered that they would want their stepchildren to inherit more, and 16% of women and 14% of men answered that they would want their stepchildren to receive less than their biological or adopted children. Only 10% of men answered that they would want their stepchildren to receive nothing, whereas 17% of women did (See Table II).

TABLE II

	Men (51 respondents)	Female (58 respondents)
I want my stepchild to inherit <i>nothing</i>	5	10
I want my stepchild to inherit <i>less than a biological or adopted child</i>	7	9
I want my stepchild to inherit the <i>same as a biological or adopted child</i>	27	23
I want my stepchild to inherit <i>more than a biological or adopted child</i>	9	3

When the data is filtered based on an income level of \$75,000 or more, roughly 69% of respondents with stepchildren indicated that they would want their stepchild to receive either the same amount or more than a biological or adopted child. About 24% of those respondents stated that they would want their stepchild to receive less than a biological or adopted child, or nothing. Whereas, when the data is filtered based on an income of \$74,999 or less, only about 47% of respondents with stepchildren answered that they would want a stepchild to inherit either the same amount or more than a biological or adopted child. About 33% of those respondents indicated that they would want their stepchild to receive less than a biological or adopted child, or nothing from the stepparent's estate (See Table III)

TABLE III

	Income of \$75,000+ (51 respondents)	Income of \$74,999 or less (58 respondents)
I want my stepchild to inherit <i>nothing</i>	5	10

I want my stepchild to inherit <i>less</i> than a biological or adopted child	7	9
I want my stepchild to inherit the <i>same</i> as a biological or adopted child	30	20
I want my stepchild to inherit <i>more</i> than a biological or adopted child	5	7

The breakdown by income level is important because studies have found that a person's socioeconomic status is linked to the likelihood of the person executing a will; studies have found that people with higher incomes are more likely to have estate plans in place.¹⁹ The same Gallup Poll discussed *supra*, found that in 2016, 55% of people with an income of \$75,000 or more had a will. That percentage dropped to only 38% when respondents had an income of \$30,000 to \$74,999.²⁰ Though, these numbers are dropping; in a 2005 Gallup Poll, 62% of Americans with an income of \$75,000 or more and 40% of people with an income of \$30,000 to \$74,999 stated they had a will.²¹ These percentages show that lawmakers should give more weight to the intent of people with lower income levels because they are more likely to die intestate. Though, the overall decrease in the number of people executing wills over the last eleven years show that intestacy laws are becoming increasingly important regardless of a person's income level.

Prior to conducting the survey, I predicted that respondents who became stepparents when their stepchildren were still minors would be more likely to want their stepchildren to inherit from their estate if they were to die intestate. I also predicted that those respondents whose stepchildren lived with them full time would be more likely to want their stepchildren to inherit. Finally, I predicted that respondents whose stepchildren lived only part time with them would be less likely to want their stepchildren to inherit, but still more likely than those whose stepchildren lived full time with the other biological parent. I based these predictions on the

assumption that the more time a stepparent spends with the stepchild, the more likely they are to bond as though they are blood related.

All three predictions were confirmed by the data. Roughly 75% of respondents who answered that their stepchildren “grew up full time” in their household indicated that they would want their stepchildren to inherit either the same or more than a biological or adopted child. To break that down further, 64% responded that they would want their stepchildren to receive the same amount as any biological or adopted children and 12% indicated they would want their stepchildren to receive more than any biological or adopted children. Only 12% of those respondents indicated that they would want their stepchildren to receive less than a biological or adopted child and 7% answered that they would want their stepchildren to receive nothing from their estate. (See Table IV).

TABLE IV

	I want my stepchild to inherit <i>nothing</i>	I want my stepchild to inherit <i>less</i> than a biological or adopted child	I want my stepchild to inherit the <i>same</i> as a biological or adopted child	I want my stepchild to inherit <i>more</i> than a biological or adopted child
My stepchildren grew up <i>full time</i> in my household (44 respondents)	3	5	28	5

Furthermore, 67% of respondents who indicated that their stepchildren grew up part time in their household stated that they would want their stepchildren to inherit the same as or more than a biological or adopted child. Of those respondents, 50% answered that they would want their stepchild to inherit in equal shares with any biological or adopted children and 14% answered that they would want their stepchild to inherit more than a biological or adopted child.

About 14% stated they would want their stepchild to receive less than a biological or adopted child and 9% answered that they would want their stepchildren to receive nothing. (See Table V).

TABLE V

	I want my stepchild to inherit <i>nothing</i>	I want my stepchild to inherit <i>less than a biological or adopted child</i>	I want my stepchild to inherit the <i>same</i> as a biological or adopted child	I want my stepchild to inherit <i>more than a biological or adopted child</i>
My stepchildren grew up <i>part time</i> in my household (22 respondents)	2	3	11	3

Finally, 37% of respondents who answered that their stepchildren grew up full time in the other parent’s household indicated that they would want their stepchildren to inherit either the same as or more than a biological or adopted child. Roughly 23% answered that they would want their stepchild to receive less than a biological or adopted child and 27% stated they would not want their stepchildren to inherit. (See Table VI).

TABLE VI

	I want my stepchild to inherit <i>nothing</i>	I want my stepchild to inherit <i>less than a biological or adopted child</i>	I want my stepchild to inherit the <i>same</i> as a biological or adopted child	I want my stepchild to inherit <i>more than a biological or adopted child</i>
My stepchildren grew up <i>full time</i> in the <i>other biological parent’s</i> household (30 respondents)	8	7	9	2

As demonstrated by the data, there is a connection between whether the stepchild grew up in the stepparent’s household and whether the stepparent would want the stepchild to inherit. The more time the stepchild spent living with the stepparent as they grew up, the more likely it is

that the stepparent would want the stepchild to inherit from their estate. Though, it is important to note that a significant portion of respondents, about 60%, whose stepchildren grew up full time in the other parent's household would still want their stepchildren to inherit from their estate if they were to die without a will.

Although these results should be retested with a larger data set, the data from this survey supports the idea that if intestacy law aims to effectuate intent, then states need to allow stepchildren to inherit from their stepparents who die intestate. The data from this survey show that stepparents want their stepchildren to inherit from their estate and thus that the current intestacy laws across the country are failing to address the wants of stepparents. The data further support the three requirements of my proposed law because the data show that whether the stepchild grew up in the stepparent's household and whether the stepchild lived full time or part time with the stepparent are both important in determining whether the stepparent would have wanted the stepchild to inherit.

IV. THE ONLY STEPCHILD INHERITANCE LAW IN THE UNITED STATES

In 1983, California became the first, and only, state to allow stepchildren, as well as foster children, to inherit from an intestate stepparent or foster-parent regardless of whether any natural children of the decedent exist. California Probate Code § 6454 requires that a parent-child relationship existed to allow inheritance and sets out a two-requirement test for courts to use: (1) The relationship must have begun during the person's minority and continued throughout the joint lifetimes of the person and the person's foster or stepparent, and (2) it must be established by clear and convincing evidence that the foster-parent or stepparent would have

adopted the person but for a legal barrier.²² The most common legal barrier to adoption of a minor is lack of consent from the other biological parent.²³

There are numerous issues with this statute as written. First, the term “relationship,” as used in the first requirement, is ambiguous. Nothing in the statute explains what constitutes a “relationship.” Since the law was enacted in 1983, the California courts have spent very little time discussing the first requirement, focusing almost entirely on the legal barrier requirement of the test. Any mention of the first requirement has been brief. For example, in *Estate of Stevenson*, the court stated that the first requirement of the test was met because the relationship between the stepmother and biological father began when the respondents were toddlers.²⁴ Similarly in *Estate of Cleveland*, the court stated that a “stepchild relationship is created automatically by the marriage of two adults where one or both have children.”²⁵ Therefore, based on how the statute has been construed by the courts in California, the relationship between the stepparent and stepchild comes into existence when the stepparent and biological parent are married.

Moreover, it quickly became apparent that the second requirement of the test has limited the law’s application to only a trickle of cases. Within the first ten years of enactment, California courts were split on how to interpret the legal barrier requirement. In 1992, the California Sixth District Court of Appeal decided *Estate of Stevenson*. In this case, the respondents discovered that their mother was not their biological mother when they were in their 30s, although they continued to have a parent-child relationship with her until her death.²⁶ The court found that their stepmother would have adopted them, but never did because their biological mother refused to give consent.²⁷ The court allowed inheritance, arguing that the second requirement of the California law does not require proof that the legal barrier existed at all times for that

requirement to be satisfied.²⁸ The court further explained that “it must appear that the legal barrier existed when the parties attempted adoption; it is not necessary that the legal barrier exist until the time the stepparent dies.”²⁹

Less than one year after California’s Sixth District Court of Appeal decided *Stevenson*, the Second District Court of Appeal came to the opposite conclusion in *Estate of Cleveland*. In *Cleveland* the court argued that the appellant could not inherit from his deceased foster-parent, despite evidence of an ongoing parent-child relationship, because there was “no evidence that any legal impediment to appellant's adoption existed after he reached the age of majority, 16 years prior to decedent's death.”³⁰ The appellant’s biological mother had refused to consent to the adoption, but the court found that no legal barrier continued to exist after the appellant reached the age of majority because at that point his mother’s consent was no longer needed.³¹ The *Cleveland* court disagreed with the *Stevenson* court, holding that a legal barrier to adoption must exist at all times until the step or foster-parent’s death in order for the second requirement of the test to be satisfied.³²

In 1998, this dispute between courts was finally settled when the Supreme Court of California decided *Estate of Joseph*. In that case, the petitioner’s foster parents had attempted to adopt her when she was a minor but, her biological parents refused to consent.³³ Petitioner’s foster parents died after she became an adult, having never formally adopted her.³⁴ The California Supreme Court denied inheritance; they agreed with the Second District Court of Appeal in *Cleveland* and disagreed with the Sixth District Court of Appeal in *Stevenson*, holding that “the provision should not be read to allow such barrier or barriers to have existed only at a time at which adoption was contemplated or attempted.”³⁵ Thus, the *Joseph* Court found that the legal barrier to adoption must have continued beyond the child reaching the age of majority and

until the death of the step or foster-parent. It was this California Supreme Court decision that hollowed out California Probate Code § 6454. Just as the dissent argued in *Joseph*, the California Supreme Court's interpretation of the legal barrier requirement leaves the statute "virtually inapplicable to adult foster children or stepchildren, who seldom (if ever) could demonstrate a lifetime legal barrier to adoption."³⁶

Currently, the California Supreme Court's decision in *Joseph* still controls, which means that in order to inherit under California Probate Code § 6454, a stepchild must show by clear and convincing evidence that the parent-child relationship between the stepparent and the stepchild began while the child was a minor and continued until the stepparent's death. The stepchild must also show by clear and convincing evidence that the stepparent would have adopted the stepchild but for the existence of a legal barrier which continued to exist throughout the life of the stepparent. Thus, if the stepchild is over the age of eighteen, the age of majority in California, at the time of the stepparent's death, the stepchild must show that a legal barrier to adoption continued to exist despite the fact that the stepchild was no longer a minor. Given that the most likely legal barrier to adoption is lack of consent from both biological parents, proving that a legal barrier existed beyond the child reaching the age of majority is nearly impossible.

The legal barrier almost always disappears after the child becomes a legal adult and can consent to the adoption themselves. If the stepparent dies after the stepchild turns eighteen years old, the stepchild who is attempting to inherit under the law must show that a different legal barrier to adoption continued to exist past reaching the age of majority. One possible legal barrier that could arise after the stepchild becomes an adult is lack of consent from the stepchild's spouse, if the stepchild is married,³⁷ but that too is often inapplicable. Thus, the only situation where the statute has any hope of application is one in which the stepparent dies while the

stepchild is still a minor. Although that does happen, it is not nearly as common as the stepparent dying after the stepchild has become an adult. California Probate Code § 6454 was a groundbreaking intestacy law but, due to the law being virtually inapplicable as written, the two-requirement test falls short of achieving the intent effectuation policy goal of intestacy law.

It is clear that California Probate Code § 6454 should not be used as a model for new stepfamily intestacy laws. There are multiple issues with the law, but the biggest issue is the second requirement because that is where most stepchildren hit a wall. Many stepparents never attempt to adopt their stepchild, despite having a close parent-child relationship with them, and thus, the stepchild would never be able to meet the legal barrier test regardless of whether their other biological parent would have consented. A law that looks at whether the stepparent ever tried to adopt the stepchild as a basis for whether a parent-child relationship existed ignores the fact that many people “may fail to take steps to declare themselves a legal family for the same reasons that many people die intestate.”³⁸ It is common for people to procrastinate when it comes to adopting their stepchild because they do not feel as though it is something that absolutely needs to be done, or they know that even if they were to ask the other biological parent for consent, they would be denied. Further, the adoption process is not free, and many people may never go through with it because of the expense they would have to incur.³⁹ A stepchild who cannot show by clear and convincing evidence that their stepparent ever attempted adoption cannot meet the legal barrier requirement of the California test and therefore cannot inherit, regardless of how close a relationship they had with their stepparent. Whether a stepparent has ever tried to adopt their stepchild does not denote lack of a parent-child relationship and does not necessarily imply that the stepparent would not want their stepchild to inherit under intestacy law.

V. PROPOSAL

A. THREE-REQUIREMENT TEST

As previously stated, the main goal of intestacy law is intent effectuation. Intestacy laws attempt to distribute an intestate decedent's estate in a way that reflects what the decedent most likely would have wanted. As such, across the country, when a person dies intestate leaving behind biological children, intestacy law provides for inheritance by those biological children because it is believed that the decedent would have wanted his children to inherit. It should be no different if a person dies intestate and is survived by one or more stepchildren with whom he had a close parent-child relationship. The revised law, however, needs to be applied mechanically, as all other intestacy laws are. This is one of the benefits of intestacy law; a person has the ability to know exactly how his estate will be divided if he chooses not to execute a will. This proposal should not vary from this framework. Thus, the probate codes across the United States should adopt the following three-factor test for stepparent and stepchild inheritance:

(1) Whether the relationship began during the step-child's minority.

Studies show that the age of the stepchild at the time of the marriage between the biological parent and stepparent is a significant factor in determining the strength of the stepparent-stepchild relationship. First, it is generally agreed upon that a close parent-child relationship between a stepparent and a stepchild takes time to develop.⁴⁰ As explained in Joshua M. Gould's book, Stepping In, Stepping Out: Creating Stepfamily Rhythm, the "process of stepfamily bonding... will happen more quickly for younger children and more slowly the older the child."⁴¹ He goes on to explain that if the stepfamily is formed when the child is a teenager, true family bonding between the stepparent and the stepchild may never occur.⁴² Other studies have come to similar conclusions, with one finding that "stepchildren reared by stepparents from

infancy or toddlerhood generally think of the stepparent as another parent.”⁴³ As such, it is vital that the first factor of the proposed intestacy law require the court to look at whether the stepfamily relationship was formed during the minority of the stepchild. The younger the child was, the more likely it is that the stepchild and stepparent were able to bond as if they were related by blood.

(2) Whether the relationship was maintained until the death of the stepparent or at least until the step-child reached the age of majority.

The second factor the court needs to consider is the length of the relationship between the stepparent and stepchild. As previously stated, the current California law requires the relationship, meaning the marriage between the stepparent and biological parent, to have continued throughout the life of the stepparent, terminating only at the stepparent’s death. This requirement is in line with research conducted into stepparent-stepchild relationships which has found that the length of the relationship between the stepparent and stepchild is important. Studies have found that “those stepparents who allow their parenting role to emerge slowly often develop strong relationships with stepchildren that sustain into adulthood.”⁴⁴ Thus, the longer the relationship lasted, the more likely it is that a strong parent-child relationship was formed.

To meet this current California requirement though, the stepparent must have remained married to the biological parent until the stepparent’s death. Although that can be indicative of a strong relationship between the stepparent and the stepchild, the requirement does not go quite far enough. As written, it does not take in to consideration situations in which the relationship is terminated by way of divorce between the stepparent and biological parent after the stepchild has reached the age of majority. It is imperative that the proposed intestacy law take into consideration divorce between the stepparent and biological parent because “[t]he divorce rate

for remarriages is higher than that for first marriages.”⁴⁵ A divorce between the stepparent and biological parent while the stepchild is still a minor is likely to sever the relationship between the stepparent and stepchild because the relationship would not have had long to develop. Though, it is not as likely that a divorce after the stepchild has become an adult would sever the relationship in the same way, especially if the relationship began when the stepchild was a minor. The court in *Estate of Stevenson* made a similar point, arguing that a separation between the stepparent and biological parent should not definitively bar inheritance by a stepchild.⁴⁶

A study conducted in 2006 found that when “former stepparents had coresided with adult children, they were perceived more fully as family and parent, regardless of the temporality of stepparents’ relationships with biological parents.”⁴⁷ Thus, the study concluded that a person was more likely to still consider their *former* stepparent as a member of their family, or even as still their parent, if they had previously lived with the stepparent. Therefore, a divorce will not necessarily destroy the relationship between the now former stepparent and stepchild if the stepchild grew up in the stepparent’s household prior to the divorce. As such, the second factor of the proposed intestacy law should be whether the relationship was continuous until the death of the stepparent, or if terminated by divorce, whether the divorce occurred after the stepchild had reached the age of majority.

(3) Whether the stepparent was married to the custodial biological parent.

The final factor the court needs to consider is whether the stepparent was married to the custodial biological parent. The same 2006 study discussed above found that “[s]tepparents who had coresided with stepchildren were more likely to be perceived to be family members.”⁴⁸ Similar results were found in the online survey I conducted in March 2018 with Qualtrics. The data from my survey shows that whether the stepchild grew up in the household of the

stepparent, either full time or part time, made a difference with regard to whether the stepparent wanted their stepchild to inherit. Of the forty-four survey-takers who responded that they have stepchildren who grew up in their household full time, 86% responded that they would want their stepchildren to inherit from their estate. Moreover, twenty-two survey-takers indicated that they have stepchildren who grew up part of the time in their household and part of the time in the household of the other biological parent. Of these twenty-two responses, roughly 77% stated they would want their stepchildren to inherit from their estate.

These results are not surprising considering that other studies have found that a relationship between a stepparent and stepchild takes time to develop, as discussed above. If a stepchild has grown up in the stepparent's household, then the stepchild and stepparent had more opportunity to spend time with one another to allow the relationship to develop. A stepchild that lives full time with the biological parent not married to the stepparent likely did not spend much time with the stepparent, making it much more difficult to form a relationship.

Thus, every probate code in the United States should allow a stepchild to inherit from an intestate stepparent if the stepchild can prove by clear and convincing evidence (1) that the relationship began during the stepchild's minority, (2) that the relationship continued until the death of the stepparent, or if the stepparent and biological parent divorced, at least until the stepchild reached the age of majority, and (3) that the stepparent was married to the custodial biological parent. If the stepchild presents evidence to show that all three requirements are met, inheritance should be allowed.

**B. EXPANSION TO INCLUDE INHERITANCE BY STEPPARENTS AND NATIONWIDE
ADOPTION**

The law needs to allow for inheritance not only by a stepchild from a stepparent, but by a stepparent from a stepchild as well. Current intestacy laws across the county “privilege survivors in the following order: surviving spouses first, children and grandchildren next, and then parents.”⁴⁹ This means that if a person dies intestate with no surviving spouse, children, or grandchildren, his parents would be next in line to inherit from his estate. The legislature believes that out of all possible heirs, the decedent probably had the closest relationships with his spouse, children, grandchildren, and parents, and thus the intestacy laws are written to reflect those close relationships.

Unsurprisingly, though, there are currently no intestacy laws, not even California Probate Code § 6454, that allow a stepparent to inherit from a stepchild who has died intestate without a surviving spouse, child, or grandchild. If there is nationwide adoption of my proposed intestacy law, the next logical step is to expand the law to allow stepparent inheritance. A stepparent should be able to present the same evidence discussed above to meet the three-requirement test. The only difference in the three-requirements would be that when a stepparent was trying to inherit, the second requirement would read: “*Whether the relationship lasted until the death of the stepchild, or if the stepparent and biological parent divorced prior to the stepchild’s death, at least until the stepchild reached the age of majority.*”

If the court determines that, based on the evidence provided by the stepparent, the three requirements are met, the law should allow for the stepparent to take a portion of the stepchild’s estate along with the biological parent or parents. It would make little sense to only allow

inheritance by a stepchild, but not by a stepparent, based on the three-requirement test because relationships tend to be reciprocal.

Finally, nationwide adoption of this proposed law is necessary. Stepfamilies are not solely a California occurrence; the intent of many stepparents and stepchildren across the country is being ignored by the lack of stepparent/stepchild inheritance laws in the United States. Every state allows biological or adopted children to inherit from a parent when the parent has died intestate. Every state also allows a parent to inherit from a biological or adopted child if the child is not survived by a spouse, child, or grandchild. It is not enough to simply revise the law in California; each state needs to adopt this proposed law so that the intent of stepparents and stepchildren is no longer ignored. As previously explained, other areas of the law across the country are adapting and including stepchildren within the definition of “child.” It is time that the intestacy laws across the country catch up and begin recognizing that a stepparent likely wants his or her stepchild to inherit from their estate and *vice versa*.

C. PRETERMITTED CHILD STATUTES

As of today, most states have adopted some type of Pretermitted Child statute. These laws are meant to protect children whom the court believe have been unintentionally omitted from a parent’s will. For example, the Uniform Probate Code states that if a will fails to provide for any “children born or adopted after the execution of [the] will, the omitted child receives a share...equal in value to that which he would have received if the testator had died intestate.”⁵⁰ The statute goes on to list three exceptions: An omitted child will receive nothing under the will if there is evidence within the will that the omission was intentional, if substantially all of the estate was devised to the surviving parent of the child, or if the omitted child was provided for through a transfer outside of the will and there is evidence to show that the transfer was meant to

substitute a share under the will.⁵¹ Just as with intestacy law, the policy behind pretermitted child statutes is intent effectuation. Unless evidence reveals that the omission was intentional for whatever reason, lawmakers assume that the testator only accidentally failed to update the will to provide for his or her after-born child. Therefore, the law in most states gives the child an intestate share of the testator's estate.

Pretermitted child statutes come into play when a person executes a will and subsequently has a child or adopts a child but fails to amend his or her existing will or execute a new will that provides for the new child. Unsurprisingly, these statutes only cover biological children of the testator or children legally adopted by the testator. No state allows a stepchild who joined the testator's family after the testator's will was executed to recover if the testator failed to amend his or her will or execute a new will to include the stepchild as a beneficiary. If the main policy goal behind pretermitted child statutes is intent effectuation, just as with intestacy law, then these statutes also need to adapt to the growing number of stepfamilies across the country.

If states pass the proposed statute discussed above to allow a stepchild to inherit from a stepparent who has died intestate by meeting the three-requirement test proposed, then pretermitted child statutes should be similarly revised as well. States that have some form of pretermitted child statute should expand their laws not only to include protection for biological children born after execution of the will and adopted children adopted after execution of the will, but also stepchildren who joined the family after execution of the stepparent's will. The laws should allow a stepchild to produce evidence to prove that the relationship began in the stepchild's minority, continued until the stepparent's death or, if the stepparent and biological parent divorced, at least until the stepchild reached the age of majority, and that the stepchild

grew up in the stepparent's household. Proving those three requirements by clear and convincing evidence would show that the stepparent would have wanted to name the stepchild as a beneficiary. Once the stepchild has produced the evidence, the court should then determine whether there is any evidence that the omission was intentional, and if there is not, the pretermitted statute should apply to allow the stepchild to inherit as they would have done, had the stepparent died intestate.

VI. CONCLUSION

In a perfect world, everyone would execute an estate plan that details exactly how they want their estate to be distributed after their death. Unfortunately, though, many people die without ever executing a will, leaving behind estates that the court must then distribute. Through intestacy law, the legislature has acknowledged the fact that most people want their estate to be divided up among the people they cared most about during their lives, such as spouses, children, and parents. Thus, the various intestacy laws across the country were written with the policy goal of intent effectuation in mind; they were written so that an intestate decedent's estate is distributed based on what the decedent most likely would have wanted.

These laws get it right most of the time but fall short when it comes to stepfamilies. California Probate Code § 6454 came close to solving the issue when enacted in 1983, but case law construing this statute has stripped the law of its power. My proposed law will solve the issues present in California Probate Code § 6454. The three-requirement test can be applied mechanically, as all other intestacy laws are, and allows for stepchildren and stepparents to inherit from each other when the three requirements are met and thus when a strong parent-child relationship is proven. The requirements are supported by studies conducted into stepfamily

dynamics and relationships as well as my online empirical study of stepparents conducted through Qualtrics. Finally, nationwide adoption of the proposed law is necessary so that stepfamilies across the country are treated equally under intestacy law.

¹ Gallup Inc., Majority in U.S. Do Not Have a Will, Gallup.com (2016), <http://news.gallup.com/poll/191651/majority-not.aspx>

² The 2005 Gallup Poll cited above found that 51% of people had a will; the 1990 Gallup Poll found that 48% did.

³ In other words, lawmakers should formulate rules of intestacy that operate to divide estates in the same way testators would have dictated had they executed wills.

⁴ Joshua M. Gould, *Stepping In, Stepping Out: Creating Stepfamily Rhythm*, (1 ed. 2016), at V.

⁵ US Bureau, Stats for Stories: Stepfamily Day Census.gov (2018), <https://www.census.gov/newsroom/stories/2015/september/stepfamily.html>

⁶ David T. Lardier Jr. et al., *Relationships Between (Step)Parents and Adult (Step)Children: Explaining Influences on Life Satisfaction and Marital Quality*, 58 *Journal of Divorce & Remarriage* (2017), at 430.

⁷ A small minority of states allow a stepchild to inherit from an intestate stepparent to prevent the estate from escheating to the state (e.g., U.P.C. § 2-103(b)).

⁸ Danaya C. Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Non-Traditional Families* (2015), at 11.

⁹ Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 *Law & Equity: A Journal of Law and Practice* (2000), at 58.

¹⁰ *Id.* at 4.

¹¹ Stepchild Survey, March 2018.

¹² Danaya C. Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Non-Traditional Families* (2015), at 11.

¹³ Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 *Law & Equity: A Journal of Law and Practice* (2000), at 6.

¹⁴ *Id.*

¹⁵ O.R.S. § 656.005

¹⁶ Survey conducted in March 2018; full survey data is available upon request.

¹⁷ <https://www.qualtrics.com/>

¹⁸ US Census Bureau, *Custodial Mothers and Fathers and Their Child Support* (2013), <https://www.census.gov/content/dam/Census/library/publications/2016/demo/P60-255.pdf>.

¹⁹ See, Inc. Gallup, Majority in U.S. Do Not Have a Will, Gallup.com (2018), <http://news.gallup.com/poll/191651/majority-not.aspx>

²⁰ *Id.*

²¹ *Id.*

²² Cal.Prob.Code § 6454

²³ Terin Barbas Cremer, *Reforming Intestate Inheritance for Stepchildren and Stepparents*, 18 *Cardozo Journal of Law & Gender* (2011), at 4.

²⁴ 14 Cal. Rptr. 2d 250 (1992), 253.

²⁵ 22 Cal. Rptr. 2d 590 (1993), 599.

²⁶ 14 Cal. Rptr. 2d 250 (1992), 252.

²⁷ 14 Cal. Rptr. 2d 250 (1992), 252.

²⁸ *Id.* at 257.

²⁹ *Id.*

³⁰ 22 Cal. Rptr. 2d 590 (1993), 599–600.

³¹ *Id.* at 593.

³² See, *Id.*

³³ 17 Cal. 4th 203 (1998), 207.

³⁴ See, *Id.* at 203 and 207.

³⁵ *Id.* at 212.

³⁶ *Id.* at 218.

³⁷ Cal.Fam.Code § 9302

³⁸ Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 *Law & Equity: A Journal of Law and Practice* (2000), at 41.

³⁹ *Id.* at 40.

⁴⁰ Todd M. Jensen, *Constellations of dyadic relationship quality in stepfamilies: A factor mixture model*, 31 *Journal of Family Psychology* (2017), at 2.

⁴¹ Joshua M. Gould, *Stepping In, Stepping Out: Creating Stepfamily Rhythm* (1 ed. 2016), at 8.

⁴² Todd M. Jensen, *Constellations of dyadic relationship quality in stepfamilies: A factor mixture model*, 31 *Journal of Family Psychology* (2017), at 8.

⁴³ Marilyn Coleman, et al., *Stepchildren's views about former Step-Relationships Following Step-Family Dissolution*, 77 *Journal of Marriage and Family* (2015), at 776; (quoting Lawrence H. Ganong, et al., *Patterns of stepchild–stepparent relationship development*, *Journal of Marriage and Family* (2011), at 73.).

⁴⁴ David T. Lardier Jr et al., *Relationships Between (Step)Parents and Adult (Step)Children: Explaining Influences on Life Satisfaction and Marital Quality*, 58 *Journal of Divorce & Remarriage* (2017), at 435.

⁴⁵ Marilyn Coleman, et al., *Stepchildren's views about former Step-Relationships Following Step-Family Dissolution*, 77 *Journal of Marriage and Family* (2015), at 776; (quoting J. Teachman, *Complex life course patterns and the risk of divorce in second marriages*, 70 *Journal of Marriage and Family* (2008), at 294-305.).

⁴⁶ See, 14 Cal. Rptr. 2d 250 (1992), 254.

⁴⁷ Maria Schmeekle, et al., *What Makes Someone Family? Adult Children's Perceptions of Current and Former Stepparents*, 68 *Journal of Marriage and Family* (2006), at 606.

⁴⁸ *Id.* at 603.

⁴⁹ Danaya C. Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Non-Traditional Families* (2015), at 10.

⁵⁰Unif.Probate Code § 2-302

⁵¹ Unif.Probate Code § 2-302