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Intestate Succession for Stepchildren: California Leads the Way, but Has It Gone Far Enough?

by

THOMAS M. HANSON*

"There is certainly, therefore, no injustice done to individuals, whatever be the path of descent marked out by the municipal law."1

— Sir William Blackstone

"Then one day when the lady met this fellow
And they knew that it was much more than a hunch
That this crew must somehow form a family;
That’s the way they all became the Brady Bunch!"

— Theme from “The Brady Bunch”

Did Mike Brady ever adopt those three precious little girls, all of them having hair of gold like their mother?2 We know that they used his surname and that he was as “fatherly” as any father could be. But did Mike ever actually go before a judge and declare that the law should consider him their natural father? If he didn’t, should the law allow Marcia, Jan, and Cindy to claim a portion of Mike’s intestate estate?3

* J.D. Candidate, 1996. This Note is dedicated to Kimberly Regalado, my friend, my wife, and my muse. I would also like to thank my parents, Nancy and Dale Hanson, for the love, support, and opportunities that they have given me. Finally, thanks to Professor Gail Boreman Bird for her comments on this Note.

1. 2 WILLIAM BLACKSTONE, COMMENTARIES *211
2. Obviously, Carol Brady could serve just as easily as the principal in this illustration.
3. Property passes through intestate succession “when a property owner dies without a will, leaves a will which is totally or partially ineffective, or by his or her will directs that the property be distributed according to the intestate laws.” JOHN RITCHIE ET AL., CASES AND MATERIALS ON DECEDENTS’ ESTATES AND TRUSTS 88 (8th ed. 1993). A 1978 study sponsored by the American Bar Foundation found that 55% of those surveyed had not prepared a will, and that based on prior studies the number of people who die intestate may be even higher. 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. 319, 337, 337 n.65. This is especially true for poorer, less educated Americans. Id. at 338; see also RITCHIE, supra at 89 (noting that “older, wealthier, more educated persons are likely to have a will”).

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Courts and legislatures have traditionally answered this question with a resounding no. In the 1951 case of *In re Berge's Estate*, for example, the Minnesota Supreme Court had this to say:

Simply that a child of another is received into a home, cared for, and educated until the age of 16 years, cannot well indicate that such a child has further claims upon those who so took it in. No doubt such a child has received much more than it has parted with.

Such a statement seems harsh, but an examination of the purposes of intestate succession laws shows that the court's reasoning is not entirely unjustifiable. Intestacy laws are designed both to act as a substitute for the unknown testamentary intent of the decedent and also to provide a clear and efficient means of transferring wealth. When a particular familial structure is predominant, an intestacy scheme can serve both of these purposes by assuming that a decedent would wish to limit distribution of his or her estate to those family members who fit the dominant pattern. For most of Anglo-American history, of course, the dominant familial pattern was that which has come to be known as the traditional or nuclear family. Children who were raised in such a family were naturally included in the intestacy scheme. Stepchildren, on the other hand, were naturally cut out.

At the time of the *Berge* decision, the traditional family was still the predominant familial unit in America. Divorce and remarriage, which directly influence the living arrangements of children, were at low levels in the 1950s, meaning that the vast majority of the community was composed of traditional families. To reflect this common social familial composition, intestacy laws anticipated that most people would want to leave their property to their spouses and their biological children. As a result, the law did not recognize relationships

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4. 47 N.W. 2d 428 (Minn. 1951).
5. *Id.* at 431 (quoting *In re Hack's Estate*, 207 N.W. 17, 18 (Minn. 1926)).
7. This Note uses "traditional family" to denote those consisting of two parents with whom all of the children have a biological and/or adoptive relationship. The "stepfamily" is one in which the biological or adopted children of one parent have no biological or legal relationship with the other parent.
8. See Mahoney, *Stepfamilies in the Law*, *supra* note 6, at 919-20 (noting that stepfamilies have historically not fared well in the law of intestate succession).
such as the one between Mike Brady and his stepdaughters absent a formal adoption.

The structure of the American family, however, has changed dramatically since the days of Berge.11 Divorce rates exploded in the sixties and seventies,12 remained very high throughout the eighties,13 and have continued to rise in the nineties.14 Remarriage rates also increased dramatically in the early sixties15 and rose throughout the seventies and into the eighties.16 The result has been a decline in the number of children living in traditional families17 and a rise in the number of children in stepfamilies.18


13. LUGAILA, supra note 12, at 8; ARTHUR J. NORTON AND LOUISA F. MILLER, BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, SERIES P-23, No. 180, MARRIAGE, DIVORCE, AND REMARRIAGE IN THE 1990s 1-6 (1992); Mahoney, Stepfamilies in the Law, supra note 6, at 917-918 n.2.

14. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 55 (1994). According to these Census Bureau statistics, the divorce rate rose from 8.3% in 1990 to 8.9% in 1993. Id.

15. SALUTER, supra note 9, at 7.


17. The rise in the number of children living outside traditional nuclear families has been nothing short of phenomenal. One commentator noted that in 1982, 25% of minor children did not live with both biological parents, and went on to cite authorities that estimated the number could rise to 40% by 1990. Bartlett, supra note 12, at 880-81. A more recent study confirms that in the summer of 1991 nearly 50% of American children lived in a situation other than the traditional nuclear family. STACY FURUKAWA, BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, SERIES P70-38, THE DIVERSE LIVING ARRANGEMENTS OF CHILDREN: SUMMER 1991 1-4 (1994).

18. One Census Bureau study found that in 1985 about 19% of all married-couple families were stepfamilies, which was up from 16% only five years earlier. Miller and Moorman, supra note 9, at 29. The same study found that 15% of all children (in married-couple families in 1985) were stepchildren, up from 13% in 1980. Id. The most recent data indicate that in the early 1990s approximately 16% of all children lived in stepfamilies. NORTON AND MILLER, supra note 13, at 11-12; LUGAILA, supra note 12, at 38. One study notes that "it has been estimated that about one-quarter of children today will live with a
Despite the proliferation of stepfamilies and the decline of the traditional family, the intestacy laws of most states are still structured as if the traditional family is the dominant social familial unit.\(^{19}\) Because inheritance rights hinge on the marital relationship and the parent-child relationship,\(^{20}\) basing an intestacy scheme on the traditional family means that stepchildren either do not inherit or only inherit when property would otherwise escheat.\(^{21}\) In other words, stepchildren are still excluded from the laws of intestate succession,\(^{22}\) despite the fact that meaningful familial relationships can and do develop between stepparents and stepchildren. And Sir Blackstone notwithstanding, injustice is done when stepchildren with legitimate intestacy claims\(^{23}\) are thwarted by out-of-date laws.

California is the only state that has attempted to rectify this outright rejection of stepchild intestacy claims. Under section 6454 of the California Probate Code, stepchildren under certain circumstances have a parent-child relationship with their stepparent so that they may inherit by intestate succession as would a biological or adopted child.\(^{24}\) Unfortunately, two California courts of appeal have interpreted a key stepparent by the time they have reached 16 years of age." Miller and Moorman, supra note 9, at 27 (citing Nicholas Zill, Behavior, Achievement, and Health Problems Among Children in Stepfamilies: Findings From a National Survey of Child Health, in THE IMPACT OF DIVORCE, SINGLE PARENTING AND STEPPARENTING ON CHILDREN 325, (E. Mavis Hetherington and Josephine D. Arasteh eds., 1988)).

19. Glick, supra note 11, at 631-2; Lovas, supra note 11, at 353. For example, Uniform Probate Code section 2-103 provides that the intestate share for heirs other than the decedent's spouse shall pass first to the decedent's descendants, then to the decedent's parents, then to descendants of the decedent's parents, and finally to the decedent's grandparents and their descendants. U.P.C. § 2-103 (1991). The Official Comment to this recently amended section indicates that the word "descendants" is used instead of "issue" to recognize that in certain situations adopted children may inherit, id., but nowhere indicates that unadopted stepchildren would fare any better under this modern statute than they did under traditional intestacy statutes that focused strictly on blood relationships. For further discussion of traditional and modern intestacy statutes, see infra notes 33-42 and accompanying text.

20. Lovas, supra note 11, at 355

21. For a general review of particularized state intestacy statutes which deal with stepchildren, see Mahoney, Stepfamilies in the Law, supra note 6, at 919-24.

22. Id.

23. This Note uses the terms "legitimate" or "valid" to describe those intestacy claims brought by a stepchild whose relationship with a stepparent was so meaningful that the stepchild should be considered the natural object of the stepparent's bounty. For a discussion of presumptions and the types of extrinsic evidence that might assist a court in determining legitimacy, see infra Part III.

24. CAL. PROB. CODE § 6454 (Deering Supp. 1995). This section reads in its entirety:

For the purpose of determining intestate succession by a person or the person's issue from or through a foster parent or stepparent, the relationship of parent and child exists between that person and the person's foster parent or stepparent if both of the following requirements are satisfied:
provision of the statute differently,\textsuperscript{25} causing a split which the California Supreme Court has not yet resolved.\textsuperscript{26} The dispute revolves around section 6454's requirement that the stepparent show that the stepchild would have adopted the stepchild but for a legal barrier. The court in \textit{Estate of Stevenson}\textsuperscript{27} accepted a stepchild intestacy claim by holding that this requirement was satisfied so long as a legal barrier existed at the time of the attempted adoption.\textsuperscript{28} In \textit{Estate of Cleveland},\textsuperscript{29} on the other hand, the court held that the legal barrier had to exist throughout the lifetime of the decedent in order for the stepchild to inherit.\textsuperscript{30} With no similar provision in other states and no guidance from California's highest court, probate courts are virtually free to read the statute as narrowly or as broadly as they wish.\textsuperscript{31} Therefore, despite California's legislative recognition that meaningful familial relationships are often formed between a stepparent and stepchild, probate courts may still ignore these relationships when determining estate distribution by viewing section 6454 from the perspective of traditional intestacy schemes.

(a) The relationship began during the person's minority and continued throughout the joint lifetimes of the person and the person's foster parent or stepparent.

(b) It is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier.

\textit{Id.} California also allows a stepchild to inherit if the decedent leaves no spouse, issue, parents or issue of parents, or grandparents or issue of grandparents. \textsc{cal. prob. code} § 6402(e) (Deering 1991). Additionally, in order that property be returned to the family of the original donor, California provides for special distribution of "the portion of the decedent's estate attributable to decedent's predeceased spouse." \textsc{cal. prob. code} § 6402.5(a) (Deering 1991). Although distribution under this provision is complex and occurs in only limited circumstances, this statute does provide for de facto intestate succession by stepchildren.

25. The two cases are \textit{Estate of Stevenson}, 14 Cal. Rptr. 2d 250 (Ct. App. 1992), and \textit{Estate of Cleveland}, 22 Cal. Rptr. 2d 590 (Ct. App. 1993), review denied 1993 Cal. LEXIS 6355 (Cal. 1993). The provision causing the split is the requirement that the stepchild would have been adopted "but for a legal barrier." \textsc{cal. prob. code} § 6454(b). For discussion of the two cases, see \textit{infra} Part II B.

26. Although the California Supreme Court declined its first opportunity to resolve the split, \textit{In re Estate of Cleveland}, 1993 Cal. LEXIS 6355 (1993), the Court has recently granted review in another case that interpreted the same provision of section 6454 that was at issue in \textit{Stevenson} and \textit{Cleveland}. \textit{Estate of Smith}, 42 Cal. Rptr. 2d 42 (Ct. App. 1995), review granted 902 P.2d 1296 (Cal. 1995). The court of appeals in \textit{Smith} examined the contrasting interpretations in \textit{Stevenson} and \textit{Cleveland} and determined that the \textit{Stevenson} opinion more correctly construed the intent behind the statute. 42 Cal. Rptr. 2d at 47.

27. 14 Cal. Rptr. 2d 250.

28. \textit{Id.} at 258.

29. 22 Cal. Rptr. 2d 590.

30. \textit{Id.} at 596-600.

31. It should be noted that guidance from the California Supreme Court may soon be forthcoming after the Court's decision to review \textit{Smith}. See \textit{supra} note 26.
This Note examines California Probate Code section 6454 and its disparate treatment in the California courts of appeal to determine how the intestacy needs and wishes of the growing stepfamily population might be better addressed. The issue is simply framed: Which interpretation of section 6454 is more aptly attuned to the needs of modern probate? Should probate courts and the legislature, like the Cleveland court, continue to regard stepchild intestacy claims from the traditional perspective, thus denying such claims in all but exceptional cases? Or should Stevenson's more liberal treatment of stepchild intestacy claims serve as a model for a probate system that strives to account for the diversity in modern family structures? While the law certainly could not have responded immediately to the dramatic shifts in family structure outlined above, continued treatment of stepfamilies as a social anomaly is absurd as much as it is unfair. To rectify this unfair treatment, this Note argues that courts should construe section 6454 in a way that will ensure acceptance of stepchild intestacy claims in those situations in which the probate court determines that a legitimate parent-child relationship existed between the stepparent and the stepchild. In addition, to the extent that section 6454 itself imposes unfair burdens on the ability of stepchildren to legitimately claim intestate shares, the legislature should amend the statute to allow probate courts the latitude necessary to ascertain the existence of legitimate parent-child relationships.

In order to adequately frame the debate, Part I summarizes the law's historical treatment of stepfamilies, with special consideration of California's treatment before the passage of section 6454. Part II analyzes the Stevenson and Cleveland decisions, highlighting their contrasts and noting how section 6454 still places irrational burdens on legitimate stepchild intestacy claims. Part III argues that, for policy reasons, the legislature needs to amend section 6454 to further recognize the meaningful relationships that can develop between a stepparent and a stepchild. Part III also argues that until such a legislative change, courts must strive for equitable treatment of stepchildren by construing section 6454 as liberally as possible.

I. Historical Treatment of Stepchildren in the Law of Intestate Succession

A. Traditional and Modern Treatment in Jurisdictions Other than California

Rights to intestate succession are almost wholly statutory. American intestacy statutes are largely based on the common law ca-

32. See Ritchie, supra note 3, at 6 (defining intestate succession as the process by which "property passes . . . to those relatives who are named in a state statute"); Lovas,
nons of descent, which governed the succession of real property, and the English Statute of Distribution, which governed the succession of personalty. Under both of these intestacy schemes, inheritance was strictly limited to blood relatives. American jurisdictions have softened this strict limitation only slightly by permitting intestate succession by the decedent's surviving spouse and adopted children, often by including the relationship between a decedent and an adopted child in the statutory definition of "parent-child relationship."

Stepchildren, on the other hand, have traditionally been ignored by modern intestacy statutes. As one early commentator noted,

It is popularly believed that stepchildren are often shamefully neglected. They have been practically forgotten, so far as general legislation is concerned. The stepchild is therefore generally left to the tender mercies of the common law, whose fundamental pronouncement is that the mere relationship of stepparent and stepchild confers no rights and imposes no duties. . . . No right of inheritance is conferred unless the stepchild is adopted.

The most striking aspect of this commentary on "traditional" treatment of stepchildren is that it serves equally well to describe the "modern" treatment. Professor Mahoney noted that "under modern intestacy laws, the decedent's 'children' have priority over most other surviving relatives. The term 'children' has never been defined broadly to include stepchildren in this context. Similarly, stepparents have never been included in the category of 'parents.' And when intestacy statutes do acknowledge stepchildren, they often do so only

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supra note 11, at 354 (noting that "[i]n the absence of a will . . . and sometimes in spite of a will, probate codes dictate who gets what").
33. BLACKSTONE, supra note 1, at *208-234.
34. 22 & 23 Car. 2 ch. 10 (1670) (Eng.) (repealed 1925).
35. Fellows, supra note 3, at 322; Ritchie, supra note 3, at 10.
36. See Mahoney, Stepfamilies in the Law, supra note 6, at 919-20 (noting that "[h]istorically, the law of intestate succession has focused rigidly on blood relationships. . . . Steprelatives who are not related by blood have not fared well in this system"). The canons of descent provided that "inheritances shall lineally descend to the issue" of the decedent or to "the next collateral kinsman of the whole blood." BLACKSTONE, supra note 1, at *208, 224 (emphasis in original). The Statute of Distribution was slightly more liberal, providing for collateral inheritance among "every of the next of kindred of the intestate," thus including half-blood inheritance. 22 & 23 Car. 2 ch. 10 s. 3 (emphasis added).
37. Mahoney, Stepfamilies in the Law, supra note 6, at 919; see also IV CHESTER G. VERNIER, AMERICAN FAMILY LAWS § 262 at 408-409 (1936) (noting that by 1936 all American jurisdictions except for Mississippi conferred inheritance rights on adopted children).
38. E.g., CAL. PROB. CODE § 6450 (Deering Supp. 1995). For a summary of the debate over whether adoption severs the parent-child relationship between the adopted child and that child's natural parents, see Ritchie, supra note 3, at 107-08, and Lovas, supra note 11, at 367-71.
39. VERNIER, supra note 37, § 268 at 485.
40. Mahoney, Stepfamilies in the Law, supra note 6, at 920.
in order to specifically except the stepparent-stepchild relationship from the statutory definition of "parent-child relationship."\footnote{41}  

Other jurisdictions acknowledge stepchildren by allowing them to inherit when the property would otherwise escheat.\footnote{42} One such statute was at issue in \textit{In re Estate of Smith}.\footnote{43} In Smith, the decedent's will left a dollar to each of five named "children," four of whom were actually stepchildren.\footnote{44} Because the residual beneficiary had predeceased the decedent, virtually the entire estate passed through intestate succession.\footnote{45} The court ignored the clear indication that the decedent wished the stepchildren to be treated as his "children" for distribution purposes, instead emphasizing that the applicable statute "provid[ed] for inheritance from a stepparent in order to avoid escheat of the property to the state. The right of a stepchild to inherit from a stepparent is limited to the circumstances outlined therein."\footnote{46}  

Stepchildren have also sought to establish intestacy claims under statutes which eliminate the distinction between half-blood and whole blood kindred. In \textit{In re Estate of Humphrey},\footnote{47} the decedent left no legal children but did leave a stepdaughter.\footnote{48} The stepdaughter was eight years old at the time of her mother's marriage to the decedent, and was raised and cared for in her stepfather's and mother's household.\footnote{49} The federal district court for the District of Columbia held valid the stepdaughter's intestacy claim under a statute that eliminated half-blood/whole blood distinctions for purposes of intestate succession.\footnote{50} In reaching its decision, the court noted "the modern public policy of Congress to accord to stepchildren the same rights as to natural children."\footnote{51} The court failed to acknowledge, however, that this modern public policy had yet to manifest itself in intestacy statutes, and that the statute at issue did not eliminate distinctions between collateral relatives (whether of half or whole blood) and steprelatives. On appeal, the D.C. Circuit summarily reversed the District Court's decision.\footnote{52}  

\footnote{41} \textit{E.g.}, \textsc{Alaska Stat.} § 13.06.050(3) (1994) (excluding from the definition of child "any person who is only a stepchild").  
\footnote{42} \textit{E.g.}, \textsc{Wash. Rev. Code Ann.} § 11.04.095 (West 1987).  
\footnote{43} 299 P.2d 550 (Wash. 1956).  
\footnote{44} \textit{Id.} at 551.  
\footnote{45} \textit{Id.}  
\footnote{46} \textit{Id.} at 552.  
\footnote{48} \textit{Id.} at 33.  
\footnote{49} \textit{Id.}  
\footnote{50} \textit{Id.} at 35.  
\footnote{51} \textit{Id.}  
\footnote{52} Humphrey v. Tolson, 384 F.2d 987 (D.C. Cir. 1966).
Smith and Humphrey are perfect illustrations of how probate courts are handcuffed by modern intestacy statutes even when the facts indicate that the stepchild’s intestacy claim is legitimate. The laws of intestate succession simply fail to acknowledge that meaningful parent-child relationships can ever form between a stepparent and stepchild, when in fact such relationships are by no means uncommon. Because of the statutory nature of the law of intestate succession, judges are faced with the choice of either rejecting valid claims or ignoring statutory language in order to achieve just results.

B. Traditional Treatment of Stepchildren in California

Prior to the general revision of the California Probate Code that took effect on January 1, 1985, stepchildren had little hope of inheriting through intestate succession in California. In the leading case of Estate of Lima, the decedent left one biological child and three stepchildren, who were the biological children of her predeceased husband. The intestate estate’s principal asset was real property that the decedent’s husband (the stepchildren’s biological father) had transferred to the decedent six years before his death and eleven years before the death of the decedent. The stepchildren claimed equal shares in the real property under former Probate Code section 229, which provided: "If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came from such spouse by gift ... such property goes in equal shares to the children of the deceased spouse ...." The court correctly noted, however, that section 229 only applied where the decedent left no issue, and here the decedent was survived by a biological child. Accordingly, the court applied former Probate Code section 222, which provided: "If the decedent leaves no surviving spouse, but leaves issue, the whole estate goes to such issue ...." The court was left with no choice but to distribute the entire estate to the surviving biological daughter, because “[s]tepchildren simply have

53. Non-blood, unadopted children have occasionally established intestacy claims under the judicial doctrine of equitable adoption, which bases the relationship on a contract to adopt. Mahoney, Stepfamilies in the Law, supra note 6, at 925-26. This doctrine has proven to be an inadequate tool for stepchildren: "When the alleged adoptor is the child's stepparent the courts almost invariably find the proof insufficient on the grounds that the conduct of the parties was as consistent with a normal stepparent-stepchild relationship as it was with a contract to adopt." Jan Ellen Rein, Relatives by Blood, Adoption and Association: Who Should Get What and Why, 37 Vand. L. Rev. 711, 781-82 (1984).

54. 37 Cal. Rptr. 404 (Ct. App. 1964).
55. Id. at 397.
56. Id.
57. Id. at 405 n.1.
58. Id. at 405.
59. Id.
not been embraced within the meaning of the word 'issue' as used in Probate Code section 222.\textsuperscript{60} In so doing, the court acknowledged that such a result was hardly desirable:

Although it may appear unjust that stepchildren, under facts here present, may not share in the estate of their stepparent who has left issue, especially when the assets of the estate were at one time the property of the natural parent of the stepchildren, the language of the code section, the case law and the historical status of stepchildren permit no other interpretation. . . . [T]he status of stepchildren has not been disturbed, and we must take the law as we find it.\textsuperscript{61}

The facts of \textit{Estate of Davis}\textsuperscript{62} are similar. Philip and Alice, each of whom had children from a previous marriage, were married for 32 years.\textsuperscript{63} When Alice died without a will, her entire estate passed to her husband.\textsuperscript{64} When he died four months later, Alice's children from the previous marriage claimed that they were entitled to a share of the estate on the theory of equitable adoption.\textsuperscript{65} The court dismissed the equitable adoption claim and ruled instead that succession was governed by the former section 222, under which "[u]nadopted children are not 'issue' entitled to take."\textsuperscript{66}

In \textit{Steed v. Imperial Airlines},\textsuperscript{67} the California Supreme Court confirmed that stepchildren had no right to intestate succession. In that case the decedent's stepdaughter Elizabeth brought an action for the wrongful death of her stepfather.\textsuperscript{68} The stepfather had held Elizabeth out to world as his daughter, fully supporting her and encouraging her to use his surname, and the parties stipulated that he had treated the stepdaughter in exactly the same manner as he had his natural daughter.\textsuperscript{69} Under the applicable wrongful death statute, however, rights of action were limited to those who were "heirs" of the deceased.\textsuperscript{70} Citing \textit{Lima}, the Court rejected the stepdaughter's claim, noting that "[t]here is . . . no provision for inheritance by dependent stepchildren."\textsuperscript{71}

\textsuperscript{60. Id.  
61. Id. (citations omitted).  
62. 165 Cal. Rptr. 543 (Ct. App. 1980).  
63. Id. at 544.  
64. Id.  
65. Id. The doctrine of equitable adoption allows non-legal children to inherit based on the promise or contract of the parent to adopt the child. Stepchildren traditionally are unable to prove the existence of such a contract. \textit{See supra} note 53.  
66. 165 Cal. Rptr. at 544.  
68. Id. at 802.  
69. Id. at 802-03 n.2.  
70. Id. at 803.  
71. Id.}
Justice Burke, joined by Justices Tobriner and Mosk, dissented. Noting that Elizabeth’s injury was identical to her half-sister, who was allowed to recover under the wrongful death statute, the dissent argued that “it would be wholly inequitable to deny recovery to Elizabeth.”

Although they limited their argument to actions for wrongful death, the dissenters found “no rational reason for drawing a distinction between dependent stepchildren... and other dependent children.”

Lima, Davis, and Steed adequately illustrate California’s traditionally inflexible and inequitable treatment of stepchildren. They also illustrate the inability of courts to contravene long-standing and out-of-date succession laws in order to acknowledge stepchild intestacy claims even when they are clearly legitimate. The following Part discusses the California Legislature’s response to these problems—Probate Code section 6454.

II. California Probate Code Section 6454

A. First Impressions—Claffey and Lind

In 1983 the California Legislature passed Assembly Bill 25, which effected a wholesale revision of a large part of the California Probate Code. Included in these changes was the addition of section 6408, which provided for determination of the existence of a parent-child relationship for purposes of intestate succession. As originally enacted, the statute provided that a relationship between a stepparent and stepchild had the same effect as if it were an adoptive relationship if (i) the relationship began during the person’s minority and continued throughout the parties’ joint lifetimes and (ii) it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier.

72. Id. at 811 (Burke, J., dissenting).
73. Id. at 811-12 (Burke, J., dissenting).
74. For a summary of changes made by the bill, see CALIFORNIA LEGISLATURE, 1983 SUMMARY DIGEST 284-87 (1983).
75. Id.
76. 1983 Cal. A.B. 25, 1983-84 Sess., § 6408(a)(2) (1983). The statute was proposed by the Law Revision Commission, which commented that the provision “is new and is not found in the Uniform Probate Code. This sentence applies, for example, where a foster child or stepchild is not adopted because a parent of the child refuses to consent to the adoption.” 17 CAL. LAW REV. COMM. REP, S. REP. AB 25, at 882 (1983). This language is repeated in the Law Revision Commission’s Comments to the subsequent amendments and recodification of section 6408, but it is clear that other legal barriers may exist. For example, a child over the age of 12 must consent to being adopted. CAL. FAM. CODE § 8602 (West 1994). It is not hard to imagine such a child, still feeling attachment to a deceased or non-custodial biological parent, refusing to consent when first confronted with the idea of stepparent adoption. Nor is it hard to imagine that a legitimate familial relation-
The legislature subsequently amended the statute, dropping the "adoptive relationship" language and instead providing that "[f]or the purpose of determining intestate succession by a person or his or her descendants from or through a foster parent or stepparent, the relationship of parent and child exists between that person and his or her foster parent or stepparent" if the requirements are met. In 1993, the statute was recodified (with technical changes) as section 6454.

In its present form, section 6454 provides five requirements that must be met in order for the stepchild to take through intestate succession. First, a stepparent-stepchild relationship must exist. Second, the relationship must have formed during the child's minority. Third, the relationship must have continued throughout the lifetimes of both the stepchild and the stepparent. Fourth, clear and convincing evidence must show that the stepparent would have adopted the stepchild. Finally, clear and convincing evidence must also prove that the adoption would have taken place but for a legal barrier.

The court of appeal first construed section 6454 in Estate of Claffey. The stepchildren of Bessie Claffey claimed that the trial judge had improperly instructed the jury that the statute required the existence of a "family relationship" rather than "merely" a "stepchild/stepparent relationship," which would arise as soon as the natural parent and the stepparent were married, whether or not the stepparent relationship may eventually develop between that child and the stepparent. Another example of a legal barrier is found in Estate of Lind, in which the attempted adoption of an adult failed because California law at the time prohibited adult adoptions. Id. at 859.

77. CAL. PROB. CODE § 6408(e) (West 1991) (repealed 1993). The change has two effects. First, the claiming stepchild can still inherit from the natural parents (and vice versa). Adoption, on the other hand, severs the child's right to inherit from his or her biological parent unless certain requirements are met. CAL. PROB. CODE § 6451 (Deering Supp. 1995). Such an effect is not desirable in stepfamily situations, because the stepchild may develop a meaningful relationship with the stepparent while maintaining a traditional parent-child relationship with the natural parents. The second effect is that stepparents cannot inherit under the statute, which "applies only to inheritance by the foster child or stepchild or the child's issue 'from' or 'through' a foster parent or stepparent, not to inheritance 'by' a foster parent or stepparent." 20 CAL. LAW REV. COMM. REPORTS at 1470 (1990). This Comment does not explain why a stepparent should not be permitted to inherit from a stepchild. If a legitimate parent-child relationship is established, it makes little sense to allow inheritance within that relationship to flow in one direction and not the other.

78. CAL. PROB. CODE § 6454.

79. At the time of Claffey, Lind, Stevenson, and Cleveland, section 6454 was codified as part of section 6408. Because the requirements of section 6454 are identical to those in the former section 6408, the remainder of this Note refers to both the old and the new codifications as section 6454. See supra notes 74-77 and accompanying text for a discussion of the legislative history.

80. 257 Cal. Rptr. 197 (Ct. App. 1989).
even knew the children or was allowed to see them.\textsuperscript{81} The court properly rejected this claim, agreeing instead with the trial court's determination that the statute contemplated a relationship "'like that of' a natural parent and child in the sense of a 'family' relationship."\textsuperscript{82} The stepchildren apparently had little to show that their relationship with Bessie was in any way a "family relationship," as the only time they had spent in her home and under her care followed the tonsillectomies that Bessie (who was a doctor) had performed.\textsuperscript{83} Consequently, the jury found that no family relationship existed, and the court of appeal found no reason to disturb this result.\textsuperscript{84}

The \textit{Claffey} case is important because it showed that stepchildren could not use the new statute to support intestacy claims that were not legitimate. Under the \textit{Claffey} court's interpretation, stepchildren bear the burden of proving more than a mere stepparent-stepchild relationship. Instead, stepchildren must prove, by a preponderance of evidence, the existence of a legitimate parent-child relationship.\textsuperscript{85} If claiming stepchildren cannot meet this threshold requirement, a court need not even consider the statute's other requirements, i.e., that the relation began during the child's minority, continued throughout the lifetime of both parties, and that the child would have been adopted but for a legal barrier.\textsuperscript{86}

The court's interpretation is in accord with the premise of this Note: legitimate family relationships do not always form between stepparents and stepchildren, but when they do, intestate succession rights should form with the relationship. One commentary argues that the \textit{Claffey} interpretation supplants an ambiguous term ("relationship") with an equally ambiguous phrase ("family relationship").\textsuperscript{87} To be sure, "family relationship" is not easily defined and can be manipulated, especially in light of the reality of abusive and/or dysfunctional family relationships. This ambiguity is not fatal—it only means that claimants must prove that their relationship with their stepparent was such that the stepparent would have expected the stepchild to be treated as a natural child for the purposes of intestate succession.\textsuperscript{88} As

\textsuperscript{81}. \textit{Id.} at 199.
\textsuperscript{82}. \textit{Id.} at 198.
\textsuperscript{83}. \textit{Id.} at 199 n.3.
\textsuperscript{84}. \textit{Id.} at 200.
\textsuperscript{85}. \textit{Id.}
\textsuperscript{86}. The \textit{Claffey} court noted that even if it had not read a "family relationship" requirement into the statute, the stepchildren would have lost because they failed to convince the jury by clear and convincing evidence that Bessie would have adopted them but for a legal barrier. \textit{Id.} at 200 n.6.
\textsuperscript{88}. For the factors that may help prove such a claim, see \textit{infra} Part III.
the Claffey court said, "[D]istribution of the estate of one dying without a will to his or her unadopted stepchild rather than to heirs claiming by blood relationship is not automatic and must be based on a review of each situation." The jury in Claffey made its review of the situation and determined that a family relationship did not exist.

The next court to construe section 6454 also had little trouble in determining whether a legitimate relationship had developed. In Estate of Lind, claimant Warren Haughey appealed the probate court's determination that he lacked standing to contest his foster sister's will. The central issue on appeal was whether Warren had pled sufficient facts to allege that he had met section 6454's requirement that his foster parents would have adopted him but for a legal barrier. Warren had lived with his foster parents from shortly after his birth until he was twenty-two years old, and the foster parents had treated him as their natural child throughout their lifetimes. Based on these facts the court noted that the Claffey-imposed "family relationship" requirement had been met. Warren had produced letters written by his foster parents which indicated that adoption papers had been filed and which made references to Warren as their adopted son. From this evidence, the court held that "the probate court could infer, at least, an attempt or attempts at adoption, which could be taken by the court as showing the Haugheys 'would have adopted' [Warren]."

This holding shows a softening of the statutory "would have adopted" requirement. Showing by clear and convincing evidence that the parents' state of mind was such that they "would have adopted" is difficult in any context. In Lind it was particularly difficult because more than forty years had passed between the attempted adoption and the will contest. Therefore, circumstantial evidence that tends to

89. 257 Cal. Rptr. at 200.
90. Id.
92. Id. at 854.
93. The statute imposes the same requirements on claiming foster children as are imposed on claiming stepchildren. CAL. PROB. CODE § 6454.
94. 257 Cal. Rptr. at 857. The facts and issues of the case are somewhat confusing. The claimant was the foster child of the decedent's parents. In order to have standing to contest, he had to show that he was an "interested person," i.e., that he would be entitled to a share if any portion of the estate should pass through intestacy. Id. at 856. The decedent had died a widow without issue and was predeceased by her parents, in which case the Probate Code calls for distribution to the issue of the decedent's parents. CAL. PROB. CODE § 6402(c) (Deering 1991). In order to have standing to contest, therefore, the claimant needed to show a section 6454 parent-child relationship that would allow him to claim an intestate share of the decedent's estate through his foster parents. 257 Cal. Rptr. at 856.
95. See supra notes 79-90 and accompanying text.
96. 257 Cal. Rptr. at 857.
97. Id. at 857-58.
98. Id. at 858.
show the parents’ state of mind is often the best and possibly the only way for a foster or stepchild to satisfy this statutory requirement. The *Lind* court recognized this in holding that a court may infer this state of mind when the parent has attempted to adopt the child.\textsuperscript{99} In dicta, the court noted that courts could infer from an attempted adoption that the parents would have completed the adoption but for a legal barrier, provided that the claiming child can show that a definite legal barrier existed.\textsuperscript{100} The court stated that a probate court can infer that the attempted adoption failed because of a legal barrier, “absent evidence the attempt was aborted for nonlegal [sic] reasons (such as a change of heart, lack of funds, or mere lethargy).”\textsuperscript{101} In other words, once a claiming stepchild (or foster child) establishes the existence of an attempted adoption and a legal barrier, the burden switches to the opposing party to show the adoption failed for a non-legal reason.

In summary, these first attempts to construe section 6454 produced several common sense results. First, the relationship contemplated by the statute is not simply any relationship that begins as soon as the stepparent has married the natural parent. Rather, the stepchild has the burden of proving that the relationship with the stepparent was such that the stepparent would have wished that the stepchild be treated as a natural child for intestate succession purposes.\textsuperscript{102} Second, probate courts can infer that the stepparents “would have adopted” the stepchild from evidence of an attempted adoption.\textsuperscript{103} Finally, where the claiming stepchild can show an attempted adoption and a definite legal barrier, the burden switches to the opposing party to prove that the adoption failed for reasons other than the legal barrier.\textsuperscript{104} The legal barrier requirement, however, is more ambiguous than it first appears. The following Part reveals that two California courts of appeal have reached diametrically opposed conclusions in determining whether the legal barrier must exist throughout the joint lifetimes of the parties.

\textbf{B. A Split in the Courts of Appeal—Stevenson and Cleveland}

*Estate of Stevenson*\textsuperscript{105} required interpretation of both the “continuous relationship” and the “but for a legal barrier” requirements of

\textsuperscript{99} *Id.*

\textsuperscript{100} *Id.* at 859. Here, the attempted adoption took place after the claimant turned twenty-two. His age constituted a legal barrier because California law at the time prohibited adult adoptions. *Id.*

\textsuperscript{101} *Id.*

\textsuperscript{102} *Claffey*, 257 Cal. Rptr. at 198-200.

\textsuperscript{103} *Lind*, 257 Cal. Rptr. at 858.

\textsuperscript{104} *Id.* at 859.

\textsuperscript{105} 14 Cal. Rptr. 2d 250 (1992).
The claiming stepchildren, born in 1950 and 1951, lived with the decedent (their stepmother) from 1953 or 1954 until approximately 1959, when the decedent and the natural father separated. The couple reunited seven years later, and remained together as a couple until the father's death in 1983. The stepchildren, who had remained with the decedent when their father went to serve in the Vietnam War, did not know that the decedent was not their natural mother until around the time of the father's death. Their relationship with the decedent continued until the decedent's death in 1990.

The court first determined that the seven year separation between the natural father and the stepmother did not preclude satisfaction of the "continuous relationship" requirement. Instead, the court agreed with Claffey's reasoning that the statute contemplated a "family relationship" and that the probate court should review each situation in order to determine whether that family relationship existed. The Stevenson court emphasized that no particular formula exists for making this determination: "Courts should consider the totality of the circumstances to determine whether the relationship satisfies the statutory criteria. If the totality of the circumstances suggests a continuing family relationship, then this aspect of section [6454] is met." The Stevenson court held that the totality of the circumstances indicated a continuous relationship between the decedent and the stepchildren. The court based its decision mainly on the length of the relationship and evidence that the stepmother regarded the claim-

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106. The court also reviewed the evidence in the probate court to determine whether it was sufficient for that court to find that the stepparent "would have adopted." Id. at 255-56. Like the Lind court before it, the Stevenson court held that circumstantial evidence of the stepparent's intent to adopt could be sufficient to meet this requirement. Id. For a discussion of Lind, see supra notes 91-101 and accompanying text.

107. 14 Cal. Rptr. 2d at 252.

108. Id.

109. Id.

110. Id. at 254-55. The court provided three reasons why a "continuous relationship" did not require "continuous cohabitation." First, the court noted that the statute makes no reference to continuous cohabitation. Id. at 253-54. Second, "there are good reasons why a stepparent's separation from the natural parent should not automatically prevent the child from inheriting from the stepparent," such as cases in which the separation was brief, the relationship continued to flourish during the separation, or the length of time spent together outweighed the fact that the relationship was temporarily interrupted. Id. at 254. As an example, the court pointed out that the relationship at issue had lasted more than thirty-five years. Id. Third, section 6454 refers "to a relationship which continues 'throughout the parties joint lifetime.' This indicates that the relationship should continue past the child's minority," when most children have left the family home. Id.

111. Id. at 254-55.

112. Id. at 255.
ants as her natural children and the children regarded the decedent as their natural mother.\textsuperscript{113}

One commentary criticizes Stevenson's "totality of the circumstances" test because California residents will not know "what might be considered the 'totality of circumstances' as of a yet unknown and unknowable date of death."\textsuperscript{114} This argument ignores the fact that intestate succession statutes are designed not for those who concoct a plan to distribute their estate, but for instances when the decedent has failed to plan. It is hard to imagine a situation where a person engaged in estate planning would worry about satisfying the section 6454 requirements when their donative intent could be simply and specifically spelled out in a will. It is easier to imagine the situation where the decedent has maintained a continuous family relationship with a stepchild, not out of desire to satisfy section 6454, but because the stepparent had meaningful parental feelings for the child and wished to treat the stepchild as his or her natural child. Stevenson's "totality of the circumstances" test merely directs the finder of fact to examine the evidence and to decide whether the decedent would have wanted the stepchild to take a natural child's share of the intestate estate. The argument that this approach causes confusion among those planning their estates fails to acknowledge that section 6454 is an intestacy statute, not an estate planning device.\textsuperscript{115}

The second issue in Stevenson concerned the "but for a legal barrier" requirement.\textsuperscript{116} The natural mother's refusal to consent constituted the legal barrier to the adoption.\textsuperscript{117} That legal barrier disappeared upon the child's reaching the age of majority because the consent of the natural parent was no longer required.\textsuperscript{118} The decedent's natural children argued that the statutory requirement was not met because the legal barrier was non-existent after the stepchildren turned eighteen.\textsuperscript{119} The court disagreed, holding that "so long as the circumstances demonstrate that the parent wanted to adopt the child

\textsuperscript{113} Id.

\textsuperscript{114} Meadow & Loeb, supra note 87, at 39-40.

\textsuperscript{115} Meadow and Loeb also express the concern that under Stevenson, "how can anyone know for certain how to end an otherwise continuous relationship if separation alone may not be sufficient?" Id. at 40. This concern seems to be based on the assumption that people who end relationships normally do so by taking specific actions so that they can later convince courts that the relationship did indeed end at that time. This assumption is unrealistic. Finders of fact, whether judge or jury, should just as easily be able to tell if a relationship has ended, based on an examination of the totality of circumstances surrounding that relationship.

\textsuperscript{116} 14 Cal. Rptr. 2d at 256-58.

\textsuperscript{117} Id. at 257.

\textsuperscript{118} Id.

\textsuperscript{119} Id. The decedent's natural children also claimed that the consent of the stepchild's natural mother was not necessary because the natural mother had abandoned the
but was prevented by a legal barrier, then we believe the statutory requirements are met... It is not necessary that the legal barrier exist until the time the stepparent dies.”\(^{120}\)

The court in *Estate of Cleveland\(^{121}\)* reached a dramatically different result in its interpretation of the “but for a legal barrier” requirement. In this case the claiming stepchild and his natural mother had lived with the decedent when the stepchild was between the ages of twelve and twenty-four.\(^{122}\) The stepchild argued that the “but for a legal barrier” was met because the decedent had once asked the mother for permission to adopt, but the mother had refused.\(^{123}\) The decedent, however, made no attempt to adopt the stepchild during the sixteen years that lapsed between the claimant’s eighteenth birthday and the decedent’s death.\(^{124}\) Explicitly rejecting the *Stevenson* court’s interpretation of the statute, the court denied the claimant’s appeal from summary judgment. The court held that “[t]he term ‘but for’ as found in section [6454] is plain and unequivocal in its meaning... The legal impediment must be the ‘sine qua non’ of the failure to adopt. The test is whether the adoption would have occurred ‘but for’ the legal impediment.”\(^{125}\) Applying this holding to the facts of the case, the court concluded that “decedent’s failure to adopt appellant was not caused by the legal impediment of appellant’s mother’s refusal to consent to the adoption during appellant’s minority.”\(^{126}\)

Despite the obvious split formed by the *Cleveland* court’s holding, the California Supreme Court declined to review the decision.\(^{127}\) Probate courts in California, therefore, currently have little guidance as to whether they should follow *Stevenson* or *Cleveland* when faced with a “but for a legal barrier” problem.\(^{128}\) The final Part of this Note

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\(^{120}\) Id. at 256. The court rejected this argument because the natural children had failed to raise the issue at the trial level. Id. at 256-57.

\(^{121}\) Id. at 257.

\(^{122}\) 22 Cal. Rptr. 2d 590 (Ct. App. 1993).

\(^{123}\) Id. at 593.

\(^{124}\) Id. The mother refused because “[s]he feared it would damage her relationship with [the child], wanted [the child] to retain her name, and felt she could financially support him.” Id.

\(^{125}\) Id.

\(^{126}\) Id. at 597 (citation omitted).

\(^{127}\) Id. at 600.

\(^{128}\) In re Estate of Cleveland, 1993 Cal. LEXIS 6355 (1993).

\(^{129}\) Since the split occurred, one other case has examined the “but for a legal barrier” requirement. Estate of Smith, 42 Cal. Rptr. 2d 42 (Ct. App. 1995). The court acknowledged the rift caused by *Stevenson* and *Cleveland* before deciding to follow *Stevenson* as more closely effectuating the legislative intent. Id. at 47-48. The California Supreme Court granted review of this decision, 902 P.2d 1296 (Cal. 1995), meaning that probate and appellate courts may soon have explicit guidance regarding “but for a legal barrier” problems. However, the Supreme Court’s resolution of the “but for a legal barrier” dilemma would
discusses how courts, and ultimately the legislature, should resolve this dilemma.

III. Guidance and Proposals Regarding the Future of Intestate Succession for Stepchildren in California

A. Guidance for the Courts

Resolution of the split caused by the disparate holdings in Stevenson and Cleveland is ultimately for the legislature or the California Supreme Court. Until such resolution, however, California probate and intermediate appellate courts must apply the statute in its present form and with its present interpretations. In holding that the "but for a legal barrier" requirement is met if the barrier existed at the time of the attempted adoption, the Stevenson court first noted that "once the child reaches adulthood, the parties may decide that adopting the child is not so important."129 The court did not explain why adult adoption may be "not so important," and it failed to acknowledge that the diminishing importance of adoption may just as easily show that the importance of the relationship is declining in the minds of the party—a point emphasized in Cleveland.130 As the Cleveland court noted, "[t]here are many reasons for formalizing a parent-child relationship besides the care and protection of a minor. Adoption implicates estate tax planning . . . ; construction of insurance policies . . . ; right to recover for wrongful death; right to sue or be sued for negligence; dependency matters . . . ; and custody/visitation issues."131 In short, the "not so important" rationale supplies little support for the Stevenson court's holding.132

The Stevenson court also attempted to support its conclusion by arguing that a different interpretation would subvert legislative intent by precluding application of section 6454 to adult stepchildren:

Given that the legal barrier is usually the natural parent's refusal to consent to the adoption, it would not make sense to require that the legal barrier exist until the stepparent dies. If such a requirement were imposed, then section [6454] would only apply when the stepson or stepdaughter is a minor . . . . We doubt that this was the Legislature's intent in enacting section [6454].133

still not resolve the broader problem of inadequate recognition of stepchildren in modern intestacy schemes.

129. 14 Cal. Rptr. 2d at 257.
130. 22 Cal. Rptr. 2d at 597.
131. Id. at 599.
132. Although the Smith court agreed with the holding of Stevenson, it did not support its conclusion by arguing that adoption may be "not so important" after the stepchild attains adulthood. 42 Cal. Rptr. 2d at 47-48.
133. 14 Cal. Rptr. 2d at 257-58.
The court in this sense is almost right, but not quite. The legislative history of the statute clearly indicates that the statute is intended to function in those situations where the natural parent has refused to consent to the adoption. Other barriers may exist, however, even after the child has become an adult. For instance, the spouse of the adopting parent must consent to the adoption, as must the spouse of the adoptee if the adoptee is married. In addition, as is the case for the adoption of any person over the age of twelve, the adoptee must consent.

Despite the court's correctness in assuming that the legal barrier will usually be the refusal of the natural parent to adopt, the court is incorrect in stating that "section [6454] would never permit an adult to inherit when the stepparent dies intestate." As the Cleveland court notes, there is "nothing in the statutory language which indicates that the 'but for' language is inapplicable to adults. Nor is there anything in the legislative history evidencing such an intent." In short, it appears that no valid support exists for Stevenson's holding that the legal barrier need only exist at the time of the attempted adoption.

Despite the impropriety of the Stevenson's holding, probate courts should not rush to dismiss it in favor of Cleveland, because the Cleveland opinion also has its faults. Although Cleveland has better legal support, the policy reasons behind its holding are suspect. Unlike Stevenson, the Cleveland court did not mention the earlier decision reading the statute as requiring a "family relationship." The court

134. See supra note 76.
135. CAL. FAM. CODE § 9301 (Deering 1994). In the stepfamily context, the "spouse of the adopting parent" is the custodial biological parent of the adoptee. The reasons why a custodial biological parent would refuse consent in such a situation are probably limited, but not unthinkable. In Cleveland, for example, the biological mother refused to consent to an adoption in part because she wanted the child to retain her name. 22 Cal. Rptr. 2d at 593.
136. CAL. FAM. CODE § 9302 (Deering 1994).
137. CAL. FAM. CODE § 8602. If an adult adoptee's biological parent refuses to consent, the adoptee may, out of respect for that parent's wishes, refuse to consent even though the adoptee has formed a meaningful relationship with the stepparent and the stepparent wishes to adopt.
138. 14 Cal. Rptr. 2d at 258. The Smith court acknowledged that under Cleveland section 6454 could still apply to adult stepchildren, but argued that Cleveland suggests that section 6454 "applies primarily when the child is still a minor, or has only recently reached the age of majority when the step- or foster parent dies." 42 Cal. Rptr. 2d at 47.
139. 22 Cal. Rptr. 2d at 598.
140. Estate of Claffey, 257 Cal. Rptr. 197 (Ct. App. 1989). Although one commentary has criticized Claffey's "family relationship" requirement as being hopelessly vague, Meadow & Loeb, supra note 87, at 39-40, the most recent case to examine section 6454 endorsed the test as an integral requirement that would help to provide "substantial protection against . . . marginal claims." Smith, 42 Cal. Rptr. 2d at 48. For a discussion of Claffey see supra notes 80-90 and accompanying text.
also neglected to mention that Stevenson had gone even further by stating that courts should look to the “totality of the circumstances” in determining whether a family relationship existed and continued throughout the joint lifetimes of the parties.\textsuperscript{141} The policy behind these interpretations is sound: because intestate succession laws are designed to reflect the estimated wishes of the decedent,\textsuperscript{142} common sense dictates that in uncertain circumstances such as a stepfamily situation the probate court should closely examine the facts in order to determine whether the steprelatives would be the “natural objects of each other’s bounty.”\textsuperscript{143} Despite its liberal holding, then, Stevenson read into the statute a requirement of close judicial examination in order to assure that probate courts could ferret out illegitimate claims.\textsuperscript{144}

Cleveland failed to acknowledge Stevenson’s “totality of the circumstances” safeguard, opining instead that the Stevenson construction “would invite sham or marginal claims” and would create “uncertainty as to how the statutory scheme will operate whenever a stepparent or foster parent relationship has existed.”\textsuperscript{145} In fact, the Stevenson court would likely have disposed of the claim in Cleveland without even considering the “but for a legal barrier” requirement, because the claimant in that case was neither a stepchild\textsuperscript{146} nor a foster child.\textsuperscript{147} Before addressing the express statutory requirements, a court following Stevenson could easily dismiss such a claim as not demonstrating a family relationship based on the totality of the circumstances.

At the heart of the dispute between Stevenson and Cleveland are the different perspectives from which each court viewed the claims before it. Cleveland viewed the claim from the perspective of traditional-family based intestacy schemes, emphasizing that “[s]tepchildren and foster children have historically been excluded from intestate succession schemes,”\textsuperscript{148} and that its holding would “inject[ ] a strong dose of certainty into the operation of [section

\textsuperscript{141} Stevenson, 14 Cal. Rptr. 2d at 255.

\textsuperscript{142} Mahoney, \textit{Stepfamilies in the Law}, supra note 6, at 918; Fellows, \textit{supra} note 3, at 321; Ritchie, \textit{supra} note 3, at 89.

\textsuperscript{143} Mahoney, \textit{Stepfamilies in the Law}, supra note 6, at 931.

\textsuperscript{144} In Claffey, the court denied a claim based solely on its family relationship test without having to determine whether the express statutory requirements were met. 257 Cal. Rptr. at 200.

\textsuperscript{145} Cleveland, 22 Cal. Rptr. 2d at 598-99.

\textsuperscript{146} The claimant’s mother was never married to the decedent. \textit{Id.} at 593.

\textsuperscript{147} While for purposes of the summary judgment motion upon which the appeal was taken the parties stipulated that the claimant was a foster child, \textit{id.} at 599, the court declined to express any opinion as to whether the claimant was a foster child according to the statutory definition. \textit{Id.} at 599 n.14.

\textsuperscript{148} \textit{Id.} at 599.
Stevenson approached the problem with a more contemporary perspective, emphasizing "the fluid state of today's family units [and] . . . the frequency of separation and divorce" in noting that stepparent-stepchild relationships may continue to flourish even during periods of separation. Probate courts should follow Stevenson by adopting this modern perspective. Granted, the Cleveland holding might better serve the traditional goal of certainty in intestacy laws, but courts and legislatures need to recognize that this certainty was a function of a societal assumption that the decedent would die a member of a traditional family, not a family affected by divorce and remarriage. Because American society has lost the luxury of predictable familial compositions, probate courts should in every instance consider the totality of the circumstances to determine whether a claiming stepchild should be the natural object of the decedent's bounty. If the court concludes that no family relationship existed between the decedent and the claimant, the court should dismiss the claim. If the court is convinced, however, that a legitimate relationship existed, it should interpret section 6454 in such a way so that justice will be served, and the claimant may claim the intestate share to which he or she is entitled.

The question remains as to the contents of the inquiry. As explained below, the child's age at the time of the stepfamily's formation and the child's economic dependency on the stepparent are important factors. Excessive reliance on these factors, however, can have detrimental results. Rather, when determining whether a parent-child relationship was formed, courts should first look at how the stepparent and stepchild treated each other. If the stepparent has natural children, a court should place great emphasis upon how the stepparent treated the stepchild in comparison to how the stepparent treated the natural children. This comparison will be helpful in determining

149. Id.
150. 14 Cal. Rptr. 2d at 254.
151. Mark L. Ascher, The 1990 Uniform Probate Code: Older and Better, Or More Like the Internal Revenue Code?, 77 MINN. L. REV. 639, 641 (1993) (preferring "living values, such as simplicity and certainty, [over] 'dead' values, such as incremental improvements in effectuating a decedent's intent"); Lomenzo, supra note 6, at 945 (arguing that an intestacy statute "should be clear, simple, and comprehensible"); Meadow & Loeb, supra note 87, at 35 (stating that predictability is "essential" to intestacy schemes). Some scholars feel that certainty is better served, however, by laws that recognize the diverse nature of the modern family. See, e.g., Mahoney, Support and Custody Aspects, supra note 12, at 39 (asserting that in the face of diverse family life "the law must create new rules to accomplish the goals of clarity and protection").
152. See infra text accompanying notes 167-72.
153. Cf. Mahoney, Support and Custody Aspects, supra note 12, at 39 (arguing that the legal status of a natural parent-child relationship "serves as a logical model for formulating a definition of the stepparent-child status").
whether the relationship continued after the child left the stepparent's home or after the stepchild's natural parent separated from the stepparent. On the one hand, while a decline in the stepparent-stepchild relationship might be expected at this point, such a decline would be far more telling if the stepparent's declining relationship with the stepchild were contrasted with continuing close relations with natural children who had left home. Conversely, consider the situation in which an adult stepson, while admitting that his relationship with his stepmother had declined after he left her home, shows that the relationship between the stepmother and her natural children had completely disintegrated after they had moved out. In this case the comparison would enable a court to find the existence of a parent-child relationship between the stepmother and stepson despite the fact that the relationship had declined.

Often, however, the stepparent will bring no natural children to the relationship, eliminating the helpful comparison. In this case, the finder of fact must determine whether the stepchild should be considered the natural object of the stepparent's bounty. The kind of evidence that could aid such a determination is virtually unlimited. Did the child introduce her stepmother as "Mom," and did the mother introduce her stepchild as "Daughter"? There may be evidence that the child with a stepmother addressed letters from summer camp to "Dad and Mom," or even "Dad and Sally," indicating a closer relationship than if the child addressed the letters just to "Dad." Evidence might be introduced showing that the stepparent attended every one of the child's performances, whether they were football games or piano recitals. On the other hand, perhaps the stepparent never attended a single event. When the stepson was spurned by his high school love interest, did he tell his stepfather about it? Did the stepchild ever consult the stepparent for advice on college choices, job prospects, or financial matters? These types of questions might be relevant to a court's inquiry, and each case will dictate what evidence is important and what is not. Today's society, with its myriad ways in which families and family relationships form, compels courts to determine each case on its own specific facts.

B. Proposal for the Legislature

The California Legislature could resolve the problems identified in Stevenson and Cleveland by removing all requirements from section 6454 except for one: the claiming stepchild must prove by a preponderance of evidence that a legitimate family relationship existed between the decedent and the stepchild. There are two reasons why this proposal has a much better chance of achieving justice than does the current section 6454.
First, section 6454 does not define what sort of relationship must exist between the stepparent and stepchild. Instead, the statute sets forth certain requirements as an inflexible test by which all stepparent-stepchild relationships must stand or fall. This plain reading, adopted by Cleveland, means that satisfaction of the statutory requirements is sufficient to establish intestate succession rights, despite evidence that might show the relationship was by no means a good one. Suppose, for example, that for income tax purposes a stepparent wished to adopt a stepchild with whom he or she had no real relationship. If that stepchild was over the age of twelve, the stepchild could refuse to consent to the adoption, thus imposing a legal barrier. As long as the stepchild’s natural parent remained married to the stepparent until the stepparent’s death (thus satisfying the “continuous relationship” requirement), the stepchild would have a valid claim under 6454.

The second and more important reason for revising section 6454 is that in its current form the statute may bar claims even when the relationship between the stepparent and stepchild was a meaningful and loving one. The facts of Stevenson are illustrative. In that case, the stepchildren had a relationship with their stepmother that began in their early childhood and lasted until her death almost 40 years later—some ten years after her husband, who was the stepchildren’s natural father, had died. For over twenty years the children believed the decedent to be their biological mother, and the decedent was the sole caretaker of the children while their natural father was stationed in Vietnam. Under the facts, it seems just for the stepchildren to share in the decedent’s estate. But according to Cleveland’s holding, a section 6454 claim would fail because the legal barrier to adoption vanished upon the stepchildren reaching the age of majority.

In addition, even under the Stevenson court’s liberal interpretation, the “but for a legal barrier” requirement can in some instances defeat an otherwise valid stepchild intestacy claim. In Stevenson, for example, the natural children argued on appeal that the consent of the

154. CAL. FAM. CODE § 8602.
155. Claffey interpreted the statute as requiring a “family relationship,” 257 Cal. Rptr. at 198-200, and other courts have cited this additional requirement with approval. Smith, 42 Cal. Rptr. 2d at 48; Stevenson, 14 Cal. Rptr. 2d at 254-55. The statute, however, does not include this common sense requirement and courts outside of the Fourth District are not obliged to follow Claffey’s reading. Cf. Cleveland, 22 Cal. Rptr. 2d 590 (failing to acknowledge Claffey’s “family relationship” requirement).
156. 14 Cal. Rptr. 2d at 251-52.
157. Id. at 252.
158. Id.
159. See Cleveland, 22 Cal. Rptr. 2d at 597. For analysis of the disparate interpretations of Stevenson and Cleveland, see supra Part II B.
claiming stepchildren's natural mother was not required because she had abandoned the claimants.\textsuperscript{160}

Because the abandonment theory was not raised at trial, the court declined to consider whether section 6454 applies when "the parties mistakenly believe that a legal barrier exists."\textsuperscript{161} However, the statute requires the stepchild to show that the stepparent "would have adopted the child but for a legal barrier."\textsuperscript{162} According to the plain language of the statute, a mistaken belief would not satisfy this requirement because the adoption would have failed due to mistake, not because of an actual legal barrier. The claiming stepchildren, therefore, might have lost the case if the natural children had claimed at trial that the consent of the stepchildren's mother was not required because she had abandoned the children.

The ramifications of the abandonment theory are broad, because the adopting parents (that is, the custodial natural parent and the stepparent) may choose to respect the non-custodial parent's refusal to consent without knowing that the law of abandonment may actually allow them to adopt without the non-custodial parent's consent. Such parents, while certainly well-intentioned, would not be able to satisfy the "but for a legal barrier" requirement. Furthermore, adopting parents who are aware of the abandonment theory but who also know that the non-custodial parent will contest the adoption, are well advised to see a lawyer, who "\textit{may} be able to accomplish the adoption in spite of the absent parent's refusal to cooperate."\textsuperscript{163} Parents in this situation, who are unwilling or financially unable to retain a lawyer and proceed through litigation which \textit{may} produce an adoption, might decide to forgo the adoption. Strictly speaking, under these circumstances the "but for a legal barrier" requirement is not met.

\textsuperscript{160} 14 Cal. Rptr. 2d at 256. Family Code section 8604(b) provides that the consent of a natural parent who has abandoned the child is not required for the child's adoption. The section reads in full:

If one birth parent has been awarded custody by judicial order, or has custody by agreement of both parents, and the other birth parent for a period of one year willfully fails to communicate with and to pay for the care, support, and education of the child when able to do so, then the birth parent having sole custody may consent to the adoption, but only after the birth parent not having custody has been served with a copy of a citation in the manner provided by law for the service of a summons in a civil action that requires the birth parent not having custody to appear at the time and place set for the appearance in court under Section 8718, 8823, 8913 or 9007.

\textsuperscript{161} 14 Cal. Rptr. 2d at 256 n.7.

\textsuperscript{162} \textit{CAL. PROB. CODE} § 6454.

\textsuperscript{163} \textsc{Frank Zagone} & \textsc{Mary Rudolph}, \textsc{How To Adopt Your Stepchild in California}, § 3:8 (3d ed. 1987) (emphasis added).
Thus, the Stevenson stepchildren could have lost their case as a result of the "but for a legal barrier" requirement. Had they lost, they would have received nothing from the estate if the decedent was survived by "issue, parent or issue of a parent, grandparent or issue of a grandparent." In other words, the Stevenson stepchildren could have lost their claim to an heir as remote as a first cousin thrice removed.

The question remains, however, what exactly constitutes a relationship upon which a legitimate intestacy claim can be based. Claffey suggests that it should be a "family relationship," but courts must have some guidance as to what this phrase means. Professor Mahoney proposes that reform-minded legislatures should include three requirements in formulating a stepfamily intestacy statute: First, "[s]tepfamily inheritance should be permitted only when the stepfamily is formed during the child's minority." Second, a de facto parent-child relationship must exist according to the common law in loco parentis doctrine. Third, Professor Mahoney concurs with section 6454 in that the relationship must continue throughout the parties' joint lifetimes.

Even this progressive and well-intentioned statute would be too limited to consistently achieve justice for stepchildren seeking to es-

165. 257 Cal. Rptr. at 198-99.
166. In addition to the three requirements, Professor Mahoney's proposed statute would also establish inheritance rights not only in stepchildren, but in stepparents as well. Mahoney, Stepfamilies in the Law, supra note 6, at 933-34. Section 6454 expressly precludes the possibility of stepparent inheritance rights by limiting its applicability to inheritance "by a person or the person's issue from or through a foster parent or stepparent." Cal. Prob. Code § 6454 (emphasis added). Professor Mahoney's suggestion is a good one, as it makes little sense to allow inheritance within a legitimate stepparent-stepchild relationship to flow in one direction and not the other.

Professor Mahoney's proposed statute would also be limited to "stepparents and stepchildren and their descendants," thereby precluding, for example, a stepuncle from inheriting from his stepniece. Mahoney, Stepfamilies in the Law, supra note 6 at 934. This limitation is also sound, although at first blush it appears to be opposed to Professor Mahoney's and this Note's argument that intestacy schemes should treat stepchildren equally with natural and adopted children if their relationship with their stepparent was a meaningful one. Without such a limitation, circumstances under which probate courts would be overwhelmed are not hard to imagine. Consider, for example, the situation in which Decedent is the stepdaughter of X, who was the stepson of Y, who was the stepmother of Z, who was the stepfather of Claimant. To support her claim, Claimant would have to prove that each of stepparent-stepchild relationships was a meaningful one. Given the frequency of stepfamily relations today, such claims might not be too uncommon, and the fact-finding burden that they would impose upon probate courts would be crushing.

168. Id. at 930.
169. Mahoney, Stepfamilies in the Law, supra note 6, at 932-33.
tablish intestate succession claims. Professor Mahoney supports her first requirement by stating that "[t]he likelihood of real family ties between stepparent and child are remote in cases where the child has reached adulthood at the time of his or her parent's marriage to the stepparent."\textsuperscript{170} While it is less likely that a family relationship will form after adulthood than during childhood, this does not mean that family relationships could never form in such a case. Parental functions do not cease when a child reaches the age of majority. Adult children often consult their parents on such matters as career choices, emotional crises, financial planning and relationships both personal and professional. An automatic rejection of relationships that form after the child has reached the age of majority cuts against this Note's and Professor Mahoney's basic argument: intestacy schemes should recognize that in today's society, family relationships develop in ways that were unthought of only twenty years ago.

In addition to possible unjust exclusions of legitimate claims, the bright-line majority age rule embodied in both section 6454 and Professor Mahoney's proposal could lead to arbitrary results if the stepfamily forms when some stepchildren are adults and others still under eighteen. A better solution would be to impose a presumption against relationship formation that increases with the child's age at the time of the formation of the stepfamily. Under this proposal a relationship that began when a child was seventeen would be viewed with more skepticism than a relationship that began when a child was an infant. Under Professor Mahoney's proposal and section 6454, these two relationships would be treated as if the child's age at the time of formation were not a factor.

Professor Mahoney's use of the \textit{in loco parentis} doctrine to determine whether the relationship was legitimate is an idea with some merit, but this Note rejects it for two reasons. The first involves the factors that courts have traditionally used in making \textit{in loco parentis} determinations. While Professor Mahoney is correct in noting that some courts do consider non-economic evidence such as shared household and performance of counseling functions in making \textit{in loco parentis} determinations,\textsuperscript{171} she does not acknowledge that courts have often relied heavily on the economic factor of financial support of the child.\textsuperscript{172} While a court should consider economic factors, overreliance

\textsuperscript{170} Id. at 930. 
\textsuperscript{171} Id. at 931. Two opinions that set forth factors substantially similar to Professor Mahoney's are Estate of Wilts, 145 Cal. Rptr. 759, 762 (Ct. App. 1978) and Loomis v. State of California, 39 Cal. Rptr. 820, 822-23 (Ct. App. 1964). 
\textsuperscript{172} See e.g., Estate of Teddy, 29 Cal. Rptr. 402, 405 (Ct. App. 1963) (noting that "'responsibility for the support of the child'" is foremost among the obligations inherent in standing in loco parentis) (quoting Strauss v. United States, 160 F.2d 1017 (2d Cir. 1947)); Commonwealth v. O'Connor, 555 N.E. 2d 865, 868 (Mass. 1990) (stating that the key fac-
on such factors tends to shift the inquiry from the relationship between the parent and child to whether the child was dependent upon the parent. The second reason for rejecting use of the *in loco parentis* doctrine in the stepchild intestacy context is that it focuses solely on the relationship between a stepparent and a minority child. As discussed above, placing absolute age limitations on the right to intestate succession is contrary to the premise that in modern society meaningful family relationships can develop at any age.

This Note proposes that the legislature amend section 6454 so that the sole statutory requirement is proof of the existence of a legitimate family relationship between the stepparent and the stepchild. At the same time, however, section 6454's present requirements should not be completely discarded. Rather, they should be recast as presumptions included in the statute to guide the courts. Thus, if the stepchild can show that the stepparent "would have adopted but for a legal barrier," a strong presumption should arise in favor of a legitimate relationship. Evidence that the relationship remained strong after the child moved away from home would also give rise to a presumption of legitimacy. Finally, the younger the child was at the time of the stepfamily's formation, the stronger the presumption of a legitimate relationship.

**Conclusion**

In light of the growing number of people who will spend at least some part of their lives in stepfamilies, the traditional view which excludes stepchildren from intestacy schemes is outdated and unjust. The California legislature has attempted to rectify this injustice by enacting section 6454, but that statute is not the best means of determining the legitimacy of a stepchild's claim that he or she is the natural object of the stepparent's bounty. The recent split in the California...
courts of appeal caused by *Stevenson* and *Cleveland* highlights the statute’s inadequacy by showing how the statute forces the courts to stretch its plain language to achieve just results. The best possible solution to the inequities caused by section 6454 is for the California legislature to amend the statute so that probate courts may use their discretion to examine the facts particular to each claim to determine its legitimacy. And until the legislature takes such action, probate courts are urged to construe the statute in such a way as to best achieve justice whenever a deserving stepchild asserts a legitimate intestacy claim.