INHERITANCE RIGHTS AND THE STEP-*PARTNER* ADOPTION PARADIGM: SHADES OF THE DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN

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*Kate Hudson is the biological daughter of Goldie Hawn and Bill Hudson. Goldie and Bill divorced when Kate was young, and Kate was raised by Goldie and Kurt Russell, Goldie's longtime partner. If Kurt, a step-*partner*, had adopted Kate, and thereafter Bill died intestate, would/should Kate still be entitled to inherit from and through Bill?*[1]

I. INTRODUCTION

Due to changing social norms and evolving reproductive technology, the issue of what constitutes a family, and more specifically, what constitutes a legally recognized parent-child relationship, is one of the more complex and hotly debated issues in the legal academy.[2] Because inheritance rights attach themselves to a legally recognized parent-child relationship, the discussion has spilled over into the law of wills and trusts.[3] Traditionally, inheritance rights have been based on

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1. Some states permit an adopted child to continue to inherit from and through his or her natural parents, but the great majority do not, unless the child qualifies for the stepparent adoption exception. *See infra* notes 54, 59-60 and accompanying text. Under the stepparent adoption exception, the adopted child retains the right to inherit from and through both natural parents, but only if the adoptive parent is married to one of the natural parents. *See infra* Part IV.

2. For a sense of the debate, see generally Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835 (2000); Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077 (2003); Deborah L. Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 B.C. L. REV. 1 (2004); John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991); Rebecca L. Melton, Note, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family,"* 29 J. FAM. L. 497 (1991).

3. *See, e.g.*, Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 38 (1994); Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 4-5 (2000) [hereinafter Gary, *Adapting Intestacy Laws*]; Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 94-95; Sol Lovas, *When Is a Family Not a Family? Inheritance and the Taxation of Inheritance Within the Non-Traditional Family*, 24 IDAHO L. REV. 353, 353-54 (1988).

family paradigms that assumed a traditional nuclear family.[4] Increasingly, however, the traditional nuclear family is no longer the norm.[5] The law of wills and trusts has failed to keep pace with these societal changes,[6] a failing for which it has been harshly criticized.[7] As applied to the emerging phenomenon of step-*partner* adoptions,[8] the

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4. *See* Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 200-01 (2001); MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 289 (1989); Gary, *Adapting Intestacy Laws*, *supra* note 3, at 4 n.14, 4-5; Brashier, *supra* note 3, at 95.

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> Statistics from the 2000 U.S. Census show that for the first time less than twenty-five percent of all households in the United States are "traditional" families consisting of a married couple and children. Unmarried households increased fifty percent from 1990 to 2000, and the number of nonfamily households grew twice as fast as family households during that period.
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> In addition to an increase in unmarried cohabitants heading households, there has also been an increase in the number of families consisting of children with no biological ties to at least one parent. According to the Census, there were approximately 2.1 million adopted children and 4.4 million stepchildren in the country as of the year 2000.
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> Courts and legislators have been increasingly confronted with the challenge of providing a family law system that reflects the changing and diverse American family.

R. Brent Drake, Note, *Status or Contract? A Comparative Analysis of Inheritance Rights Under Equitable Adoption and Domestic Partnership Doctrines*, 39 GA. L. REV. 675, 678-79 (2005) (footnotes omitted); *accord infra* notes 107-11.

6. There have been some limited statutory efforts at increasing the number of legally recognized parent-child paradigms for inheritance purposes. For example, the Uniform Probate Code grants full inheritance rights to non-marital children. UNIF. PROBATE CODE § 2-114(a) (revised 1990), 8 U.L.A. 91 (1998). It grants children adopted by a stepparent greater inheritance rights. *See* § 2-114(b). The Uniform Probate Code denies inheritance rights to a natural parent who has not openly treated the child as his or her own or who has refused to support the child. § 2-114(c). The Code includes non-marital children and adopted individuals in class gifts if, at a minimum, they qualify as intestate takers. § 2-705 (amended 1991). A handful of states grant a surviving domestic partner inheritance rights comparable to those of a spouse, but the details of how to qualify and the extent of the rights vary by jurisdiction. *See* HAW. REV. STAT. ANN. §§ 560:2-102, 2-201 to 2-214 (LexisNexis 2005); VT. STAT. ANN. tit. 15, §§ 1201-1207 (2002); CAL. FAM. CODE §§ 297, 297.5(c) (West 2005); CAL. PROB. CODE § 6401 (Deering 2004). A number of states permit a child adopted after the death of either or both natural parents to continue to inherit from and through each of the natural parents. *See, e.g.*, CAL. PROB. CODE § 6451(a)(2) (West 2005); OR. REV. STAT. § 112.175(2) (2001).

7. Many commentators have decried the failure of the law of wills and trusts to adopt a more functional approach to what constitutes a parent-child relationship. For a list of articles proposing revisions to the notions of what constitutes a family and what constitutes a legally recognized parent-child relationship for inheritance purposes, "based on function rather than form," see Foster, *supra* note 4, at 201-04; Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77, 79-81 (1998); Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 646 n.10 (2002) [hereinafter Gary, *The Parent-Child Relationship*]. This Article, however, does not go that far, proposing instead an expansion of an existing statutory provision under the prevailing paradigm approach.

8. Step-*partner* adoptions are a subset of third-parent adoptions. The third-parent adoption scenario assumes that the child has two legally recognized parents, that the adoption is by a single

failure to keep pace with family law developments is not only inequitable,[9] it is also unconstitutional.

Step-*partner* adoption is cutting edge family law.[10] It can involve either an unmarried same-sex couple or an unmarried heterosexual couple.[11] Increasingly, states are recognizing the right of an unmarried individual to adopt his or her partner's child. As applied to same-sex couples, this scenario is commonly referred to as a "second-parent" adoption[12] But inevitably second-parent adoptions will lead to third-parent adoptions. As same-sex couples break up, and the custodial parent enters into a new relationship with a new partner, that partner may want to adopt the custodial parent's child.[13] Inasmuch as courts are recognizing second parent adoptions, there is no reason to believe the courts will not recognize such third-parent adoptions between same-sex

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individual, and that the adoption is intended to legally displace only one of the natural parents. *See infra* Part V. The classic example of a third-parent adoption is a stepparent adoption. The adoptive party is married to the custodial parent, and the adoptive parent is intended to legally displace the non-custodial parent. *See infra* Part IV. Increasingly, however, courts are permitting adoptions by a third party who is *not* married to either of the natural parents. For a discussion of which jurisdictions permit such adoption, which do not, and which have not addressed the issue yet, see *infra* note 128. Typically the adoption is by the partner of one of the natural parents. The partner may be of the opposite sex or the same sex as the custodial parent. *See infra* text accompanying notes 105-06. The third-party adoption scenario assumes that, at the time of the adoption, the child already has two legally recognized parents (either of the opposite sex or of the same sex). This last assumption contrasts the third-parent adoption scenario from the second-parent adoption scenario. *See infra* note 117. For a discussion of the latter, see Alona R. Croteau, Comment, *Voices in the Dark: Second Parent Adoptions When the Law is Silent*, 50 LOY. L. REV. 675 (2004); Eleanor Michael, Note, *Approaching Same-Sex Marriage: How Second Parent Adoption Cases Can Help Courts Achieve the "Best Interests of the Same-Sex Family,"* 36 CONN. L. REV. 1439, 1446 (2004); Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933 (2000); Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17 (1999).

9. *See* Gary, *The Parent-Child Relationship*, *supra* note 7, at 654; Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 65-66 (1998); Gary, *Adapting Intestacy Laws*, *supra* note 3, at 40-41, 56-57, 71-72; Margaret H. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917, 918 (1989); Foster, *supra* note 4, at 240-42, 244-51; E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255, 256-58 (2002).

10. It is so new that there is no consensus on what it should be called. *See infra* notes 117, 137. This Article hereby denominates it "step-*partner*" adoption, an admittedly new term, because it is functionally indistinguishable from a stepparent adoption except for the fact that the adoptive parent is not married to the custodial parent. *See infra* note 137 and text accompanying notes 137-47. In light of the fact that increasingly family law no longer draws a distinction based on whether the adoptive parent is married to the custodial parent, the issue is whether it is right and/or legal for the law of wills and trusts to do so.

11. *See infra* notes 114-36 and accompanying text.

12. *See infra* notes 117-28 and accompanying text.

13. For a discussion of the reasons why a partner may want to adopt the other partner's child, see *infra* note 113.

couples.

Moreover, the step-*partner* adoption scenario is not limited to same-sex couples. The second parent adoption rule implicitly repudiates the traditional approach that an unmarried partner is unqualified to adopt a partner's child. There is no reason to limit such repudiation to same-sex couples. The courts that have addressed this issue have allowed unmarried heterosexuals to adopt their partner's child.[14] Such adoptions constitute step-*partner* adoptions.[15] While there are no statistics available on how many same-sex or heterosexual step-*partner* adoptions have occurred, they are becoming increasingly common, and with time they will only become more common in light of evolving social, demographic, and legal developments.[16]

While family law has evolved to recognize the growing trend towards step-*partner* adoptions, the law of wills and trusts has not. In the classic "stranger" adoption paradigm,[17] the general rule is: (1) the adoption severs the parent-child relationship between the adopted child and his or her parents (including severance of all inheritance rights), and (2) the adoption creates a parent-child relationship between the adopted child and his or her adoptive parent(s) (including full inheritance rights).[18] When a child is adopted by a stepparent, however, the Uniform Probate Code and many states recognize a special stepparent adoption rule.[19] Under it, (1) the adoption creates a parent-child relationship between the adopted child and the adoptive stepparent (with full inheritance rights); (2) the adoption does not affect the parent-child relationship between the child and the custodial natural parent (full inheritance rights remain intact); and (3) the adoption *partially* severs the parent-child relationship between the child and the non-custodial parent (the child can inherit from and through the non-custodial parent, but the non-custodial parent cannot inherit from or through the child).[20] Under the stepparent adoption rule, a child adopted by a stepparent effectively has *three* parents from whom he or she can inherit.

But the stepparent adoption exception applies *only* if the adoptive parent and the custodial parent are married.[21] If the adoptive parent and

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14. For a discussion of family law recognizing that unmarried heterosexual couples have the right to adopt, see *infra* notes 129-36 and accompanying text.

15. *See infra* notes 137-47 and accompanying text.

16. *See infra* notes 107-13.

17. For a discussion of the classic adoption paradigm, see *infra* Part III.

18. *See infra* notes 50-59 and accompanying text.

19. *See infra* notes 60-65 and accompanying text.

20. *See infra* notes 66-100 and accompanying text.

21. The Uniform Probate Code expressly requires that the adoption be by a "spouse of either natural parent." UNIF. PROBATE CODE § 2-114(b) (revised 1990), 8 U.L.A. 91 (1998). The

the custodial parent live together but are not married,[22] the general adoption rule applies. Under the general adoption rule, the parent-child relationship between the child and the non-custodial parent who is legally displaced by the adoptive step-*partner* is completely severed.[23] The child can no longer inherit from and through the legally displaced parent, and the legally displaced parent can no longer inherit from and through the child.[24] The result is that a child adopted by a step-*partner*, though functionally indistinguishable from a child adopted by a stepparent, is worse off. While the child adopted by a stepparent effectively has three parents from whom he or she can inherit, the child adopted by a step-*partner* has only two parents from whom he or she can inherit.[25]

In the step-*partner* adoption scenario, the adopted child is effectively punished because the adoptive parent and the custodial parent commit the socially unacceptable sin of living together without being

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Restatement Third of Property (Wills and Other Donative Transfers) provides that the adoption must be by a "stepparent." RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5(2)-(4) (1999). The Restatement does not define the term, but it is assumed that it is using the term as that term is commonly used. Webster's Third New International Dictionary defines stepparent as "the husband or wife of one's mother or father by a subsequent marriage." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2237 (Philip Babcock Gove ed., 1986). *Accord* UNIF. ADOPTION ACT § 1-101(17) (1994), 9 U.L.A. 21 (1999) (defining "stepparent" as "an individual who is the spouse or surviving spouse of a parent of a child but who is not a parent of the child").

The stepparent adoption norm is for the adoptive parent to marry the custodial natural parent—the natural parent who has been awarded primary custody of the children. To facilitate identification of the parties, this Article will assume that the adoptive parent is married to the custodial natural parent, though that is not a legal requirement. *See* Lisa A. Fuller, Note, *Intestate Succession Rights of Adopted Children: Should the Stepparent Exception Be Extended?*, 77 CORNELL L. REV. 1188, 1219 (1992).

22. This assumes the jurisdiction permits step-*partner* adoptions—or as some call them, "non-conventional adoptions." *See, e.g.*, Casey Martin, *Equal Opportunity Adoption & Declaratory Judgments: Acting in a Child's Best Interest*, 43 SANTA CLARA L. REV. 569, 570 n.11 (2003). For a discussion of how many jurisdictions permit non-stepparent adoptions, see *infra* note 128 and accompanying text. For purposes of this Article, it is assumed that, in the step-*partner* adoption scenario, the adoptive parent lives with the custodial parent. This arguably is the norm, and it is unclear if a court would permit a step-*partner* adoption if the partner was not living with the custodial parent.

23. The great majority completely severs the parent-child relationship, including all inheritance rights. *See infra* note 54 and accompanying text. A minority of states permit the child to retain the right to inherit from and through the natural parents even after the adoption. *See infra* note 59.

24. *See infra* notes 75-76 and accompanying text.

25. This statement also assumes a heterosexual non-stepparent adoption scenario. Where the adoption scenario is a same-sex partner (the second-parent adoption scenario), *see infra* text accompanying notes 117-18, strict application of the classic adoption rule means that the child adopted by a same-sex step-*partner* has only one parent from whom he or she can inherit. *See infra* text accompanying notes 120-21.

married. But the child has no control over whether the parties marry. To punish the child because of the "sins" of the parents[26] is illogical, unjust, and constitutes shades of the discrimination the law used to practice against illegitimate children.[27]

II. INHERITANCE RIGHTS BASED ON THE PARENT-CHILD RELATIONSHIP

When an individual dies without a will, a state's intestate scheme sets forth *who* takes the decedent's probate property, *in what order*, and *how much* each taker receives.[28] While the details of each intestate

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26. This is the current practice of the Uniform Probate Code, the Restatement Third of Property (Wills and Other Donative Transfers), and many jurisdictions. *See supra* note 21; *infra* text accompanying notes 75-76.

Some might assume that the obvious inequities of applying the stepparent adoption rule against a child adopted by a step-*partner* would compel a court to grant a child adopted by a step-*partner* the same rights as a child adopted by a stepparent. In light of the clear and unambiguous language in the stepparent adoption statutes requiring the adoptive parent to be "married to" a natural parent or "a stepparent," the more likely outcome is that a court would *not* construe such language to include a step-*partner*. *See supra* note 21; *see also* Gary, *The Parent-Child Relationship*, *supra* note 7, at 661-62. Rather than leaving the matter ambiguous, legislators should ensure the appropriate inheritance rights by revising the intestate statutes. Laura M. Padilla, *Flesh of My Flesh But Not My Heir: Unintended Disinheritance*, 36 BRANDEIS J. FAM. L. 219, 235 (1997-98).

27. *See, e.g.*, Lane v. Philips, 6 S.W. 610, 611 (Tex. 1887). The failure of the Uniform Probate Code, the Restatement Third of Property (Wills and Other Donative Transfers), and the states to extend the stepparent adoption rule to the non-stepparent adoption paradigm is also indicative of the broader failure of the law of inheritance rights to keep up with judicial and statutory changes in family law and adoption law with respect to what constitutes a valid family for adoption purposes.

28. For a general discussion of the role of intestacy, see JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 59-140 (7th ed. 2005); LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 33-79 (3d ed. 2002); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS §§ 2.1-2.7 (1999). Any property not passing pursuant to a non-probate instrument falls to the decedent's probate estate where it is distributed pursuant to the decedent's will, if there is one. Any probate property not passing pursuant to the decedent's will, or if the decedent has no will, passes through the state's intestate scheme. *See* DUKEMINIER & JOHANSON, *supra*, at 71-72.

The principal rationale underlying an intestate scheme is that it constitutes a decedent's presumed intent based upon traditional familial paradigms. *See id.*; WAGGONER ET AL., *supra*, at 37-38; Gary, *The Parent-Child Relationship*, *supra* note 7, at 651, 653-54; Foster, *supra* note 4, at 200-01, 257. The modern trend is to criticize the paradigm approach. For a comprehensive list of recent articles proposing alternatives to the paradigm approach, see *supra* note 7; Gary, *The Parent-Child Relationship*, *supra* note 7, at 646 n.10. Even assuming, *arguendo*, that one favors the paradigm approach, the current distinction between stepparent and step-*partner* adoptions is indefensible under the prevailing approach.

Precisely who takes, and how much is taken, depends on the familial paradigm that fits the decedent at the time of his or her death. There is a strong preference for family members as defined from a traditional nuclear family perspective—spouse, issue, parents, issue of parents, grandparents, issue of grandparents and so on. *See* Foster, *supra* note 4, at 200-01; Gary, *The Parent-Child*

scheme vary greatly from jurisdiction to jurisdiction, the hierarchical order of takers is basically the same. The decedent's surviving spouse, if there is one, takes first.[29] If the decedent has surviving issue, they either take along with the surviving spouse or they take second after the surviving spouse.[30] Either way, qualifying as a surviving issue of a decedent has significant property ramifications under every state's intestate inheritance scheme.[31]

To qualify as an issue, the individual must establish a legally recognized parent-child relationship.[32] Historically, there were two ways to establish a parent-child relationship: naturally or artificially.[33] As used

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Relationship, *supra* note 7, at 653-54; UNIF. PROBATE CODE §§ 2-102 to 2-103 (revised 1990), 8 U.L.A. 81-83 (1998); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS §§ 2.2-2.4 (1999).

29. *See* Katheleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193, 222-23 (1997); Jennifer R. Boone Hargis, Note, *Solving Injustice in Inheritance Laws Through Judicial Discretion: Common Sense Solutions From Common Law Tradition*, 2 WASH. U. GLOBAL STUD. L. REV. 447, 449 (2003); Cindy L. Steeb, Note, *A Child Conceived After His Father's Death?: Posthumous Reproduction and Inheritance Rights. An Analysis of Ohio Statutes*, 48 CLEV. ST. L. REV. 137, 161 (2000). How much the surviving spouse takes varies from jurisdiction to jurisdiction depending first on whether the decedent also has surviving issue (and under some approaches, whether all of the surviving issue are issue of the surviving spouse), whether the decedent also has surviving parents, and/or whether the decedent also has surviving issue of parents.

30. *See* DUKEMINIER & JOHANSON, *supra* note 28, at 73; WAGGONER ET AL., *supra* note 28, at 46; Guzman, *supra* note 29, at 222-23; Steeb, *supra* note 29, at 161. For a detailed listing of those states where the issue share with the spouse versus those approaches where the surviving spouse may be the lone taker, see Brashier*, supra* note 3, at 95 n.4.

31. For other benefits associated with qualifying as a decedent's heir, see Gary, *The Parent-Child Relationship*, *supra* note 7, at 645-46; Laurence C. Nolan, *Critiquing Society's Response to the Needs of Posthumously Conceived Children*, 82 OR. L. REV. 1067, 1075-76 (2003). There are many other benefits associated with qualifying as a child of an individual. *See* Forman, *supra* note 2, at 53; Cynthia R. Mabry, *"Who Is My Real Father?"—The Delicate Task of Identifying a Father and Parenting Children Created From an In Vitro Mix-Up*, 18 NAT'L BLACK L.J. 1, 233 (2004-05).

32. The issue need not be a child of the decedent, but the issue must establish a parent-child relationship that connects to the decedent; i.e., child, grandchild, great-grandchild, etc. WAGGONER ET AL., *supra* note 28, at 118; Gary, *The Parent-Child Relationship*, *supra* note 7, at 654-55; Nicholas Bala & Rebecca Jaremko Bromwich, *Context and Inclusivity in Canada's Evolving Definition of the Family*, 16 INT'L J.L. POL'Y & FAM. 145, 146 (2002). An individual's issue includes not only one's children, but also all of one's descendants. For a general discussion of the different ways that one's descendants can take by representation, see RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.3(b) & cmt. c (1999); DUKEMINIER & JOHANSON, *supra* note 28, at 73-77; WAGGONER ET AL., *supra* note 28, at 46-52. But one's descendants are nothing more than a series of parent-child relationships with the decedent at the top. As long as the individual can establish a parent-child relationship with any of the decedent's descendants, the individual qualifies as an issue of the decedent. The first issue who are eligible to take under the intestate scheme are the decedent's children. For analytical purposes, this Article will assume that the question is whether a child qualifies as an issue, though the individual need not be a child.

33. *See* Gary, *The Parent-Child Relationship*, *supra* note 7, at 654-55; WAGGONER ET AL., *supra* note 28, at 118-19; Mahoney, *supra* note 9, at 928-29; UNIF. PROBATE CODE § 2-114 (revised

in this Article, the natural way of establishing a parent-child relationship refers to a parent-child relationship created by contributing the genetic material that makes up the child.[34] Whoever contributes the egg is the natural mother, and whoever contributes the sperm is the natural father.[35] As used in this Article, the artificial way of establishing a parent-child relationship refers to a parent-child relationship created by operation of law, through adoption,[36] independent of who contributes the egg or sperm.

The traditional and predominant method of establishing a parent-child relationship is the natural method.[37] The moment a child is born, the assumption is that the child has a natural mother and a natural father,

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1990), 8 U.L.A. 83, 91 (1998); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5 cmts. a, d (1999).

34. *See* Bruce L. Wilder, *Assisted Reproduction Technology: Trends and Suggestions for the Developing Law*, 18 J. AM. ACAD. MATRIMONIAL LAW. 177, 181 (2002); Michael, *supra* note 8, at 1445; Richard L. Brown, *Disinheriting the "Legal Orphan": Inheritance Rights of Children After Termination of Parental Rights*, 70 MO. L. REV. 125, 145 (2005); Jayna Morse Cacioppo, Note, *Voluntary Acknowledgments of Paternity: Should Biology Play a Role in Determining Who Can Be a Legal Father?*, 38 IND. L. REV. 479, 485 (2005) (discussing how section 3 of the Uniform Parentage Act implicitly defines the legal father as the "natural" father—the party who contributed the genetic material); Gary, *The Parent-Child Relationship*, *supra* note 7, at 654-55 & nn.49-53.

35. *See* Wilder, *supra* note 34, at 181. Modern reproductive technology has greatly complicated the issue of how one can biologically establish a parent-child relationship, but the complications are under and affect the natural method of establishing a parent-child relationship. For a general discussion of some of the issues inherent in modern reproductive technology, see DUKEMINIER & JOHANSON, *supra* note 28, at 101-14; WAGGONER ET AL., *supra* note 28, at 137-43. For more in-depth analysis of technological advancements in reproductive medical technology and the legal challenges they present, see Wilder, *supra* note 34; Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497 (1996); Gary, *The Parent-Child Relationship*, *supra* note 7, at 655 & n.51; Martin, *supra* note 22, at 579-84. For purposes of this Article, the analysis will assume that a parent-child relationship has been established between the child and his or her natural parents. Issues inherent in how that analysis should be performed under different modern reproductive technology scenarios are beyond the scope of this Article.

36. *See* Wilder, *supra* note 34, at 181; Michael, *supra* note 8, at 1445; Gary, *The Parent-Child Relationship*, *supra* note 7, at 654-55; Timothy Hughes, Comment, *Intestate Succession and Stepparent Adoptions: Should Inheritance Rights of an Adopted Child Be Determined by Blood or by Law?*, 1988 WIS. L. REV. 321, 327-28.

37. In 2005, over 97% of all parent-child relationships (as applied to children who were under the age of 18) were established naturally; only 2.5% were established through adoption (there were 1.6 million adopted children under the age of 18 in 2005). *See* Alvin W. Cohn, *Juvenile Focus*, FED. PROBATION, June 2004, at 43, 45, *available at* http://www.uscourts.gov/fedprob/June_2004/juvenile.html. In 2002, over 45,000 babies were born in the United States as a result of assisted reproductive technology ("ART") procedures—just over 1% of all live births in America. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T HEALTH & HUM. SERVS., 2002 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 11, 13 & fig.1 (2004), *available at* http://www.cdc.gov/ART/ART02/PDF/ART2002.pdf. ART includes infertility treatment procedures in which both egg and sperm are handled in the laboratory. The most common procedure is in vitro fertilization. *See id.* at 1, 3.

and that full inheritance rights exist between the child and the child's natural parents regardless of their marital status.[38] The child can inherit from and through each of his or her natural parents, and each natural parent can inherit from and through the child.[39]

Likewise, the moment a child is adopted, traditionally by a married couple,[40] by operation of law the adoption creates a parent-child relationship between the child and the adoptive parents, a relationship which includes inheritance rights.[41] The child can inherit from and

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38. *See* John C. Duncan, Jr., *The Ultimate Best Interest of the Child Enures From Parental Reinforcement: The Journey to Family Integrity*, 83 NEB. L. REV. 1240, 1246 n.25 (2005); Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 594-604 (2001) [hereinafter Storrow, *Family Privacy*]; Brashier, *supra* note 3, at 113-14; Patricia G. Roberts, *Adopted and Nonmarital Children—Exploring the 1990 Uniform Probate Code's Intestacy and Class Gift Provisions*, 32 REAL PROP. PROB. & TR. J. 539, 542 (1998). The Uniform Probate Code treats an individual as the child of his or her natural parents, regardless of their marital status. *See* UNIF. PROBATE CODE § 2-114 (revised 1990), 8 U.L.A. 91 (1998); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5 (1999).

A child who is conceived by a single woman as a result of medically performed artificial insemination using sperm from an anonymous donor or a sperm bank generally has a natural mother, but no natural father. *See* Shapiro, *supra* note 8, at 22; Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?*, 26 WHITTIER L. REV. 429, 436 n.32 (2004); *see also* UNIF. PARENTAGE ACT § 702 (2000), 9B U.L.A. 355 (2001) (denying parental status to a party who donates an egg or sperm). A child who is conceived as a result of rape may also have no natural father. *See* Jeanette Mills, Comment, *Unwed Birthfathers and Infant Adoption: Balancing a Father's Rights with the States Need for a Timely Surrender Process*, 62 LA. L. REV. 615, 635 n.106 (2002).

39. Generally, if the natural parents are married to each other, inheritance rights automatically attach themselves in both directions. UNIF. PROBATE CODE § 2-114 (revised 1990), 8 U.L.A. 91 (1998); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS §§ 2.3, 2.5(1) & cmt. c (1999). However, the Uniform Probate Code and some jurisdictions require the natural parent to acknowledge and support the child before the natural parent and his or her kindred are entitled to inherit from and through the child. UNIF. PROBATE CODE § 2-114(c) (revised 1990), 8 U.L.A. 91 (1998); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5(5) (1999) (barring inheritance to a parent who has refused to acknowledge or who has abandoned his or her child). *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-2114 (1995). If the natural parents are not married to each other, for the child to inherit from and through the natural father, the child generally has to establish paternity. *See* UNIF. PROBATE CODE § 2-114(a) (revised 1990), 8 U.L.A. 91 (1998); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5 cmts. a-c (1999); *see also* Melinda L. Eitzen & Matthew T. Slimp, *Five Easy Steps to Paternity*, 63 TEX. B.J. 988 (2000); Cacioppo, *supra* note 34, at 500.

40. *See infra* text accompanying notes 46, 49.

41. *See* Brashier, *supra* note 3, at 149-50 & nn.189-90 (citing ALA. CODE § 43-8-91(1) (1991); ALASKA STAT. § 13.11.045(1) (1985); ARIZ. REV. STAT. ANN. § 14-2114(B) (1995); ARK. CODE ANN. § 9-9-215(a)(2) (1993); CAL. PROB. CODE § 6450 (West 1995); COLO. REV. STAT. ANN. § 15-11-114(2) (West 1994); CONN. GEN. STAT. § 45a-731(2) (1995); DEL. CODE ANN. tit. 12, § 508(1) (1987); D.C. CODE ANN. § 16-312(a) (LexisNexis 1989); FLA. STAT. ANN. § 732.108(1) (West 1995); GA. CODE ANN. § 19-8-19(a)(2) (1991); HAW. REV. STAT. § 560:2-109(a)(1) (1993); IDAHO CODE ANN. § 15-2-109(a) (1979); 755 ILL. COMP. STAT. ANN. 5/2-4 (West 1992); IND. CODE ANN. § 29-1-2-8 (LexisNexis 1989); IOWA CODE ANN. § 633.223 (West 1995); KAN. STAT. ANN. § 59-2118(b) (1994); KY. REV. STAT. ANN. § 199.520(2) (LexisNexis 1994); LA.

through each of the adoptive parents,[42] and each adoptive parent can inherit from and through the child.[43]

Legal tension arises, however, when the two methods of establishing a parent-child relationship overlap. When a child is adopted, a plethora of legal issues arise concerning inheritance rights.[44] One issue in particular is whether the adopted child should still be entitled to inherit from and through his or her natural parents.[45] The answer to that issue depends in large part on how one defines what constitutes a "family," and on what one believes to be the purpose of the inheritance scheme.

CIV. CODE ANN. art. 214 (1993); ME. REV. STAT. ANN. tit. 18-A, § 2-109(1) (1994); MD. CODE ANN., EST. & TRUSTS § 1-207(a) (LexisNexis 1991); MASS. GEN. LAWS ANN. ch. 210, § 7 (West 1987); MICH. COMP. LAWS ANN. § 700.110(3) (West 1995); MINN. STAT. § 524.2-114(1) (1995); MISS. CODE ANN. § 93-17-13 (1994); MO. ANN. STAT. § 474.060 (West 1992); MONT. CODE ANN. § 72-2-124(2) (1994); NEB. REV. STAT. § 30-2309 (1989); NEV. REV. STAT. ANN. § 127.160 (LexisNexis 1993); N.H. REV. STAT. ANN. § 170-B:20(IV) (LexisNexis 1994); N.J. STAT. ANN. § 9:3-50(b) (West 1995); N.M. STAT. ANN. § 45-2-114(B) (LexisNexis 1995); N.Y. DOM. REL. LAW § 117(1)(c) (McKinney 1988); N.C. GEN. STAT. § 29-17(a) (1994); N.D. CENT. CODE § 30.1.-04-09 (1993); OHIO REV. CODE ANN. § 3107.15(A)(2) (LexisNexis 1989); OKLA. STAT. ANN. tit. 10, § 60.16(A) (West 1996); OR. REV. STAT. § 112.175(1) (1993); 20 PA. CONS. STAT. ANN. § 2108 (West 1995); R.I. GEN. LAWS § 15-7-16 (1994); S.C. CODE ANN. § 62-2-109(1) (1976); S.D. CODIFIED LAWS § 29A-2-114(b) (1995); TENN. CODE ANN. §§ 31-2-105(1), 36-1-126(b) (West 2001); TEX. PROB. CODE ANN. § 40 (Vernon 1995); UTAH CODE ANN. § 75-2-109(1) (1993); VT. STAT. ANN. tit. 15, § 448 (1989); VA. CODE ANN. § 64.1-5.1(1) (1995); WASH. REV. CODE ANN. § 26.33.260 (West 1996); W. VA. CODE § 48-4-11(b) (1995); WIS. STAT. ANN. § 851.51(1) (West 1994); WYO. STAT. ANN. § 2-4-107 (1977)); *see also* UNIF. PROBATE CODE § 2-114(b) (revised 1990), 8 U.L.A. 91 (1998).

42. A handful of states permit the child to inherit from the adoptive parents, but not through them. Brashier, *supra* note 3, at 150 n.190 (citing VT. STAT. ANN. tit. 15, § 448 (1989) ("[T]here shall be no right of inheritance between the person adopted and his issue on the one hand and predecessors in line of descent and collateral kin of the person or persons making the adoption on the other hand."); Schaefer v. Merchs. Nat'l Bank, 160 N.W.2d 318, 323 (Iowa 1968) ("Where an instrument has been executed before an adoption by a stranger to the adoption, 'children' does not include an adopted child except when the contrary appears from other language or circumstances.")).

43. *See* Mabry, *supra* note 31, at 48-49; Gary, *The Parent-Child Relationship*, *supra* note 7, at 656; Brown, *supra* note 34, at 146; SCOLES ET AL., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 47-48 (6th ed. 2000) (noting that adoption creates inheritance rights between the adopted child and his or her adoptive parents); UNIF. PROBATE CODE § 2-114 (revised 1990), 8 U.L.A. 91 (1998); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5 (1999).

44. *See* Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*, 37 VAND. L. REV. 711, 728-30 (1984) (noting at least ten different legal issues with respect to inheritance that arise between the relevant parties following an adoption).

45. *Id.*; Brown, *supra* note 34, at 145-46; *see also* Gary, *The Parent-Child Relationship*, *supra* note 7, at 656.

III. INHERITANCE RIGHTS AND THE CLASSIC ADOPTION PARADIGM

The classic "stranger" adoption paradigm and the inheritance rights that flow from the adoption are based upon a set of factual assumptions and corresponding public policy considerations. Factually, the classic adoption paradigm assumes the following:

> (1) a parent-child relationship exists between the child and both of his or her natural parents, including full inheritance rights;[46]
> (2) the child is adopted shortly after birth by strangers;[47]
> (3) because the child is adopted shortly after birth, the child has no meaningful relationship with either of his or her natural parents;[48] and
> (4) the child is adopted by a married couple.[49]

Consistent with these assumptions, the general rule is that the adoption creates a new family, with a new parent-child relationship between the child and the adoptive parents,[50] including full inheritance rights. The adopted child can inherit from and through each of the adoptive parents,[51] and each of the adoptive parents can inherit from and through

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46. *See supra* note 38 and accompanying text. This assumes that the natural parents are married. Where the natural parents are not married, full inheritance rights can be established, but it may take additional steps on behalf of one or more of the parties. The child may have to establish paternity to inherit from and through the natural father, and the natural parent or a relative of the natural parent may have to acknowledge and support the child before the natural parent or relative of the natural parent can inherit from and through the child. *See supra* notes 38-39 and accompanying text.

47. The adoption can be by either a couple or a single individual. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5(2)(A) & cmt. e (1999); Gary, *The Parent-Child Relationship*, *supra* note 7, at 656; Susan Ayres, *The Hand That Rocks the Cradle: How Children's Literature Reflects Motherhood, Identity, and International Adoption*, 10 TEX. WESLEYAN L. REV. 315, 322-23 (2004) (discussing VALENTINA P. WASSON, THE CHOSEN BABY (Glo Coalson illus., rev. ed. 1977)), which describes how a married, childless couple adopted a baby boy, as a "classic adoption" book); Catherine J. Jones, *Teaching Bioethics in the Law School Classroom: Recent History, Rapid Advances, the Challenges of the Future*, 20 AM. J.L. & MED. 417, 420 (1994); Croteau, *supra* note 8, at 681; Fuller, *supra* note 21, at 1191.

48. *See* Carol A. Gorenberg, *Fathers' Rights vs. Children's Best Interests: Establishing a Predictable Standard for California Adoption Disputes*, 31 FAM. L.Q. 169, 183 (1997); Gary, *The Parent-Child Relationship*, *supra* note 7, at 656; Fuller, *supra* note 21, at 1195; *see also* Elizabeth Brandt, *Cautionary Tales of Adoption: Addressing the Litigation Crisis at the Moment of Adoption*, 4 WHITTIER J. CHILD & FAM. ADVOC. 187, 210 (2005).

49. *See* William C. Duncan, *Choice and Kinship in Contemporary Family Law*, 4 WHITTIER J. CHILD & FAM. ADVOC. 233, 239 (2005); Lynn D. Wardle, *Preference for Marital Couple Adoption—Constitutional and Policy Reflections*, 5 J.L. & FAM. STUD. 345 (2003) [hereinafter Wardle, *Marital Couple Adoption*]; Kenneth Strauss, *Recent Developments in Single Parent Adoptions*, 11 J. CONTEMP. LEGAL ISSUES 597 (2000); Croteau, *supra* note 8, at 681; Fuller, *supra* note 21, at 1191.

50. *See* Schacter, *supra* note 8, at 936-37; LESTER WALLMAN & LAWRENCE J. SCHWARZ, HANDBOOK OF FAMILY LAW 108 (1989); *cf. supra* note 39 and accompanying text.

51. A few states permit the adopted child to inherit from, but not through, the adoptive parents. *See supra* note 42.

the adopted child.[52] The issue that logically arises is what effect, if any, the adoption should have on the relationship between the adopted child and his or her natural parents.[53]

Under the classic adoption paradigm, the general rule is that the adoption completely severs the parent-child relationship between the child and the natural parents.[54] This rule is based upon several public policy considerations.[55] First and foremost is the "best interests of the child" consideration—the well-known and dominant public policy

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52. *See supra* notes 43, 50 and accompanying text.

53. Technically, from a doctrinal perspective, this statement is inaccurate. Doctrinally, the general rule is that the parent-child relationship between the child and the natural parents has to be severed *before* the child can be adopted. *See* Kurt E. Scheuerman, Recent Development, Eder v. West*: Oregon's New Standard for Neglect in Contested Adoptions*, 71 OR. L. REV. 507, 509 (1992); Ellen K. Solender, *Family Law: Parent and Child*, 36 SW. L.J. 155, 180 (1982); Dawn Allison, Note, *The Importance of Estate Planning Within the Gay and Lesbian Community*, 23 T. MARSHALL L. REV. 445, 467 (1998). But the law requires this as a precondition to adoption because of the traditional, knee-jerk assumption that a child should not have more than two parents. Viewed analytically then, as opposed to doctrinally, the issue is what effect, if any, the adoption should have upon the parent-child relationship between the child and his or her natural parents. For purposes of this Article, the analytical phrasing and approach makes more sense than the traditional doctrinal approach and will be used.

54. *See* David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 813 (1999); Antoinette Greenaway, Note, *When Neutral Policies Aren't So Neutral: Increasing Incarceration Rates and the Effect of the Adoption and Safe Families Act of 1997 on the Parental Rights of African-American Women*, 17 NAT'L BLACK L.J. 247, 264-65 (2004) (quoting 6 Fam. L. & Practice (MB) § 64.01[1] (2003)); Heidi Hildebrand, *Because They Want to Know: An Examination of the Legal Rights of Adoptees and Their Parents*, 24 S. ILL. U. L.J. 515, 534 (2000); Brashier, *supra* note 3, at 151 n.193 (citing ALA. CODE § 43-8-48 (1991); ALASKA STAT. § 13.11.045(1) (1995); ARIZ. REV. STAT. ANN. § 14-2114(B) (1995); ARK. CODE ANN. § 9-9-215(a)(1) (1993); CAL. PROB. CODE § 6451(a) (West 1995); CONN. GEN. STAT. § 45a-731(6) (1995); DEL. CODE ANN. tit. 12, § 508(1) (1987); D.C. CODE ANN. § 16-312(a) (LexisNexis 1989); FLA. STAT. ANN. § 732.108(1) (West 1995); GA. CODE ANN. § 19-8-19-(a)(1) (1991); HAW. REV. STAT. § 560:2-109(a)(1) (1993); IDAHO CODE ANN. § 15-2-109(a) (1979); IND. CODE ANN. § 29-1-2-8 (LexisNexis 1989); IOWA CODE ANN. § 633.223 (West 1995); KY. REV. STAT. ANN. § 199.520(2) (LexisNexis Supp. 1994); ME. REV. STAT. ANN. tit. 18-A, § 2-109(1) (1994); MD. CODE ANN., EST. & TRUSTS § 1-207(a) (LexisNexis 1991); MASS. ANN. LAWS ch. 210, § 7 (LexisNexis 1994); MICH. COMP. LAWS ANN. § 700.110(3) (West 1995); MINN. STAT. § 524.2-114(1) (1995); MO. ANN. STAT. § 474.060.1 (West 1992); MONT. CODE ANN. § 72-2-124(2) (1994); NEB. REV. STAT. § 30-2309(1) (1989); NEV. REV. STAT. ANN. § 127.160 (Michie 1993); N.H. REV. STAT. ANN. § 170-B:20(III) (LexisNexis 1994); N.J. STAT. ANN. § 9:3-50(c)(2) (West 1995); N.M. STAT. ANN. § 45-2-114(c) (LexisNexis 1995); N.Y. DOM. REL. LAW § 117(1)(b) (McKinney 1988); N.C. GEN. STAT. § 29-17(b) (1984); N.D. CENT. CODE § 30.1-04-09(1) (1995); OHIO REV. CODE ANN. § 3107.15(A) (LexisNexis 1989); OR. REV. STAT. § 112.175(2) (1993); 20 PA. CONS. STAT. ANN. § 2108 (West 1995); S.C. CODE ANN. § 62-2-109(1) (1994); S.D. CODIFIED LAWS § 29A-2-114(b) (1995); TENN. CODE ANN. § 31-2-105(1) (1995); UTAH CODE ANN. § 75-2-109(1) (1993); VA. CODE ANN. § 64.1-5.1(1) (1995); WASH. REV. CODE ANN. § 26.33.260 (West 1986); W. VA. CODE § 48-4-11(b) (1995); WIS. STAT. ANN. § 851.51(2) (1994)); *see also* UNIF. PROBATE CODE § 2-114(b) (revised 1990), 8 U.L.A. 91 (1998); *supra* note 50 and accompanying text.

55. *See* Rein, *supra* note 44, at 729-30; Fuller, *supra* note 21, at 1212.

consideration in family law issues.[56] The traditional assumption is that it is in the child's best interest to be the child of but one family,[57] and that the child's assimilation into his or her new family is facilitated by completely severing the child's relationship with his or her old family, thereby also ensuring that the child has a "fresh start" with the new family.[58] Severance of the parent-child relationship between the child and the natural parents includes, as a general rule, complete severance of the inheritance rights between the child and the natural parents.[59] The child can no longer inherit from or through either natural parent, and neither natural parent can inherit from or through the child. The adopted child can inherit from and through his or her adoptive parents only, and only the adoptive parents can inherit from and through the adopted child.

IV. INHERITANCE RIGHTS AND THE STEPPARENT ADOPTION EXCEPTION

While the general rule is that the adoption completely severs the parent-child relationship between the child and his or her natural parents, the Uniform Probate Code and almost a third of the states recognize an exception for the stepparent adoption paradigm.[60] Like the classic

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56. *See* Jill E. Evans, *In Search of Paternal Equity: A Father's Right to Pursue a Claim of Misrepresentation of Fertility*, 36 LOY. U. CHI. L.J. 1045, 1106 (2005); Christopher Carnahan, *Inscribing Lesbian and Gay Identities: How Judicial Imaginations Intertwine with the Best Interests of Children*, 11 CARDOZO WOMEN'S L.J. 1, 2 (2004); Linda J. Olsen, Comment, *Live or Let Die: Could Intercountry Adoption Make the Difference?*, 22 PENN ST. INT'L L. REV. 483, 507-08 (2004).

57. *See* Hughes, *supra* note 36, at 321.

58. *See* Brown, *supra* note 34, at 147; Fuller, *supra* note 21, at 1193-94; *see also* R. Alta Charo, *And Baby Makes Three—or Four, or Five, or Six: Redefining the Family After the Reprotech Revolution*, 15 WIS. WOMEN'S L.J. 231, 238-39 (2000).

59. *See* Hughes, *supra* note 36, at 340; *see also supra* text accompanying note 43. Not all jurisdictions, however, follow this approach. A minority of jurisdictions permit the adopted child to still inherit from and/or through his or her natural parents under certain circumstances. *See* Brashier, *supra* note 3, at 152 n.195 (citing COLO. REV. STAT. ANN. § 15-11-103(6) (West 1995); *In re* Estate of Cregar, 333 N.E.2d 540, 542-43 (Ill. App. Ct. 1975); KAN. STAT. ANN. § 59-2118(b) (1994); LA. CIV. CODE ANN. art. 214 (1993) (same); ME. REV. STAT. ANN. tit. 18-A, § 2-109(1) (1994); Alack v. Phelps, 230 So. 2d 789, 793 (Miss. 1970); N.Y. DOM. REL. LAW § 117(1)(e) (McKinney 1988); OKLA. STAT. ANN. tit. 10, § 60.16(B) (West 1996); *In re* Estate of Marriott, 515 P.2d 571, 574 (Okla. 1973); 20 PA. CONS. STAT. ANN. § 2108 (West 1995); R.I. GEN. LAWS § 15-7-17 (1988); S.D. CODIFIED LAWS § 29A-2-114(b)(2) (1995); TEX. PROB. CODE ANN. § 40 (Vernon 1995); VT. STAT. ANN. tit. 15, § 448 (1989); WYO. STAT. ANN. § 2-4-107(a)(i) (1977)); *see also* Brown, *supra* note 34, at 146; Rein, *supra* note 44, at 723 & n.50; Fuller, *supra* note 21, at 1207-08.

60. *See* UNIF. PROBATE CODE § 2-114(b) (revised 1990), 8 U.L.A. 91 (1998); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5(2)(C) & cmt. h; s*ee also* Brashier, *supra* note 3, at 151 n.193 (citing ALA. CODE § 43-8-48(1) (1991); ALASKA STAT. § 13.12.114(2) (1996); ARIZ. REV. STAT. ANN. § 14-2114(B) (1995); CAL. PROB. CODE ANN. § 6451 (West 1995); HAW. REV. STAT. § 560:2-114 (1993); 755 ILL. COMP. STAT. ANN. 5/2-4(a) (West 1992); ME. REV. STAT. ANN. tit. 18-A, § 2-109 (1994); MICH. COMP. LAWS ANN. § 700.2114 (West 1995); MONT. CODE ANN. § 72-2-124(2) (1995); N.Y. DOM. REL. LAW § 117(1)(e)(2) (McKinney 1988); N.D.

adoption paradigm, the stepparent adoption paradigm is also based upon a series of factual assumptions and public policy considerations. Factually, the stepparent adoption paradigm assumes the following:

(1) a natural parent-child relationship exists between the child and both of his or her parents, including full inheritance rights;[61]
(2) the child lives with and/or has a meaningful relationship with both parents;[62]
(3) the parents divorce, one dies, or they separate (if never married);[63]

CENT. CODE § 30.1-04-09(1) (1995); S.D. CODIFIED LAWS § 29A-2-114(b)(1) (1995); UTAH CODE ANN. § 75-2-114 (2005); VA. CODE ANN. § 64.1-5.1(1) (1995); VT. STAT. ANN. tit. 15A, § 4-102 (2002); UNIF. PROBATE CODE § 2-109(1), 8 U.L.A. 66 (1983) (pre-1990 UPC providing adoption by stepparent does not affect adopted child's inheritance rights from either natural parent); UNIF. ADOPTION ACT § 4-103(b)(3) (1994), 9 U.L.A. 68 (Supp. 2005) (containing important exception permitting adoptee and her descendants to inherit from or through former parent when adoptive parent is stepparent of adoptee); *In re* Estate of Seaman, 583 N.E.2d 294, 300 (N.Y. 1991) (providing good discussion of development of New York adoption law and noting that drafters concluded that complete severance from natural family was not necessary in intrafamily (including stepparent) adoptions and that multiple inheritances in such situations were logical consequences)); *see also supra* note 43 and accompanying text; Brown, *supra* note 34, at 146; Rein, *supra* note 44, at 730-31; Fuller, *supra* note 21, at 1210.

The prevailing inheritance rules with respect to an adopted child arose out of and were based upon the classic adopted-child paradigm discussed above. Over the years, however, family law and the law of adoptions have come to recognize adoption paradigms other than the classic adoption scenario.

One of the first variations on the classic adopted-child paradigm is the single-parent adoption scenario. *See* Strauss, *supra* note 49, at 597. Factually, the single-parent adoption paradigm is similar to the classic adopted-child paradigm, except the child is adopted by only a single parent, as opposed to a married couple. Nevertheless, the logic and public policy considerations underlying the classic adoption paradigm and rule apply with equal validity to the single-parent adoption paradigm. The single adoptive parent is intended to legally displace both natural parents. The single adoptive parent has no relationship with either natural parent, and the child's assimilation into his or her new single-parent family is facilitated by complete severance of the parent-child relationship between the child and his or her biological family.

Accordingly, the single-parent adoption paradigm is treated legally the same as the classic adopted-child paradigm. The parent-child relationship between the adopted child and each of the natural parents is completely severed, and a new parent-child relationship is established between the adopted child and the single adoptive parent. The adoption severs all inheritance rights between the adopted child and each of the natural parents and establishes full inheritance rights between the adopted child and the adoptive parent. The purpose and legal consequences of the classic adoption paradigm apply with equal validity to the single-parent adoption paradigm.

From a historical evolution perspective, the stepparent adoption paradigm is the second major variation on the classic adoption paradigm.

61. *See supra* note 46 and accompanying text.

62. *See* Margaret M. Mahoney, *Open Adoption in Context: The Wisdom and Enforceability of Visitation Orders for Former Parents Under Uniform Adoption Act § 4-113*, 51 FLA. L. REV. 89, 102 (1999); Fuller, *supra* note 21, at 1195-97; Hughes, *supra* note 36, at 341-42.

63. For purposes of discussion, it is easiest to assume (and it is probably the norm) that the natural parents were (1) married at the time the child was born, and (2) thereafter divorced. Neither of these, however, are requirements. The marriage may have ended due to the death of one of the natural parents, or the natural parents may never have married but the relationship nevertheless ended (either by separation or death). Hallie E. Still-Caris, Note, *Legislative Reform: Redefining the*

(4) the custodial parent remarries;[64] and
(5) the stepparent adopts the child.[65]

The stepparent adoption creates a parent-child relationship between the stepparent and the adopted child.[66] The parent-child relationship brings with it full inheritance rights.[67] Under the stepparent adoption rule, the adopted child can inherit from and through the stepparent, and the stepparent can inherit from and through the adopted child.[68] The issue that logically arises is what effect, if any, the adoption should have on the parent-child relationship between the child and his or her natural parents.[69]

If the classic adoption rule were to apply, the adoption would sever the child's relationship with *both* natural parents.[70] To encourage and

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Parent-Child Relationship in Cases of Adoption, 71 IOWA L. REV. 265, 275-76 (1985); Rein, *supra* note 44, at 728; Fuller, *supra* note 21, at 1209. The assumption that the natural parents are married is not critical to the stepparent adoption paradigm, but it simplifies the discussion. *See supra* notes 38-39 and accompanying text.

64. *See* Rein, *supra* note 44, at 728; Fuller, *supra* note 21, at 1209; Still-Caris, *supra* note 63, at 275-76.

65. *See* Rein, *supra* note 44, at 728; Fuller, *supra* note 21, at 1209; Still-Caris, *supra* note 63, at 275-76. If the child is a minor, which is probably a norm, the general rule is that both natural parents have to consent to the adoption. *See* Mahoney, *supra* note 62, at 92; *see also In re* Adoption of A.M.B., 514 N.W.2d 670, 672 (N.D. 1994). There are, however, exceptions where consent of the non-custodial natural parent is not necessary. *See, e.g.*, Mahoney, *supra* note 62, at 92 (discussing how the legal status of the other biological parent can also be terminated if "the court determines that the parent is unfit or that other statutory grounds exist"); *In re* C.N.W., 560 S.E.2d 1, 8 (Ga. 2002) (holding that a stepfather married to the biological and legal mother of the child could adopt the child, even though the biological father of the child was still living; and finding that, because the biological father had not achieved legal father status and was not considered a parent for the purpose of stepparent adoption statutes, consent of the biological father was not required for adoption). This discussion will assume that both natural parents have consented to the stepparent adoption.

The stepparent adoption scenario also assumes that the adoptive parent is not the child's natural parent. If the natural parents were not married when the child was born, and thereafter the couple married, the marriage would legitimize the child without the need for an adoption. *See* UNIF. PROBATE CODE § 2-109(2) (revised 1990), 8 U.L.A. 88; *In re* Estate of Bartolini, 674 N.E.2d 74, 76 (Ill. App. Ct. 1996) (finding that a child born out of wedlock, whose parents subsequently entered into an invalid marriage, was legitimated for the purpose of determining heirship); Bates v. Meade, 192 S.W. 666 (Ky. 1917); *In re* Ruff's Estate, 32 So. 2d 840, 843 (Fla. 1947).

66. *See supra* note 50 and accompanying text.

67. *See supra* note 43, 50 and accompanying text; *see also* UNIF. PROBATE CODE § 2-114(b) & cmt. b (revised 1990), 8 U.L.A. 92 (1998).

68. *See* Brown, *supra* note 34, at 146. This, however, has not always been the law. Because early adoption law and inheritance rights were based upon the premise that the adoption was a contract between only the adoptive parents and the child, the child could only inherit from, but not through, the adoptive parents. *See id.*; Rein, *supra* note 44, at 721; Fuller, *supra* note 21, at 1203-04.

69. *See supra* notes 44, 53 and accompanying text (noting that adoption raises a plethora of interesting legal issues, and noting that this is the analytical approach to the issue, not the doctrinal approach).

70. Historically, that was the rule. *See* Mark Strasser, *Marriage, Parental Rights, and Public*

facilitate stepparent adoptions, however, the Uniform Adoption Act and many states have adopted a special stepparent adoption rule.[71] Under the stepparent exception to the classic adoption rule, the adoption does not affect the parent-child relationship between the child and the custodial natural parent (the parent who is married to the adoptive stepparent).[72] Even in jurisdictions which technically apply the classic adoption rule, thereby severing the parent-child relationship between the child and the custodial natural parent, the custodial natural parent invariably joins in the adoption petition.[73] When the court grants the adoption petition, the parent-child relationship between the child and the custodial natural parent is reestablished.[74] For all practical purposes, the general rule is that a stepparent adoption has no effect upon the parent-child relationship between the child and the custodial parent.

The jurisdictions are split, however, with respect to how a stepparent adoption affects the parent-child relationship between the child and the non-custodial parent (the natural parent of the same gender as the adoptive stepparent). In many jurisdictions, the adoption completely severs the parent-child relationship between the adopted child and the non-custodial parent, including severance of all inheritance rights.[75] In these jurisdictions, the effect of a stepparent adoption as applied to the non-custodial parent is consistent with the classic adoption approach. The adoptive stepparent steps into the shoes of the natural parent of the same gender and, from a legal perspective, completely displaces the natural parent of the same gender.[76]

But the Uniform Probate Code and approximately a third of the

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Policy: On the FMA, Its Purported Justification, and Its Likely Effects on Families, 2 U. ST. THOMAS L.J. 118, 128 (2004). But with the increase in divorces and remarriages, stepparent adoption has come to be the most common form of adoption today. *Id.* Pressures have built for the law to change to recognize that the stepparent adoption scenario is different from the classic adoption scenario. *See id.*

71. *Id.*; *see also* Fuller, *supra* note 21, at 1220-21.

72. *See* Fuller, *supra* note 21, at 1220.

73. *See* Jennifer Wriggins, *Parental Rights Termination Jurisprudence: Questioning the Framework*, 52 S.C. L. REV. 241, 245 n.19 (2000) (citing MARGARET M. MAHONEY, STEPFAMILIES AND THE LAW 161-64 (1994)).

74. *Id.*

75. *See* Brashier, *supra* note 3, at 155; Lorri Ann Romesberg, Note, *Common Law Adoption: An Argument for Statutory Recognition of Non-Parent Caregiver Visitation*, 33 SUFFOLK U. L. REV. 163, 164 (1999); *see also supra* notes 58-59 and accompanying text. This is the approach in those jurisdictions which have not adopted the stepparent adoption rule that constitutes an exception to the general adoption rule.

76. *See* Mahoney, *supra* note 62, at 109; *see also* Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 99 (2004). The phrasing in the text assumes a heterosexual couple. In states that recognize domestic partners, the issue, and phrasing, is more complicated. The adoptive third parent would displace the parent who is not the domestic partner of the adoptive parent.

states recognize that the stepparent adoption paradigm differs from the classic adoption paradigm, both factually and from a public policy perspective. Factually, in the classic adoption paradigm, the child being adopted is typically a newborn.[77] Since the child has not lived with either natural parent,[78] it is assumed that no meaningful parent-child relationship exists between the natural parents and the child at the time of adoption.[79] By putting the child up for adoption before the natural parent-child relationship can take hold, there are strong public policy considerations for completely severing the adopted child's parent-child relationship with his or her natural parents and replacing it with a parent-child relationship with his or her adoptive parents.[80]

In contrast, in the stepparent adoption paradigm there are strong public policy considerations for *not* completely severing the child's parent-child relationship with both natural parents.[81] Factually, the stepparent adoption paradigm assumes that the child has lived with and formed a meaningful parent-child relationship with both natural parents.[82] While the relationship between the natural parents may be broken (or ended), as evidenced by the assumed divorce/death/separation,[83] there is no reason to assume that the actual[84] parent-child relationship between the child and the respective natural parents and their families is also broken (or ended). Even when the natural parents divorce, which is the most common precondition to the stepparent adoption,[85] it is assumed that: (1) both natural parents *had* a parent-child relationship with the child,[86] and (2) the parent-child relationship between the child and each natural parent should continue.

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77. *See supra* text accompanying note 47.

78. *See supra* text accompanying note 48.

79. Under the classic adopted-child paradigm assumption, the natural parent-child relationship is exclusively biological as opposed to emotional and interactive. *See supra* note 48.

80. *See supra* text accompanying notes 57-59.

81. The same can be said, in large degree, for post-death adoptions and other in-family adoption scenarios. *See* Rein, *supra* note 44, at 728-29; Fuller, *supra* note 21, at 1208-09; Still-Caris, *supra* note 63, at 275-76. Some states permit an adopted child to continue to inherit from and through his or her natural parents when the adoption is after the death of either or both of the natural parents. *See* CAL. PROB. CODE § 6451 (West 2005); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5 & cmt. g (1999). The details of these statutes and the propriety of permitting the adopted child to retain the right to inherit from both natural parents when the adoption is after the death of one or both of the natural parents, however, are beyond the scope of this Article.

82. *See supra* text accompanying note 62.

83. *See supra* text accompanying note 63.

84. As opposed to legal, "actual" refers to the emotional and interactive nature of the relationship.

85. *See* Mahoney, *supra* note 62, at 103-04 & n.50.

86. *See supra* text accompanying note 61.

The fact that the parents do not want to maintain a spousal relationship with each other does not mean that the parents do not want to maintain a parent-child relationship with the child.[87] Although divorce is becoming increasingly common in today's society,[88] the courts increasingly award either joint custody of the child to the parents or extensive visitation rights to the non-custodial parent, recognizing the importance of maintaining an ongoing parent-child relationship between the child and both natural parents after the divorce/separation.[89]

The stepparent adoption paradigm also assumes, and *requires*, that after the natural parents divorce, one of the natural parents remarries.[90] Remarriage following divorce is becoming increasingly common in today's society.[91] As a matter of public policy, society wants to, and should, encourage a good relationship between the child and the stepparent.[92] As a practical matter, the child will spend days, months, or maybe even years with the stepparent.[93] The stepparent may come to play many of the roles in the child's life that the natural parent of the same gender would have played.[94] On a day-to-day basis, the child may

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87. *See* David J. Miller, *Joint Custody*, 13 FAM. L.Q. 345, 363 (1979) (quoting Frail v. Frail, 370 N.E.2d 303, 304 (Ill. App. Ct. 1977)). *See generally id.* at 361-66 (discussing constructive arguments for joint custody).

88. Although experts dispute the rate of divorce, the most commonly used figures indicate that the divorce rate in America is somewhere between 40-50% of all marriages, depending on how they are calculated. *See* Dan Hurley, *Divorce Rate: It's Not as High as You Think*, N.Y. TIMES, Apr. 19, 2005, at F7.

89. *See* Brian J. Melton, Note, *Solomon's Wisdom or Solomon's Wisdom Lost: Child Custody in North Dakota—A Presumption That Joint Custody is in the Best Interests of the Child in Custody Disputes*, 73 N.D. L. REV. 263, 274 & n.68 (1997) ("[J]oint custody provides the child with [the] love, attention, training, and influence of both parents.") (quoting Miller, *supra* note 87, at 362); Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 455 & n.2 (1984) (pointing out that a substantial body of literature favors joint custody and that there appears to be accelerating momentum toward joint custody).

90. *See supra* text accompanying note 21.

91. The U.S. Census Bureau no longer reports statistics on the rate of remarriage, but the last reported figures indicate that, between 1988 and 1990, approximately 43% of all marriages constituted a remarriage for at least one of the parties, and, in 65% of those marriages, one of the parties had at least one child, thereby producing a stepfamily. *See* STEPFAMILY ASS'N OF AM., *Stepfamily Facts*, http://www.saafamilies.org/faqs/.

92. *See* Mary Ann Mason & David W. Simon, *The Ambiguous Stepparent: Federal Legislation in Search of a Model*, 29 FAM. L.Q. 445, 467-72 (1995); Mahoney, *supra* note 62, at 106-07; David R. Fine & Mark A. Fine, *Learning from Social Sciences: A Model for Reformation of the Laws Affecting Stepfamilies*, 97 DICK. L. REV. 49, 64-65 (1992); Croteau, *supra* note 8, at 681.

93. *See* Nancy G. Maxwell & Caroline J. Forder, *The Inadequacies in U.S. and Dutch Adoption Law to Establish Same-Sex Couples as Legal Parents: A Call for Recognizing Intentional Parenthood*, 38 FAM. L.Q. 623, 626 (2004); Mason & Simon, *supra* note 92, at 467.

94. *See* Mahoney, *supra* note 9, at 917-18; Croteau, *supra* note 8, at 681; Bryce Levine, Note, *Divorce and the Modern Family: Providing* In Loco Parentis *Stepparents Standing to Sue for Custody of Their Stepchildren in a Dissolution Proceeding*, 25 HOFSTRA L. REV. 315, 316, 324 (1996). Again, this assumes a heterosexual couple. In states permitting domestic partnerships, this

spend much more time with the stepparent than with the non-custodial natural parent. It is therefore in the best interests of the child to establish and maintain a good relationship between the child and the stepparent.[95] If the child and the stepparent establish a good relationship, the stepparent may want to adopt the child to complete this new, hybrid family.[96] As a matter of public policy, society may want to recognize the special relationship that has arisen between the child and the stepparent without legally declaring that the child's relationship with the non-custodial natural parent is completely severed. In fact, even if the child is adopted by the stepparent, it is likely that the child will maintain some type of a relationship with the non-custodial natural parent and his or her family.[97]

From both a factual and a public policy perspective, the stepparent adoption paradigm *is* different from the classic adoption paradigm. In the classic adoption paradigm, the purpose of the adoption is to legally replace the child's natural parents with two "new" parents through adoption. In contrast, in the stepparent adoption paradigm, the purpose of the adoption is to recognize legally that a "third" parent has become an important part of the child's life—the purpose is *not* to completely sever the adopted child's relationship with his or her non-custodial natural parent.

These differences between the classic adoption paradigm and the stepparent adoption paradigm call for different legal treatment, both inter vivos—in terms of the relationship between the child and the non-custodial natural parent[98]—and testamentary—in terms of the inheritance rights between the adopted child and the non-custodial natural parent. In the stepparent adoption paradigm, because the non-custodial parent had a meaningful relationship with the child prior to the adoption, there is a good chance that the legally displaced non-custodial

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point applies equally well to domestic partners. The new domestic partner may come to play many of the roles in the child's life that the ex-domestic partner would have played.

95. *See supra* text accompanying note 92.

96. *See* Maxwell & Forder, *supra* note 93, at 626; Karl A.W. DeMarce, Note, *Stepparent Adoption and Involuntary Termination of Parental Rights: When Petitioners Come to Court with Unclean Hands*, 61 MO. L. REV. 995, 1000 (1996); Mahoney, *supra* note 62, at 107.

97. *See* Brown, *supra* note 34, at 147; Margorie Engel, *Pockets of Poverty: The Second Wives Club—Examining the Financial [In]security of Women in Remarriages*, 5 WM. & MARY J. WOMEN & L. 309, 377 (1999); Fuller, *supra* note 21, at 1198; Still-Caris, *supra* note 63, at 278; *see also* UNIF. ADOPTION ACT § 4-113 (1994), 9 U.L.A. 110-12 (1999) (which authorizes courts to create and enforce post-adoption visitation rights for natural parents (and others) who are legally displaced following stepparent adoptions).

98. *See* UNIF. ADOPTION ACT § 4-113 (1994), 9 U.L.A. 110-12 (1999); *see also* Mahoney, *supra* note 62, 118-19; Annette Ruth Appell, *The Move Towards Legally Sanctioned Cooperative Adoption: Can It Survive the Uniform Adoption Act?*, 30 FAM. L.Q. 483, 483-84 (1996).

parent (and his or her relatives) may still want to recognize the child as his or her child, at least for inheritance purposes. Moreover, extending such enhanced inheritance rights to the adopted child is in the best interests of the child—it permits the child to continue to inherit from and through the non-custodial natural parent.[99] Accordingly, the adoption completely severs the right of the non-custodial natural parent to inherit from and through the child, but the child retains his or her right to inherit from and through the non-custodial natural parent.[100]

But if that is the logic underlying the stepparent exception to the classic adoption rule, it is difficult, if not impossible, to understand why the law does not extend the same exception to the step-*partner* adoption scenario.

V. INHERITANCE RIGHTS AND THE THIRD-PARENT ADOPTION PARADIGM

Although the phrase "third-parent adoption"[101] is not widely recognized, the concept is. The classic example of a third-parent adoption is the stepparent adoption. The stepparent adoption paradigm assumes that (1) a child has *two* legally recognized parents;[102] and that (2) the child is adopted by a single adoptive parent who is married to one

99. *See* Rein, *supra* note 44, at 728-30; Fuller, *supra* note 21, at 1213-14; Still-Caris, *supra* note 63, at 275-76. There is also the consideration that, by consenting to the adoption, the non-custodial parent has waived his or her right to inherit from and through the child; but the child has no say in the adoption, so it would be inequitable to terminate the child's right to inherit from and through the non-custodial parent. *Cf.* Hall v. Vallandingham, 540 A.2d 1162, 1164-65 (Md. Ct. Spec. App. 1988).

100. *See, e.g.*, UNIF. PROBATE CODE § 2-114(b) & cmt. b (revised 1990), 8 U.L.A. 92 (1998); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5(2)(C) & cmt. h (1999); CAL. PROB. CODE § 6451 (West 2005); COLO. REV. STAT. § 15-11-114 (2004); DEL. CODE ANN. tit. 13, § 920(c) (2005); HAW. REV. STAT. ANN. § 560:2-114 (LexisNexis 2004); IND. CODE § 29-1-2-8 (2004); KAN. STAT. ANN. § 59-218 (2003); MICH. COMP. LAWS § 700.2114 (2004); MONT. CODE ANN. § 72-2-124 (2004).

101. Earlier articles mention "third-parent adoptions" but do not really discuss or define the term, apparently believing the term to be self-defining. *See* Kavanagh, *supra* note 76, at 105 n.113 (2004); William C. Duncan, *In Whose Best Interests: Sexual Orientation and Adoption Law*, 31 CAP. U. L. REV. 787, 802 (2003); Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 602 n.21 (2002); Pamela Gatos, *Third-Parent Adoption in Lesbian and Gay Families*, 26 VT. L. REV. 195 (2001); Elizabeth Rover Bailey, Note, *Three Men and a Baby: Second-Parent Adoptions and Their Implications*, 38 B.C. L. REV. 569, 586-87 (1997); Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN'S L.J. 329, 366 n.168 (1995); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 524 n.374 (1990) [hereinafter Polikoff, *Redefining Parenthood*].

102. *See supra* note 46 and accompanying text.

of the child's legal parents—typically the custodial parent.[103] Historically, the only form of third-parent adoption permitted was the stepparent adoption. Thus, the adoptive third parent had to be married to one of the child's legally recognized parents.[104] Heterosexual couples who were not married could not adopt, nor could same-sex couples.[105] But recent changes in family law indicate that step-*partner* adoptions—where one unmarried partner adopts the other partner's child, whether the partners are same-sex couples or heterosexual couples—are becoming increasingly common. The Uniform Adoption Act and at least 21 jurisdictions recognize step-*partner* adoptions.[106]

Changing demographics indicate that step-*partner* adoptions will only increase with time. During the decade from 1990-2000, the number of households resembling the traditional nuclear family declined.[107] During the same decade, the number of households where children lived with a step-*partner* increased dramatically.[108] In fact, the unmarried step-

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103. *See supra* notes 60-65 and accompanying text.

104. The stepparent adoption paradigm needs to be distinguished from the single-parent adoption paradigm. In the classic single-parent adoption paradigm, a single parent, with no spouse or partner, adopts the child and legally displaces *both* natural parents. *See* Lynn D. Wardle, *Parentlessness: Adoption Problems, Paradigms, Policies, and Parameters*, 4 WHITTIER J. CHILD & FAM. ADVOC. 323, 367-68 (2005) [hereinafter Wardle, *Parentlessness*] (implicitly distinguishing a single-parent adoption from the traditional adoption (married couple) and a second-parent adoption (same-sex couple)).

105. Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); Karen Markey, Note, *An Overview of the Legal Challenges Faced by Gay and Lesbian Parents: How Courts Treat the Growing Number of Gay Families*, 14 N.Y.L. SCH. J. HUM. RTS. 721, 746 (1998); Note, *Joint Adoption: A Queer Option?*, 15 VT. L. REV. 197, 204-05 (1990).

106. *See infra* note 128 and accompanying text.

107. If one defines the traditional nuclear family where the householder lives with a spouse and one natural child or more (and no other non-natural children), the number of such households fell by 421,907 or almost 2%. *See* U.S. CENSUS BUREAU, EXAMINING AMERICAN HOUSEHOLD COMPOSITION: 1990 AND 2000, at 7 (2005). Even if one expands the definition to include households where the householder lives with a spouse and either natural children and/or stepchildren (and no other children), the number of such households fell by 413,025 or almost 2%. *Id.*

108. The number of households where the householder lives with an unmarried partner and one natural child or more increased from 859,192 to 1,620,891, an increase of almost 90%. *Id.*; *see also* Brashier, *supra* note 3, at 157 (discussing the fact that, in the mid-1990s, there were "more than one million unmarried, cohabitating heterosexual couples with minor children in the same household"); Michael, *supra* note 8, at 1454-55 (discussing the "gay baby boom"). The recent California Supreme Court opinion in *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005), will only further increase this movement. The court recognized that, where "a woman who agreed to raise children with her lesbian partner, supported her partner's artificial insemination using an anonymous donor, and received the resulting twin children into her home and held them out as her own," both same-sex partners have parental status under the Uniform Parentage Act, even where the partners have not registered as domestic partners. *Id.* at 662. Recognition of such legal status, coupled with the prevalence of breakups and new partners, will only lead to an increase in same-sex step-*partner* adoptions.

partner household is the fastest growing form of household composition. During the 1990s, the number of householders living with an unmarried partner and one natural child or more increased almost ninety percent.[109] With more and more single-parent families,[110] and more couples opting to live together as opposed to getting married,[111] these demographic changes will inevitably lead to more third-parent adoptions by unmarried couples. Just as the stepparent adoption scenario has come to outnumber the classic adoption scenario,[112] changing demographics indicate that where legally permitted, the step-*partner* adoption scenario could come to outnumber the classic adoption scenario.[113]

Historically, the law favored adoption by a married couple on the theory that such adoptions best duplicated the traditional nuclear family model.[114] With time, the law came to recognize single-parent adoptions as well, but the assumption was that the single adoptive parent had no spouse or partner.[115] The legal recognition of single-parent adoptions

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109. U.S. CENSUS BUREAU, *supra* note 107, at 7.

110. The number of households where the householder lived only with one natural child or more increased from 7.5 million to 9.1 million, an increase of over 21%. *Id.*

111. The fourth most common form of household composition in America is one where there is an unmarried partner in the household. *Id*. at 5. The trend is towards more and more single parents and unmarried couples living together, including unmarried couples with children. *Id.* at 6. This will inevitably lead to an increase in third-parent adoptions by unmarried couples.

112. *See* Benjamin C. Morgan, Comment, *Adopting* Lawrence*:* Lawrence v. Texas *and Discriminatory Adoption Laws*, 53 EMORY L.J. 1491, 1500 (2004); Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299, 1409-10 (1997).

113. Assuming that the natural child of one partner is not the natural child of the parent's unmarried partner, some may question why an unmarried step-*partner* may want to adopt the child. The reasons parallel why a stepparent may want to adopt his or her spouse's child. The step-*partner* may want to formalize the relationship which has arisen over time between the child and the step-*partner*. *See* Nancy D. Polikoff, *Recognizing Partners but Not Parents/Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 731 (2000); Julia Frost Davies, Note, *Two Moms and a Baby: Protecting the Nontraditional Family Through Second Parent Adoptions*, 29 NEW ENG. L. REV. 1055, 1077 (1995). The step-*partner* may want to adopt the child so that the child receives all the benefits inherent in a parent-child relationship, including the right to be covered under the step-*partner's* insurance plan. *See id.* at 1077; Mark Strasser, *Adoption and the Best Interests of the Child: On the Use and Abuse of Studies*, 38 NEW ENG. L. REV. 629, 638 (2004); *In re* Hart, 806 A.2d 1179, 1185-86 (Del. Fam. Ct. 2001); *see also supra* note 31 and accompanying text.

114. *See* Storrow, *Family Privacy*, *supra* note 38, at 606; *see also* Kimberly Richman, *Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law*, 36 LAW & SOC'Y REV. 285, 285 (2002); Wardle, *Parentlessness*, *supra* note 104, at 367. *See generally* Wardle, *Marital Couple Adoption*, *supra* note 49.

115. Sara R. David, Note, *Turning Parental Rights into Parental Obligations—Holding Same-Sex, Non-Biological Parents Responsible for Child Support*, 39 NEW ENG. L. REV. 921, 926-27 (2005); Strauss, *supra* note 49, at 597; Myra G. Sencer, Note, *Adoption in the Non-Traditional Family—A Look at Some Alternatives*, 16 HOFSTRA L. REV. 191, 212 (1987).

opened the door for gay and lesbian adoptions.[116] Where gays and lesbians are granted the right to adopt, the assumption is that such adoptions should be treated the same as any other adoption: the adoption creates a parent-child relationship with the adoptive parent or parents, and the adoption severs the relationship with the child's biological parent or parents. Application of the classic adoption rule works well for same-sex adoptions, except for one scenario: the "second-parent adoption" scenario.[117]

In the second-parent adoption scenario, an individual adopts his or her partner's biological or adopted child.[118] The classic second-parent adoption scenario is one where a lesbian has a child through artificial insemination, and so there is no natural father.[119] Thereafter, the

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116. Shaista-Parveen Ali, Comment, *Homosexual Parenting: Child Custody and Adoption*, 22 U.C. DAVIS L. REV. 1009, 1033 (1989); *see also* William L. Pierce, *In Defense of the Argument that Marriage Should Be a Rebuttable Presumption in Government Adoption Policy*, 5 J.L. & FAM. STUD. 239, 250-51 (2003) (discussing the history of single-parent adoption as starting with heterosexual women and slowly moving to include heterosexual males and then homosexual men); Note, *Joint Adoption: A Queer Option?*, *supra* note 105, at 205, 215.

117. For a general discussion of the development and legal consequences of the second-parent adoption doctrine, see Maxwell S. Peltz, *Second-Parent Adoption: Overcoming Barriers to Lesbian Family Rights*, 3 MICH. J. GENDER & L. 175 (1995); Shapiro, *supra* note 8; Croteau, *supra* note 8. Gay-rights advocates generally use the term "second-parent adoptions" to describe the scenario where a lesbian woman has a child by artificial insemination and then her same-sex partner adopts the child. *See* Shapiro, *supra* note 8, at 22, 26 n.46. Some use the term "second-parent adoption" to include a whole host of non-traditional adoption scenarios, but that term does not apply to the third-parent adoption scenario envisioned in this Article. The second-parent adoption scenario assumes (1) the child had only one legally recognized parent, and (2) thereafter, the child is adopted by a single adoptive parent who has a non-marital relationship with the child's parent. The intent of the adoption is to add a second parent into the child's life, not to legally displace the only parent the child has. *See infra* text accompanying note 125. On the other hand, the phrase "third-parent adoption" assumes (1) the child has *two* legally recognized parents, and (2) the child is adopted by a single adoptive parent who has a non-marital relationship with one of the child's legal parents—typically the custodial parent. *See supra* note 8 and text accompanying notes 60-72. Assuming third-parent adoptions are permitted, the issue that naturally arises is the same as in the stepparent adoption scenario: whether the adoption should completely sever the child's relationship with the legally recognized parent of the same gender who is being legally displaced by the adoption or whether the child should be permitted to retain the right to inherit from and through the parent who is being legally displaced.

118. *See* David, *supra* note 115, at 927-28; Katie A. Fougeron, Note, *Equitable Considerations for Families with Same-Sex Parents:* Russell v. Bridgens*, 264 Neb. 217, 647 N.W.2d 56 (2002), and the Use of the Doctrine of* In Loco Parentis *by Nebraska Courts*, 83 NEB. L. REV. 915, 917 (2005); Morgan, *supra* note 112, at 1500.

119. If a woman's husband consents to her undergoing artificial insemination, he is deemed the legal, natural father of a child thereby conceived, regardless of who donates the sperm. *See* Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 165 (2000); UNIF. PARENTAGE ACT § 5, 9A U.L.A. 592 (1979). From the donor's perspective, he has no parent-child relationship with the child as long as the woman is married and the husband consents. The donor's situation is not so clear where the woman is unmarried. A number of states have

mother's lesbian partner seeks to adopt the child. Under traditional adoption rules, in order for a single parent to adopt a child, usually both natural parents must relinquish their parent-child relationship with the child, and, following the single-parent adoption, both parents are legally displaced.[120] At the very least, the parent-child relationship between the child and the natural parent of the same gender as the adoptive parent is legally displaced.[121] As applied to the lesbian partner adoption scenario, however, either of these approaches would defeat the purpose of the adoption: to create a two-parent family for the child.[122] Application of traditional adoption principles would be contrary to this purpose because it would legally displace the birth mother. Gay-rights advocates have attempted to avoid this legal consequence by (1) having the natural parent (who was being legally displaced) adopt along with her partner (thereby reestablishing the parent-child relationship between the child and the natural parent through the adoption),[123] and/or (2) urging the jurisdiction to adopt the second-parent adoption rule.[124]

The second-parent adoption rule provides that, where a child who is being adopted has only one legally recognized parent, adoption by that

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modified the Uniform Parentage Act to remove the word "married." DeLair, *supra*, at 166; *see, e.g.*, CAL. FAM. CODE § 7613(b) (West 1999) ("[T]he donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."); *see also* John E. Durkin, Comment, *Reproductive Technology and the New Family: Recognizing the Other Mother*, 10 J. CONTEMP. HEALTH L. & POL'Y 327, 338 & n.83 (1994). Where the woman is unmarried, the donor is not anonymous, and/or the procedure was not performed by a doctor, the courts are split over whether the donor is recognized legally as the natural father. *See* Michael J. Yaworsky, Annotation, *Rights and Obligations Resulting from Human Artificial Insemination*, 83 A.L.R. 4th 295, 306-11, 320-24 (1991).

120. *See* Debra Carrasquillo Hedges, Note, *The Forgotten Children: Same-Sex Partners, Their Children and Unequal Treatment*, 41 B.C. L. REV. 883, 884 (2000); Shapiro, *supra* note 8, at 26; Mark Strasser, *Courts, Legislatures, and Second-Parent Adoptions: On Judicial Deference, Specious Reasoning, and the Best Interests of the Child*, 66 TENN. L. REV. 1019, 1020-21 (1999); Nicole M. Shkedi, Comment, *When Harry Met* Lawrence*: Allowing Gays and Lesbians to Adopt*, 35 SETON HALL L. REV. 873, 879, 882 (2005).

121. *See* Shapiro, *supra* note 8, at 26; Robert G. Spector, *The Unconstitutionality of Oklahoma's Statute Denying Recognition to Adoptions by Same-Sex Couples from Other States*, 40 TULSA L. REV. 467, 469 (2005); Maxwell & Forder, *supra* note 93, at 626-27; Davies, *supra* note 113, at 1067.

122. *See* Shapiro, *supra* note 8, at 26; Croteau, *supra* note 8, at 690; Brooke N. Silverthorn, Note, *When Parental Rights and Children's Best Interests Collide: An Examination of* Troxel v. Granville *as It Relates to Gay and Lesbian Families*, 19 GA. ST. U. L. REV. 893, 926-27 (2003) (quoting the court's discussion in *In re Jacob*, 660 N.E.2d 397, 399 (N.Y. 1995), of the benefits of a child having two parents as support for its decision recognizing second-parent adoption).

123. *See* Gary, *The Parent-Child Relationship*, *supra* note 7, at 660; Peltz, *supra* note 117, at 186-87; Polikoff, *Redefining Parenthood*, *supra* note 101, at 522.

124. *See* Shkedi, *supra* note 120, at 883; Michael, *supra* note 8, at 1453; Peltz, *supra* note 117, at 187; Padilla, *supra* note 26, at 220.

parent's unmarried partner does not legally displace the natural parent but rather establishes a "second" parent-child relationship which complements the existing parent-child relationship.[125] The parent-child relationship between the child and natural parent is therefore unaffected.[126] This approach is based on and modeled after the analogous stepparent adoption approach.[127] The Uniform Adoption Act and a majority of the jurisdictions which have addressed the issue have adopted the second-parent adoption rule.[128]

Just as recognition of single-parent adoptions opened the door to gay and lesbian adoptions, recognition of second-parent adoptions has opened the door to unmarried heterosexual couple adoptions.[129] The

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125. *See* Peltz, *supra* note 117, at 180.

126. *See* Croteau, *supra* note 8, at 676; Shapiro, *supra* note 8, at 26-27; Suzanne Bryant, *Second Parent Adoption: A Model Brief*, 2 DUKE J. GENDER L. & POL'Y 233, 233 (1995); Patricia J. Falk, *Second-Parent Adoption*, 48 CLEV. ST. L. REV. 93, 93-94 (2000); *see also infra* note 137.

127. *See* Croteau, *supra* note 8, at 682; Michael, *supra* note 8, at 1446.

128. *See* UNIF. ADOPTION ACT § 4-102(b) & cmt. (1994), 9 U.L.A. 105 (1999). The official comment to the section provides as follows:

> In addition to permitting individuals who are within the formal definition of "stepparent" to adopt a minor stepchild under this Article, Section 4-102 allows an individual who is a de facto stepparent, but is not, or is no longer, married to the custodial parent, to adopt as if he or she were a de jure stepparent. To file a petition under this Article, the de facto stepparent or "second parent" has to . . . .

Id. at cmt. Second-parent adoptions have been recognized by state appellate courts in New York, Pennsylvania, Indiana, New Jersey, the District of Columbia, Illinois, Massachusetts, Vermont, and California. Croteau, *supra* note 8, at 682-83, 687. Second-parent adoptions have been recognized by legislative action in California, Connecticut, and Vermont. *Id.* at 691. Second-parent adoptions have been denied by appellate court decisions in Colorado, Nebraska, Oklahoma, and Wisconsin, and they have been expressly denied by statutory language in Florida, Mississippi, and Utah. *Id.* at 692-94. The rest of the states are silent on second-parent adoptions, although many claim that such adoptions are being permitted in many, if not most, of those jurisdictions at the trial court level. *Id.* at 696; *see also* Sanja Zgonjanin, Note, *What Does It Take to Be a (Lesbian) Parent? On Intent and Genetics*, 16 HASTINGS WOMEN'S L.J. 251, 257 n.28 (2005) (citing Human Rights Campaign, *Second-Parent/Stepparent Adoption Laws in the U.S.*, http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=13383, which claims that trial courts are permitting second-parent adoptions in Alabama, Alaska, Delaware, Hawaii, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Mexico, Oregon, Rhode Island, Texas, and Washington). The American Bar Association has also passed a resolution supporting second-parent adoption:

> RESOLVED, That the American Bar Association supports state and territorial laws and court decisions that permit the establishment of legal parent-child relationships through joint adoptions and second-parent adoptions by unmarried persons who are functioning as a child's parents when such adoptions are in the best interests of the child.

A.B.A., *Report to the House of Delegates*, http://www.abanet.org/irr/annual2003/finalsecondparent.doc (Aug. 11-12, 2003); *see also* Schacter, *supra* note 8, at 934; Tiffany L. Palmer, *Family Matters: Establishing Legal Parental Rights for Same-Sex Parents and Their Children*, HUM. RTS., Summer 2003, at 9, 10; Croteau, *supra* note 8, at 683, 690-92; David, *supra* note 115, at 928.

129. *See* Erica Gesing, Note, *The Fight to Be a Parent: How Courts Have Restricted the Constitutionally-Based Challenges Available to Homosexuals*, 38 NEW ENG. L. REV. 841, 854-55

second-parent adoption rule inherently rejects the traditional rule that an unmarried couple cannot adopt a child.[130] In light of the fact that all but one state bars gay marriage,[131] by permitting gay couples to adopt, either jointly or through second-parent adoptions, the courts have implicitly recognized that unmarried couples *can* adopt. There is no reason to believe that this rule should not apply to unmarried heterosexual couples. While some commentators have hinted that this doctrine should not be extended to heterosexual unmarried couples because they have the option of marrying,[132] there appears to be little support for this position. The courts that have adopted the second-parent adoption rule have done so because they concluded it was in the best interests of the child,[133] not because same-sex couples cannot marry. If it is in the best interests of the child to permit an unmarried lesbian's partner to adopt her partner's child, one can only assume that it would likewise be in the best interests of the child to permit an unmarried *heterosexual's* partner to adopt the other partner's child.[134] Moreover, the courts that have specifically addressed this issue have expressly indicated that it does not matter whether the unmarried couple is a homosexual couple or a heterosexual couple.[135] In addition, the Uniform Adoption Act, which

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(2004); Bailey, *supra* note 101, at 578-82 (discussing two of the early second-parent adoption cases involving the classic lesbian paradigm, and then discussing *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995), where the court permitted a third-parent adoption by a heterosexual unmarried couple); Croteau, *supra* note 8, at 682; Karla J. Starr, Note, *Adoption by Homosexuals: A Look at Differing State Court Opinions*, 40 ARIZ. L. REV. 1497, 1505-06 (1998).

130. For a discussion of the traditional emphasis put on the adopting couple being married, see *supra* text accompanying notes 105-06, 114 (showing that, by permitting a same-sex couple who cannot marry to adopt, the second-parent adoption rule rejects the traditional approach that unmarried couples were *per se* unqualified to adopt); *see also* Strasser, *supra* note 70, at 130; Croteau, *supra* note 8, at 682.

131. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (holding that it was inconsistent with the state constitution to "deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry"); Matthew Coles, Lawrence v. Texas *&* *the Refinement of Substantive Due Process*, 16 STAN. L. & POL'Y REV. 23, 50 (2005).

132. *See* Brashier, *supra* note 3, at 160; Patricia M. Logue, *The Facts of Life for Gay and Lesbian Parents: Compelling Equal Treatment Under the Law*, FAM. ADVOC., Fall 2002, at 43, 46.

133. *See* Strasser, *supra* note 120, at 1019, 1028-29; *see also* Gatos, *supra* note 101, at 214; Hedges, *supra* note 120, at 888; Starr, *supra* note 129, at 1507-09.

134. *See supra* note 129 and accompanying text.

135. *See In re* Jacob, 660 N.E.2d 397, 398 (N.Y. 1995) (referring to N.Y. DOM. REL. LAW § 110 (McKinney 1991) and ruling that "the right of a single homosexual to adopt" is as clear as the right of any single person to adopt under New York law and that the unmarried partner of the child's biological mother, whether homosexual or heterosexual, may become the child's second-parent through adoption); Sharon S. v. Superior Court, 73 P.3d 554, 582 (Cal. 2003) (Baxter, J., concurring and dissenting); *In re* M.M.D., 662 A.2d 837, 859 (D.C. 1995) ("[P]aramount statutory purpose—the 'best interests' of the adoptee—will be best served, and that no other affected interests protected by the statute will be ill served, by a liberal, inclusive interpretation of [the D.C. adoption

implicitly recognizes the second-parent adoption rule in its "de facto" stepparent doctrine, fails to distinguish unmarried same-sex couples from unmarried heterosexual couples.[136]

Where, however, the adoption is by the partner of an unmarried heterosexual couple, it is more appropriate to call the adoption a *third*-parent adoption as opposed to a second-parent adoption.[137] Stepparent adoptions and step-*partner* adoptions are both subsets of third-parent adoptions. In its purest form, the step-*partner* adoption paradigm mirrors the stepparent adoption paradigm in all respects except one: the adoptive parent does not marry the custodial parent. The step-*partner* adoption paradigm assumes:

> (1) a natural parent-child relationship between the child and both of his or her natural parents,[138] including full inheritance rights;[139]
> (2) the natural parents divorce, one dies, or they separate (if not married);[140]

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statute] that says: unmarried couples, whether same-sex or opposite-sex, who are living together in a committed personal relationship, are eligible to file petitions for adoption . . . .").

136. *See* UNIF. ADOPTION ACT § 4-102(b) (1994), 9 U.LA. 105 (1999). Defined broadly, a de facto stepparent adoption is an adoption by a single adopting parent who has a non-marital relationship with one of the child's legally recognized parents—typically the custodial natural parent. Several different relational paradigms come within the scope of the de facto stepparent adoption concept, including the third-parent adoption.

137. Many authorities include the "third-parent adoption" scenario within the term second-parent adoption. *See* BLACK'S LAW DICTIONARY 53-54 (8th ed. 2004); *see also* Croteau, *supra* note 8, at 682; Gesing, *supra* note 129, at 854-55. Apparently, the reason is because in both cases the adoption should not sever the adopted child's relationship with the custodial parent—the partner of the adopting parent. In that sense, the second-parent adoption is simply a variation of the stepparent adoption scenario where the adoption by a stepparent does not affect the parent-child relationship between the child and the parent married to the adoptive stepparent. *See* Michael, *supra* note 8, at 1446; Shapiro, *supra* note 8, at 27-28; Peltz, *supra* note 117, at 185. But the two scenarios are distinguishable in that the second-parent adoption scenario starts with only one parent so the end result is two parents. The adoption does not challenge the classic assumption that a child should have no more than two parents (though it does challenge the classic assumption that a child should have no more than one parent of each gender). *See* Shapiro, *supra* note 8, at 26; *see also* Ruthann Robson, *Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory*, 26 CONN. L. REV. 1377, 1377 (1994). In the classic third-parent adoption scenario, the scenario starts with two parents, so the adoption will add a third parent. Therefore, there is the added issue of what effect, if any, the adoption should have on the non-custodial parent—the parent who is *not* the partner of the adoptive parent. Should the adopted child have only two legally recognized parents, or three, at least for inheritance purposes?

138. The parent-child relationships need not be the result of the birth of the child. They could also be the result of a traditional adoption or even a second-parent adoption. The key, however, is that the child has *two* legally recognized parent-child relationships before the adoption in question.

139. The general rule is that all legally recognized parent-child relationships have full inheritance rights. *See supra* notes 38-43 and accompanying text.

140. *See supra* note 63 and accompanying text. For purposes of discussion, it is easiest to assume (and it is probably the norm) that the natural parents were married at the time the child was born but thereafter divorced. This is not a requirement, however. The same issue can arise where the

(3) the custodial parent enters into a relationship with a new partner and moves in with the new partner but they do not marry;[141] and
(4) the *non-stepparent* partner adopts the child.[142]

Under the Uniform Adoption Act and in the jurisdictions which permit such adoptions, the effect of the step-*partner* adoption is to create a parent-child relationship between the adoptive step-*partner* and the child,[143] including full inheritance rights. The child can inherit from and through the step-*partner*, and the step-*partner* can inherit from and through the adopted child.[144] In addition, the adoption has no effect upon the parent-child relationship between the child and the custodial natural parent who is living with the adoptive step-*partner*.[145] The issue is what effect, if any, the adoption should have upon the parent-child relationship between the child and the non-custodial natural parent.[146] In particular, should the adoption completely sever the child's relationship with the natural parent of the same gender who is legally displaced by the adoption, or should the child be permitted to retain the right to inherit from and through that parent?[147]

Despite the parallels between the stepparent adoption paradigm and the step-*partner* adoption paradigm, the Uniform Probate Code and every jurisdiction that has adopted the stepparent exception apply the classic adoption rule to the step-*partner* adoption paradigm.[148] The Uniform Probate Code and all of the statutes that grant the adopted child the right to continue to inherit from and through the non-custodial parent do so only if the adoptive parent is married to the adoptive parent.[149] Otherwise, the statutes apply the classic adoption approach—the adopted child's parent-child relationship with the non-custodial parent is completely severed, thereby also completely severing the inheritance rights between the non-custodial parent and the adopted child.[150] The non-custodial parent can no longer inherit from and through the adopted child, and the adopted child can no longer inherit from and through the

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child is born out of wedlock but the child has established paternity, or where there is a traditional adoption or second-parent adoption. *See supra* notes 38-43, 125-28 and accompanying text.

141. If the adoptive parent married one of the natural parents, the subsequent adoption would be covered by the stepparent adoption rule. *See supra* notes 61-65 and accompanying text.

142. *See supra* notes 129-36 and accompanying text.

143. *See supra* notes 117-28 and accompanying text.

144. *See supra* notes 42-43 and accompanying text.

145. *See supra* notes 125-26, 137 and accompanying text.

146. *See supra* note 53 and accompanying text.

147. The issue is the same one that arises in the stepparent adoption scenario. *See supra* note 69 and accompanying text.

148. *See supra* notes 90-97 and accompanying text.

149. *See supra* note 21 and accompanying text.

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

non-custodial parent.[151] Inasmuch as the only distinction between the step-*partner* adoption paradigm and the stepparent adoption paradigm is whether the adoptive parent is married to the custodial parent, the law's failure to treat the child adopted by a step-*partner* the same as a child adopted by a stepparent constitutes shades of the discrimination the law used to practice with respect to the inheritance rights of illegitimate children.[152]

VI. INHERITANCE RIGHTS AND ILLEGITIMATE CHILDREN: *TRIMBLE V. GORDON*

At common law, an illegitimate child was treated legally as the child of no one: "[A]n illegitimate child was *filius nullius* and incapable of inheriting from anyone."[153] Many states, in an attempt to ameliorate the harshness of the common law approach, adopted statutes which permitted the child to inherit from and through the natural mother but prohibited the child from inheriting from and through the natural father.[154] As recently as 1977, these statutes were widely adopted and accepted.[155] In *Trimble v. Gordon*,[156] however, the U.S. Supreme Court declared these statutes unconstitutional because they invidiously discriminated under the Equal Protection Clause of the Fourteenth Amendment on the basis of illegitimacy.[157]

The *Trimble* case arose out of an Illinois probate court decision[158] that declared an illegitimate daughter ineligible to inherit from her natural father who had died intestate.[159] While alive, he had been declared the natural father of the child in a paternity hearing.[160] He had voluntarily paid child support and had openly acknowledged the child as

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

152. *See infra* Part VI.

153. Trimble v. Gordon, 430 U.S. 762, 768 (1977); *accord* Lili Mostofi, *Legitimizing the Bastard: The Supreme Court's Treatment of the Illegitimate Child*, 14 J. CONTEMP. LEGAL ISSUES 453, 453 & n.1 (2004); Charles Nelson Le Ray, Note, *Implications of DNA Technology on Posthumous Paternity Determination: Deciding the Facts When Daddy Can't Give His Opinion*, 35 B.C. L. REV. 747, 750 (1994). For a discussion of the history behind the common law approach to illegitimate children, see Susan E. Satava, Comment, *Discrimination Against the Unacknowledged Illegitimate Child and the Wrongful Death Statute*, 25 CAP. U. L. REV. 933, 933-71 (1996).

154. *See* Legislation, *Inheritance By, From and Through Illegitimates*, 84 U. PA. L. REV. 531, 531-33, 536 (1936).

155. *See, e.g.*, *Trimble*, 430 U.S. at 763 (analyzing a state statute that allowed "illegitimate children to inherit by intestate succession only from their mothers").

156. *Id*.

157. *Id.* at 765-66.

158. The decision was issued by the Probate Division of the Circuit Court of Cook County. For purposes of simplicity, the court will be referred to as the probate court.

159. *See Trimble*, 430 U.S. at 764-65.

160. *Id*. at 764.

his daughter.[161] The father was killed at the age of 28, and he died intestate.[162] Section 12 of the Illinois Probate Code provided that an illegitimate child is the heir of his or her natural mother; but that child is not the heir of his or her natural father, unless the parents intermarry and the father acknowledges the child.[163] The probate court had ruled that the daughter, as an illegitimate child, did not qualify as an heir with respect to her father's intestate estate.[164] The daughter and her natural mother appealed, asserting that section 12 was unconstitutional.[165] The Illinois Supreme Court sustained section 12.[166] The U.S. Supreme Court accepted jurisdiction to consider whether section 12 violated the Equal Protection Clause of the Fourteenth Amendment by invidiously discriminating against illegitimate children.[167]

In addressing whether the different inheritance rights accorded to legitimate and illegitimate children under section 12 of the Illinois Probate Code were constitutional, the Supreme Court acknowledged that the question of who takes a decedent's property is "a matter particularly within the competence of the individual States."[168] Moreover, the Court acknowledged that "substantial deference" should be accorded to a state's statutory inheritance scheme.[169] Nevertheless, the Court made it clear that, in addressing the sensitive issues involved in creating a statutory framework of intestate rights, a state cannot invidiously discriminate.[170] The statutory differentiations inherent in a state's intestate scheme are subject to the Equal Protection Clause of the Fourteenth Amendment.[171]

In analyzing whether the Illinois statute that barred illegitimate children from inheriting from their natural father was constitutional, the threshold issue was which level of judicial scrutiny to apply.[172] The

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161. *Id.*

162. *Id.*

163. *Id*. at 764-65. Section 12 of the Illinois Probate Act provided in relevant part:

> An illegitimate child is heir of his mother and of any maternal ancestor, and of any person from whom his mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. A child who was illegitimate whose parents intermarry and who is acknowledged by the father as the father's child is legitimate.

Id. (quoting ILL. REV. STAT. ch. 3, § 12 (1973)).

164. *Id.*

165. *Id.* at 765.

166. *See In re* Estate of Karas, 329 N.E.2d 234, 240 (Ill. 1975).

167. *Trimble*, 430 U.S. at 765.

168. *Id*. at 771.

169. *Id.*

170. *Id.* at 765.

171. *Id.* at 765, 776.

172. The Equal Protection Clause requires a state to treat similarly situated individuals

appellants in *Trimble* argued that statutory differentiations based on illegitimacy constitute "suspect" classifications subject to "strict scrutiny."[173] The Supreme Court rejected the appellants' arguments, stating that differentiations based on illegitimacy did not require the Court's "most exacting scrutiny."[174] Instead, the Court applied an intermediate level of scrutiny.[175]

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similarly. *See id.* at 780 (Rehnquist, J., dissenting); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). Laws that intentionally differentiate between individuals or groups of individuals are subject to different levels of judicial scrutiny depending on the basis of the differentiation. *See City of Cleburne*, 473 U.S. at 439-40. Laws that intentionally differentiate based on a suspect classification are considered the most questionable and are subject to a heightened level of judicial scrutiny. The classic example of a law that differentiates on the basis of a suspect classification is a law that discriminates on the basis of race. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Laws that differentiate based on a quasi-suspect classification raise concerns that warrant an intermediate level of scrutiny. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny to quasi-suspect gender classifications in Oklahoma statutes prohibiting the sale of 3.2% alcohol by volume beer to males under the age of twenty-one and females under the age of eighteen). A quasi-suspect classification is one where the distinguishing characteristic "generally provides no sensible ground for differential treatment." *City of Cleburne*, 473 U.S. at 440. For example, gender classifications are usually considered quasi-suspect because, "[r]ather than resting on meaningful considerations, statutes distributing benefits and burdens [based on gender] very likely reflect outmoded notions of the relative capabilities of men and women." *Id.* at 441. Under this middle level of scrutiny, the state must show that the classification is substantially related to an important state interest. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988). Social and economic legislation that does not differentiate individuals or groups on the basis of suspect or quasi-suspect classifications, and which do not involve fundamental rights, are subject to the lowest level of judicial review—the rational basis test. Under the rational basis test, the law is presumed to be valid and will be upheld as long as it is "rationally related to a legitimate governmental purpose." *Id.*

173. *Trimble*, 430 U.S. at 767.

174. *Id.*

175. The Court made no express reference to the intermediate level of scrutiny. At the time of the Court's opinion in *Trimble*, however, the Court was still developing its articulation of the intermediate level of judicial review. The Court in *Trimble* was very careful in how it phrased the level of scrutiny it was applying. It rejected the argument that it should apply strict scrutiny, but the Court never expressly said that it was applying the rational basis test either. Instead, the Court intimated that it was applying something in between:

> Appellants urge us to hold that classifications based on illegitimacy are "suspect," so that any justifications must survive "strict scrutiny." We considered and rejected a similar argument last Term in *Mathews v. Lucas*, 427 U.S. 495 (1976). As we recognized in *Lucas*, illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations. *Id.*, at 505. We nevertheless concluded that the analogy was not sufficient to require "our most exacting scrutiny." *Id.*, at 506. Despite the conclusion that classifications based on illegitimacy fall in a "realm of less than strictest scrutiny," *Lucas* also establishes that the scrutiny "is not a toothless one," *id*, at 510, a proposition clearly demonstrated by our previous decisions in this area.

Trimble, 430 U.S. at 767. The Court's heavy reliance on *Mathews v. Lucas* is particularly telling, because in *Clark v. Jeter*, the Supreme Court (1) expressly acknowledged the intermediate level of judicial scrutiny, and (2) cited *Mathews v. Lucas* for the proposition that the intermediate level of scrutiny has generally been applied to discriminatory classifications based on illegitimacy. *See*

In scrutinizing the Illinois inheritance classification based on illegitimacy, the Court began by noting the legislative history behind such statutes. The Court acknowledged that the purpose of such statutes was to ameliorate the harshness of the common law *filius nullius* approach.[176] The constitutional question was whether the differentiation based on illegitimacy was sufficiently related to a legitimate state interest. The Illinois Supreme Court had upheld section 12 on the grounds that the state had a legitimate interest "in encouraging family relationships and in establishing an accurate and efficient method of disposing of property at death."[177] The Supreme Court separately analyzed the two grounds invoked by the Illinois Supreme Court.

A. Encourage Traditional Family Values

First, the Supreme Court reviewed the Illinois Supreme Court's conclusion that the differentiation in inheritance rights based on illegitimacy was justified because it promoted legitimate family relationships.[178] The Court acknowledged that the promotion of legitimate family relationships can be a proper state purpose.[179]

Clark, 486 U.S. at 461. Inasmuch as the Court in *Trimble* stated it was applying the same standard as it applied in *Mathews v. Lucas*, and in *Clark v. Jeter*, the Court said the level of scrutiny applied in *Mathews v. Lucas* was the intermediate level; the Court apparently applied the intermediate level of judicial scrutiny in *Trimble v. Gordon*.

It should be noted that in *Lalli v. Lalli*, while citing to *Mathews v. Lucas* and *Trimble v. Gordon*, the Court stated that classifications based on illegitimacy are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests. 439 U.S. 259, 265 (1978). The language used by the *Lalli* Court is different from the language used for gender classifications, which require a substantial relation to important governmental objectives. *Craig*, 429 U.S. at 197. Some have argued that the Court's application of the two terms "important governmental objectives" and "permissible state interests" reveals a difference between the two standards—the Court formulated a weak intermediate scrutiny for birth status classifications while the standard for gender classifications is somewhat more stringent. *See* Karen A. Hauser, Comment, *Inheritance Rights for Extramarital Children: New Science Plus Old Intermediate Scrutiny Add Up to the Need for Change*, 65 U. CIN. L. REV. 891, 914-15 (1997) ("'Important' means 'significant,' whereas 'permissible' means 'allowable.' An 'objective' is a 'goal,' whereas an 'interest' is something in which a claim is held. Thus, the 'important objective' of the gender test is a 'significant goal,' whereas the 'permissible interest' of the birth status test is a mere 'allowable claim.' A significant goal is weighty and focused; an allowable claim in something is not. Therefore, the important objective of the gender test would seem to be a more active and forceful concept than the permissible interest of the birth status test.").

This claimed distinction is beyond the scope of this Article. It is assumed that classifications based on illegitimacy are subject to intermediate scrutiny, requiring that the statutory classification "be substantially related to an important governmental objective." *Clark*, 486 U.S. at 461. This was the precise language used by the court in *Clark v. Jeter*, which was decided after *Lalli v. Lalli*.

176. *Trimble*, 430 U.S. at 768.

177. *Id*. at 766.

178. *See id.* at 768.

179. *See id.*

Nevertheless, the Court emphasized that "the Equal Protection Clause requires more than the mere incantation of a proper state purpose."[180] In analyzing whether a law based on illegitimacy is sufficiently related to a legitimate state interest, the Court emphasized that a state may *not* try to "influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships."[181] The Court emphasized the point:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.[182]

Applying that logic to section 12 of the Illinois Probate Code, the Court had no trouble concluding that the statute bore at best a "most attenuated relationship to the asserted goal" of promoting legitimate family relationships.[183] The nexus between the asserted state interest of promoting legitimate family relationships and the statutory differentiation on the basis of illegitimacy was insufficient to withstand the demands of the Equal Protection Clause of the Fourteenth Amendment.[184]

B. Promotion of Efficient Distribution of Decedent's Property

The Supreme Court turned next to the Illinois Supreme Court's conclusion that section 12 of the Illinois Probate Code was constitutional because it furthered the legitimate state interest of establishing a fair and efficient method of distributing property at death.[185] The Illinois Supreme Court had considered and rejected the argument that the state must be open to a case-by-case determination of paternity because of "the difficulty of proving paternity and the related danger of spurious claims."[186] The Illinois Supreme Court had concluded that (1) the just

180. *Id*. at 769.
181. *Id.*
182. *Id*. at 769-70 (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).
183. *Id*. at 768.
184. *See id.* at 769.
185. *Id.* at 770.
186. *Id.*

and efficient method of distributing an intestate's property at death was a legitimate state interest and (2) section 12 of the Illinois Probate Code was sufficiently related to that state interest.[187]

Again though, upon review, the U.S. Supreme Court concluded that the Illinois Supreme Court had failed to sufficiently scrutinize the relationship between the asserted state interest and the statutory differentiation based on illegitimacy.[188] The U.S. Supreme Court criticized the Illinois Supreme Court for failing "to consider the possibility of a middle ground between the extremes of complete exclusion [under section 12 of the Illinois Probate Code] and case-by-case determination of paternity."[189] The Supreme Court found that the statute had failed to take into consideration "significant categories of illegitimate children . . . [where] inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws."[190] Because the Illinois Probate Code unnecessarily excluded these categories of illegitimate children, the Supreme Court ruled that section 12 was unconstitutional. Despite the state's valid and important interest in establishing an orderly and effective method of distributing intestate property, section 12 was overly broad and not "carefully tuned to alternative considerations."[191]

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187. *See id.*

188. *Id.*

189. *Id.* at 770-71.

190. *Id.* at 771.

191. *See id.* at 772. Although those were the principal grounds asserted in support of the constitutionality of section 12 of the Illinois Probate Code, the U.S. Supreme Court also considered several other arguments advanced in support of the statute. First, the Court examined the argument that "the decedents whose estates were involved in the consolidated appeals could have left substantial parts of their estates to their illegitimate children by writing a will," and thus "no insurmountable barrier prevented the illegitimate child [in *Trimble v. Gordon*] from sharing in her father's estate." *Id*. at 773. The Court ruled, however, that the presence or absence of other means by which the individual could have overcome the state's statutory discrimination against the illegitimate child was not relevant to the issue of whether the statute was constitutional. *See id.* at 774. In addition, the Court addressed the argument that a state's intestate scheme is nothing more than the presumed intent of the decedent, and a majority of decedents would disinherit their illegitimate children. *See id.* First, the Court questioned whether the history and logic of section 12 of the Illinois Probate Code supported the claim that the legislature adopted section 12 because it believed that a majority of decedents would want to disinherit their illegitimate child. *Id*. at 775. More importantly, the Court distinguished between the private act of an individual who disinherits his or her illegitimate child and the public act of a state adopting an intestate scheme which statutorily and categorically disinherits illegitimate children. *Id.* at 775 n.16. The Equal Protection Clause of the Fourteenth Amendment does not apply to the former, but it does to the latter. *See id.* The Court concluded, however, that the claim that section 12 of the Illinois Probate Code was based on and supported by the presumed intent of the decedent was spurious because the Illinois Supreme Court failed to raise or address the argument. The failure of the Illinois Supreme Court to raise or address the argument showed that it was not a motivating factor in the statute's adoption. *See id.* at

The Supreme Court's analysis and holding in *Trimble* applies with equal validity to the issue of the constitutionality of the stepparent adoption rule.

VII. THE CONSTITUTIONALITY OF THE STEPPARENT ADOPTION RULE

A. Applicability of Trimble v. Gordon

In analyzing the constitutionality of the stepparent adoption rule, the first issue is whether *Trimble v. Gordon*[192] is applicable. At first blush, one might think that the stepparent adoption rule is distinguishable. The *Trimble* case concerned the constitutionality of a statute that differentiated inheritance rights on the basis of illegitimacy.[193] The stepparent adoption paradigm assumes a legitimate child, a child born to parents who are married, or an illegitimate child who can establish paternity.[194] The stepparent adoption rule appears to have nothing to do with illegitimate children. But upon closer inspection, it becomes clear that the stepparent adoption rule does discriminate on the basis of legitimacy—legitimacy with respect to the "legal rebirth" of the child through adoption.

An illegitimate child is one born out of wedlock.[195] If the natural parents are not married when the mother gives birth, traditionally the child was considered an illegitimate child.[196] The parents had committed the socially unacceptable sin of physiologically, naturally having a child out of wedlock. But there is more than one way to establish a parent-child relationship. A parent-child relationship can also be established

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775-76.

192. 430 U.S. 762 (1977).

193. *Id.* at 763.

194. *See supra* note 46 and text accompanying note 61.

195. *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 4.1, at 151 (2d ed. Hornbook Series Student ed. 1988); Hauser, *supra* note 175, at 891 n.1. The definition may, however, include children born to a married woman and fathered by a man other than her husband. *See* State v. Coliton, 17 N.W.2d 546, 549 (N.D. 1945) (reasoning that a married woman can have an illegitimate child); JENNY TEICHMAN, ILLEGITIMACY: AN EXAMINATION OF BASTARDY 177 (1982) (showing that a married woman can have an illegitimate child); Annotation, *Effect of Marriage of Woman to One Other Than Defendant Upon Her Right to Institute or Maintain Bastardy Proceeding*, 98 A.L.R.2d 256, 267 (1964) (showing that the statute controls whether a married woman can bring a paternity suit against a man other than her husband).

196. The modern trend, and better view, is to refer to such a child as a "child born out of wedlock" to remove some of the stigma attached with the term "illegitimate." *See* Hauser, *supra* note 175, at 891 n.1; Carlotta P. Wells, Comment, *Statutes of Limitations in Paternity Proceedings: Barring an "Illegitimate's" Right to Support*, 32 AM. U. L. REV. 567, 567 (1983) ("[T]here are no illegitimate children, only illegitimate parents.") (alteration in original) (quoting *In re* Miller, 605 S.W.2d 332, 333 (Tex. Civ. App. 1980), *aff'd sub nom. In re* J.A.M., 631 S.W.2d 730 (Tex. 1982)).

artificially through adoption.[197] Through adoption, the child is "legally reborn," by operation of law, to the adoptive parent(s), thereby establishing a new parent-child relationship.[198] Under the classic adoption paradigm, the norm is for the child to be adopted by a married couple.[199] Inasmuch as the adoptive parents are married, the adopted child is a legitimate child relative to the child's legal rebirth.

Likewise, in the stepparent adoption scenario, the adoptive parent and his or her partner duplicate, to the extent possible, the traditional, "legitimate" way of having a child: they marry first, and then they "have" or adopt the child. The stepparent adoption inheritance rule applies the traditional expectation—that the parents should marry before having a child—to the adoption process. If the adoptive third parent and the custodial parent act in the socially responsible and expected manner, by getting married and *then*[200] adopting the child, the stepparent adoption rule grants the adopted child special treatment to recognize the new, hybrid family that has been formed.[201]

In the step-*partner* adoption scenario, however, the adoptive parent and the custodial parent do not behave in the "socially responsible" and expected behavior.

Because the adoptive parent is living with, but not married to, the custodial parent, the "legally reborn" child is an "illegitimate" child relative to the adoption. As a "legally" illegitimate child, the stepparent adoption rule does not apply, and the child does not have the same inheritance rights as a child adopted in the socially responsible manner.[202] As a "legally" illegitimate child, a child adopted by a step-

197. *See supra* note 36 and accompanying text.

198. *See supra* notes 40-43 and accompanying text.

199. *See supra* note 49 and accompanying text.

200. The relevance of the social expectation that the adoptive parent and the natural parent should be married *before* the adoption takes place is also demonstrated by contrasting the natural illegitimate child with the adoptive illegitimate child. In the case of a natural illegitimate child, in many states it was possible to "legitimize" the child if, after the birth of the child, the natural father married the natural mother and acknowledged the child. *See* Trimble v. Gordon, 430 U.S. 762, 765 (1977). In contrast, under the stepparent adoption rule, the child receives the right to inherit from and through all three parents only if the adoptive parent is married to the custodial parent at the time of the adoption. If the adoptive step-*partner* subsequently marries the natural parent, the child does not receive the added benefit of the added right to inherit from the non-custodial parent. The failure to recognize this possibility yet further discriminates against the child adopted by a step-*partner* because the naturally illegitimate child can be legitimated later while the adoptive illegitimate child cannot. It should be admitted, however, that this probably stems more from the traditional family law view that unmarried couples could not adopt than it did from the intent to discriminate *per se*. But the failure to revise the stepparent adoption rule to acknowledge this possibility is yet further evidence of the discrimination against the adoptive illegitimate child.

201. The adopted child has *three* parents from whom he or she can inherit. *See supra* notes 66-74, 98-101 and accompanying text.

202. *See supra* notes 21-27 and accompanying text.

partner is analogous to the "naturally" illegitimate child in *Trimble v. Gordon*.[203] The Court's analysis in *Trimble* of the traditional discrimination against "naturally" illegitimate children serves as a perfect blueprint for analyzing whether the stepparent adoption rule invidiously discriminates against children adopted by a step-*partner* in violation of the Equal Protection Clause.

B. The Ameliorative Purpose of the Stepparent Adoption Inheritance Rule Does Not Insulate It from Constitutional Scrutiny

In *Trimble*, one of the first points the Supreme Court made was that, although the purpose and effect of section 12 of the Illinois Probate Code was ameliorative, it was not insulate from the Equal Protection Clause of the Fourteenth Amendment.[204] The principal purpose of section 12 of the Illinois Probate Code was to counter the harsh effect of the common law treatment of illegitimate children with regard to inheritance rights.[205] Although section 12 did improve the plight of illegitimate children by permitting an illegitimate child to inherit from and through his or her natural mother,[206] it granted only partial relief. It still discriminated against illegitimate children when it came to the child's right to inherit from and through the natural father.[207] As such, it was subject to the Equal Protection Clause.

Likewise, the apparent purpose of the stepparent adoption rule is to ameliorate the harshness of the classic adoption rule. Application of the classic adoption rule would cut off an adopted child's right to inherit from and through the non-custodial natural parent[208] even though the child did not consent to the adoption and even though the child may still have a relationship with the non-custodial natural parent and his or her

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203. For the meaning of "legally" and "naturally" as used in this context, see *supra* notes 33-36, 197-98 and accompanying text.

204. *See Trimble*, 430 U.S. at 766-68.

205. *Id.* at 768. Under the common law approach, illegitimate children were the children of no one. They could inherit from no one. *See supra* note 153 and accompanying text. Section 12 of the Illinois Probate Code, and other state statutes like it, tried to reduce the harshness of the common law approach by permitting illegitimate children to inherit from and through the natural mother, but not necessarily the natural father. *See supra* note 163 and accompanying text. Juxtaposed with the common law approach to illegitimate children, section 12 of the Illinois Probate Code was a fairer and more equitable way to treat illegitimate children. But as the Court noted, while section 12 did improve the plight of illegitimate children, it granted only partial relief. It still discriminated against illegitimate children when it came to the child's right to inherit from and through the natural father, and as such it was subject to the Equal Protection Clause of the Fourteenth Amendment. *See Trimble*, 430 U.S. at 768.

206. *See Trimble*, 430 U.S. at 768.

207. *See id.* at 763, 768.

208. *See supra* notes 54, 59 and accompanying text.

family.[209] Juxtaposed with the classic adoption rule, the stepparent adoption rule arguably is a fairer and more equitable way to treat a child adopted by a parent's spouse. But just like section 12 of the Illinois Probate Code, the stepparent adoption rule grants only partial relief to the child adopted by the custodial parent's step-*partner*. The stepparent adoption rule grants the adopted child the right to inherit from and through both of his or her natural parents if the adoptive parent is married to a natural parent, but it discriminates against a child adopted by a step-*partner* by not granting the child the same right.[210] Because the stepparent adoption rule discriminates on the basis of legitimacy relative to the adoption, it is subject to the Equal Protection Clause of the Fourteenth Amendment.

C. Encourage Traditional Family Values

Inasmuch as the only distinction between the stepparent adoption paradigm and the step-*partner* adoption paradigm is whether the adoptive parent is married to the custodial parent,[211] the most logical state interest that can be invoked to justify the stepparent exception is that it is "pro-marriage/pro-family." A rule of law is pro-marriage or pro-family to the extent it encourages and/or creates an incentive for a couple to marry—or punishes or burdens a couple for failing to marry. The argument appears to be that by granting the additional inheritance rights in the stepparent adoption scenario, but not in the step-*partner* adoption scenario, the stepparent adoption exception creates an incentive for a couple to marry before the custodial parent's new partner adopts the child. Assuming, *arguendo*, the distinction in inheritance rights is intended to promote traditional family values, the issue is whether this claimed state interest passes the intermediate level of scrutiny.[212]

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209. *See supra* notes 84-89 and accompanying text.

210. *See supra* notes 21-27 and accompanying text.

211. *See supra* notes 61-65, 138-42 and accompanying text.

212. While the legislative history behind the stepparent adoption rule does not expressly indicate that it was intended to be pro-marriage/pro-family, it clearly manifests the traditional mindset that only a new partner who marries the custodial parent should be eligible to, and/or would want to, adopt a child of the custodial parent, and only a new partner who marries the custodial parent should be rewarded for adopting the child. The stepparent adoption rule arguably is based more on an antiquated view of what constitutes an acceptable family, particularly with respect to who could adopt (that is inherently pro-marriage), than it is a conscious attempt to influence the actions of the adoptive parent by punishing the child. The stepparent adoption rule was accepted before step-*partners* could adopt. But the failure to change the stepparent adoption rule in light of the changes in adoption law with respect to who can adopt constitutes invidious discrimination. In *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), the Supreme Court ruled that gender classifications are usually considered quasi-suspect because, "[r]ather than resting on meaningful considerations, statutes distributing benefits and burdens [based on gender] . . . very likely reflect

States have a right to adopt laws that are pro-marriage and pro-family.[213] In *Trimble v. Gordon*, the Supreme Court expressly stated that "the family [unit is] perhaps the most fundamental social institution of our society."[214] State laws that promote legitimate family relationships are, therefore, a legitimate state interest.[215] But the mere incantation of a legitimate state interest is not enough.[216] The intermediate level of judicial scrutiny requires that the important governmental objective be "substantially related" to the statutory classification.[217] And as the Court held in *Trimble v. Gordon*, the claimed legitimate state interest of promoting legitimate family relationships cannot be achieved by putting the burden on an innocent child.[218] As applied to the stepparent adoption rule, to the extent it promotes traditional family values at all, it does so at the expense of the innocent children adopted by step-*partners*.

The stepparent adoption rule creates no incentive for either the adoptive parent or the custodial parent to act in a way which is consistent with traditional family values. First, as applied to the adoptive parent, the adoption creates a parent-child relationship between the child and the adoptive parent, with full inheritance rights, regardless of whether the adoptive parent marries the natural parent.[219] The adoptive parent can inherit from and through the child, and the child can inherit from and through the adoptive parent.[220] The adoptive parent receives no greater or lesser inheritance rights based on whether he or she is married

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outmoded notions of the relative capabilities of men and women." *Id.* at 441. Likewise one could say that the stepparent adoption rule, with its legitimacy-based classification scheme, very likely reflects an outmoded notion of who can adopt. On its face the stepparent adoption rule appears both in statutory language and in effect as an attempt to promote marriage and a traditional notion of what constitutes an acceptable family by punishing the adopted child where the adoptive parent and the custodial natural parent do not marry. The Supreme Court has repeatedly and unambiguously held that "a State may not justify discriminatory treatment of illegitimates in order to express its disapproval of their parents' misconduct." Reed v. Campbell, 476 U.S. 852, 854 (1986). That logic and principle applies to the stepparent adoption rule.

213. In analyzing the claim that the stepparent adoption exception to the classic adopted-child rule is constitutional because it is pro-marriage and pro-family, the first point to note is that the term "pro-family" as used in this context assumes a traditional notion of a family—one where the parents are married. Increasingly, however, couples are rejecting this traditional notion of a family. *See supra* notes 107-13 and accompanying text. Increasingly couples are living together, and having children, without bothering to get married. But even assuming, *arguendo*, that it is better for parents who are raising a child to be married, granting additional inheritance rights to the adopted child under the stepparent adoption scenario is neither pro-family nor pro-marriage.

214. Trimble v. Gordon, 430 U.S. 762, 769 (1977).

215. *See id.* at 768 (discussing Labine v. Vincent, 401 U.S. 532 (1971)).

216. *See id.* at 769.

217. *See* Clark v. Jeter, 486 U.S. 453, 461 (1988).

218. *See supra* notes 181-84 and accompanying text.

219. *See supra* notes 66-68 and accompanying text.

220. *See supra* note 68 and accompanying text.

to the custodial parent. Because the statutory distinction between the stepparent adoption scenario and the step-*partner* adoption scenario has no effect upon the inheritance rights of the adoptive parent, it creates no incentive for the adoptive parent to marry the custodial parent.

Likewise, the stepparent adoption rule has no effect on the inheritance rights between the child and the custodial natural parent.[221] The custodial natural parent maintains a full parent-child relationship with the child, including full inheritance rights.[222] Regardless of whether the custodial parent marries the adoptive parent, the custodial parent can still inherit from and through the adopted child, and the adopted child can still inherit from and through the custodial parent.[223] Because the statutory distinction between the stepparent adoption scenario and the step-*partner* adoption scenario has no effect upon the inheritance rights of the custodial parent, it creates no incentive for the custodial parent to marry the adoptive parent.

The stepparent adoption inheritance exception *does*, however, affect the parent-child relationship and inheritance rights between the non-custodial natural parent and the adopted child—but it should be noted from the outset that these parties have minimal influence, if any, over whether the adoptive parent and the custodial parent get married. If the adoptive parent and the custodial parent are not married, the classic adoption rule applies and the parent-child relationship between the child and the non-custodial parent is completely severed, including inheritance rights.[224] If, on the other hand, the adoptive parent and the custodial natural parent are married, the stepparent adoption rule applies. The non-

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221. Historically, adoption by a single adoptive parent severed the parent-child relationship with both natural parents. *See supra* note 120 and accompanying text. But that approach was based on the classic adoption paradigm. The stepparent adoption paradigm has different factual assumptions underlying it, which came to justify different legal treatment. *See supra* Part IV. In the stepparent adoption scenario, only the parent-child relationship of the natural parent of the same gender as the adoptive parent should be affected by the adoption. *See supra* notes 75-100. This debate is still reflected in the laws of some states, but it is clear that the Uniform Probate Code and the states which follow it provide that the stepparent adoption affects only the rights of the natural parent of the same gender as the adoptive parent.

222. *See supra* notes 38, 72-74 and accompanying text. Some states apply the classic adoption rule to the stepparent adoption scenario, thereby severing the parent-child relationship with both natural parents, but the natural parent who is married to the adopting parent can avoid the full effect of the rule by adopting the child along with the adoptive stepparent. *See supra* notes 73-74 and accompanying text. The same can apply to same-sex adoptions. Other states, acknowledging that the intent of the parties is not to sever the parent-child relationship with both natural parents and recognizing the ease with which the parties can nullify the effect of the classic adoption rule, have modified the law so that only the parent-child relationship between the child and the natural non-custodial parent not married to the adoptive parent is affected by the stepparent adoption. *See supra* note 72 and accompanying text.

223. *See supra* notes 37-39 and accompanying text.

224. *See supra* notes 54, 59, 64, 75-76, 148-50 and accompanying text.

custodial parent loses his or her right to inherit from and through the child, but the adopted child retains the right to inherit from and through the non-custodial parent.[225] Either way, the principal effect of the adoption on the non-custodial natural parent is the same. The non-custodial natural parent loses his or her right to inherit from and through the adopted child.[226] Because the statutory distinction between the stepparent adoption scenario and the step-*partner* adoption scenario has no effect upon the principal inheritance right of the non-custodial parent, it creates no incentive for the non-custodial parent to try to influence the adoptive parent and the custodial parent to marry (and that statement is based upon the highly questionable assumption that the non-custodial would want to, and/or would, have any influence over the adoptive parent and the custodial parent on this issue).[227]

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225. *See supra* note 100 and accompanying text.

226. The apparent logic is that, because the non-custodial parent generally must consent to the adoption, the consenting parent is deemed to have waived his or her right to inherit from and through the child—though consent is not always required. *See supra* notes 65, 99. While that logic arguably applies to the classic adoption scenario, its application to the stepparent and non-stepparent adoption scenario is more questionable. In the classic adoption scenario, the norm is for there to have been little to no meaningful parent-child relationship between the child and his or her natural parents to start with, and the adoption constitutes a complete break in the child's relationship with both of the natural parents. *See supra* notes 46-49, 79 and accompanying text. It makes more sense under these conditions to say that the consenting parents have "waived" their parent-child relationship, including the right to inherit. In the stepparent and step-*partner* adoption paradigms, however, the argument that the consenting natural parent has "waived" his or her parent-child relationship makes less sense. Both the stepparent and step-*partner* relationship assume that a meaningful parent-child relationship existed for a period of time between both of the natural parents and the child. *See supra* notes 82-89, 137-44 and accompanying text. A natural parent's willingness to consent to a stepparent or step-*partner* adoption does not necessarily mean that the natural parent is waiving his or her relationship with his or her child; it may simply be an acknowledgement by a loving parent that it may be in the best interests of the child for him or her to be adopted by the stepparent or step-*partner*. *See supra* notes 31, 113. That the natural parent is "punished" under such circumstances by losing his or her right to inherit from and through the child arguably is pro-family in that it creates an incentive for the natural parent *not* to consent, thereby keeping the initial "family" intact. But where the natural parents have divorced and the custodial natural parent has either remarried or is cohabitating with a new partner, trying to keep the initial "family" intact arguably is inconsistent with what might be in the best interests of the child. It may be in the child's best interest to be adopted by the stepparent or step-*partner*, thereby creating a new family structure for the home environment in which the child resides. Application of the general rule that the non-custodial natural parent loses his or her right to inherit from and through the child upon consenting to the adoption arguably is pro-family as applied to the original family, but not as applied to the custodial family at the time of adoption. An argument can be made that, just as the adopted child maintains his or her right to inherit from and through the non-custodial parent in the stepparent adoption scenario, the non-custodial natural parent should maintain his or her right to inherit from and through the adopted child in the stepparent adoption scenario. But that is a different issue which is beyond the scope of this Article.

227. One can make the argument that the non-custodial natural parent does have some influence over whether the adoptive parent marries the custodial natural parent in that generally the non-custodial natural parent must consent to the adoption. *See supra* note 65. The non-custodial

The only party for whom the stepparent adoption rule creates any meaningful pro-marriage/pro-family incentive is the adopted child. If the adoptive parent and the custodial natural parent are married, the adopted child retains his or her right to inherit from both natural parents and the adopted child gains the right to inherit from and through the adoptive stepparent.[228] The child adopted by a stepparent can therefore inherit from and through three parents. On the other hand, if the adoptive parent and the custodial parent are not married, although the adopted child gains the right to inherit from and through the adoptive step-*partner*, the adopted child loses the right to inherit from and through his or her non-custodial parent.[229] Thus, the child adopted by a step-*partner* can inherit from and through only two parents. From an economic perspective, the adopted child would want the adoptive parent to be married to the custodial parent so that the adopted child could keep his or her right to inherit from and through both natural parents. But the adopted child has no control over whether the adoptive parent and the custodial parent marry. Any pro-marriage/pro-family incentive that might exist in the difference between how the law treats the inheritance rights in the stepparent adoption scenario as opposed to the step-*partner* adoption scenario is lost on the child.

The Uniform Probate Code and the state statutes that fail to apply the stepparent adoption exception to the step-*partner* adoption hurt only the adopted child, yet the adopted child has absolutely no control over whether the adoptive step-*partner* is married to the cohabiting parent. The U.S. Supreme Court has repeatedly and unambiguously held that it is unconstitutional to punish the children as a means of trying to influence the conduct of the parents.[230] The Court has "invalidated

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natural parent could withhold consent unless the adoptive parent and the custodial natural parent marry. But asking the non-custodial natural parent to act as an agent of the state in promoting pro-marriage/pro-family policies by withholding consent to a proposed adoption unless the parties marry appears so farfetched that it is unlikely that the drafters of the stepparent adoption rule based it on this logic. And if that was the logic, arguably it is inappropriate. Nor do the means serve the claimed end. If the purpose was to create an incentive for the non-custodial natural parent to withhold consent unless the adoptive parent married the custodial natural parent, the statute should grant the non-custodial natural parent the right to inherit from and through the child if the adoptive parent marries the custodial natural parent, and it should sever the non-custodial natural parent's right to inherit from and through the child if the adoptive parent does not marry the custodial natural parent. But the statute does not. The only difference between the stepparent adoption scenario and the step-*partner* adoption scenario is that the child retains the right to inherit from both natural parents in the stepparent adoption scenario and the child does not in the non-stepparent adoption scenario. *See supra* notes 148-51 and accompanying text. The only party who is meaningfully affected by the statutory distinction is the adopted child.

228. *See supra* notes 66-68, 100 and accompanying text.

229. *See supra* notes 148-51 and accompanying text.

230. *See* Trimble v. Gordon, 430 U.S. 762, 769 (1977); Clark v. Jeter, 486 U.S. 456, 461

classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because 'visiting this condemnation on the head of an infant is illogical and unjust.'"[231] Thus, the stepparent adoption rule cannot be upheld on the grounds that it is pro-marriage/pro-family.[232]

D. Promotion of the Fair and Efficient Disposition of the Decedent's Property

Although the Supreme Court has been very skeptical of claims that classifications based on legitimacy are constitutional because they are pro-marriage/pro-family, the Court has been much more deferential to claims that classifications based on legitimacy are constitutional because they serve a legitimate state administrative interest. The Court has repeatedly acknowledged that states have a legitimate interest in developing statutory classifications that promote an "accurate and

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(1988); Reed v. Campbell, 476 U.S. 852, 854 (1986).

231. *Clark*, 486 U.S. at 461 (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)); *accord Reed*, 476 U.S. at 854 ("[The] answer is governed by a rather clear distinction that has emerged from our cases considering the constitutionality of statutory provisions that impose special burdens on illegitimate children. In these cases, we have unambiguously concluded that a State may not justify discriminatory treatment of illegitimates in order to express its disapproval of their parents' misconduct."); *Weber*, 406 U.S. at 173 (ruling that a statutory classification based on illegitimacy could not be upheld on the ground that "persons will shun illicit relations because the offspring may not one day reap the benefits" that they would otherwise reap if they were legitimate).

232. Related to the argument that the stepparent adoption rule is pro-marriage and/or pro-family is the argument that the stepparent adoption exception is appropriate because it recognizes that, unlike the classic adoption paradigm, in the stepparent adoption scenario the non-custodial natural parent does not necessarily step out of the child's life. *See supra* notes 82-89 and accompanying text. To the extent that this is the justification, however, there is no basis for distinguishing the stepparent adoption scenario from the step-*partner* adoption scenario. In both adoption scenarios, there is no reason to assume that the non-custodial natural parent will step out of the child's life—either before the adoption or after the adoption. In fact, the more logical assumption, and the one that society should promote, is the opposite—that the parent-child relationship will continue between the child and the non-custodial natural parent after the adoption, whether the adoption is by a stepparent or step-*partner*. In both scenarios, it is in the best interests of the child to grant the adopted child the continued right to inherit from and through the non-custodial parent on the assumption that the meaningful parent-child relationship that exists between the child and the non-custodial parent may continue after the adoption. Permitting the child adopted by a stepparent to continue to inherit from and through the non-custodial natural parent is pro-family relative to the original family unit, but it is equally pro-family relative to the original family unit to permit the child adopted by a step-*partner* to continue inheriting from and through the non-custodial natural parent. If the claimed state interest is the recognition that, in the stepparent adoption scenario the adopted child may continue to have a meaningful relationship with the non-custodial natural parent, the differentiation between the stepparent adoption scenario and the step-*partner* adoption scenario makes no sense, and it is not substantially related to an important state interest.

efficient method of disposing of property at death."[233] But even where there is a legitimate state interest, the precise terms of the statutory classification system must be substantially related to the state interest. For example, in *Trimble v. Gordon*, the Supreme Court found that the Illinois statute was not substantially related to the claimed legitimate administrative interest.[234] The Court ruled:

> [B]y insisting upon not only an acknowledgment by the father, but also the marriage of the parents, [section 12 of the Illinois Probate Code] excluded "at least some significant categories of illegitimate children of intestate men [whose] inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws."[235]

But the Court has upheld some statutory inheritance classifications based on illegitimacy.

In *Lalli v. Lalli*,[236] the Court considered the constitutionality of a New York statute that required a court of competent jurisdiction to enter an order of filiation declaring paternity during the lifetime of the natural father before an illegitimate child could inherit from and through the father.[237] The Court upheld the statute on the grounds that it was substantially related to a legitimate state administrative interest—the just and orderly disposition of property at death.[238]

In *Lalli*, an illegitimate child claimed the right to inherit from his father's intestate estate even though the child also admitted that "he had not obtained an order of filiation during his putative father's lifetime."[239] The child invoked *Trimble v. Gordon* to argue that the statutory requirement unconstitutionally discriminated against the inheritance rights of illegitimate children. In commenting on *Trimble*, the Supreme Court noted that, while inheritance rights based on illegitimacy are "not defensible as an incentive to enter legitimate family relationships,"[240]

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233. *Trimble*, 430 U.S. at 766; *accord* Lalli v. Lalli, 439 U.S. 259, 265 (1978).

234. *See Trimble*, 430 U.S. at 770.

235. *Lalli*, 439 U.S. at 266 (second alteration in original) (discussing and quoting *Trimble*, 430 U.S. at 771).

236. 439 U.S. 259 (1978).

237. *See id.* at 261-62. Section 4-1.2 of New York's Estate, Powers, and Trusts Law provided as follows:

> An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

Id.

238. *See id.* at 268-76.

239. *See id.* at 262.

240. *See id*. at 265.

such classifications are more relevant to a state's interest in "safeguarding the orderly disposition of property at death."[241] In analyzing whether the New York statutory classification based on legitimacy was constitutional, the Supreme Court distinguished the New York statutory provision from the Illinois statutory provision at issue in *Trimble*.

First, the Court distinguished the two statutory schemes by focusing on the precise test for inheritance under the respective statutes. The Illinois statute focused on the legal relationship between the natural parents, making intermarriage of the natural parents an absolute requirement and the exclusive method by which an illegitimate child could qualify to inherit from the natural father.[242] In contrast, under the New York statutory provision, the marital status of the natural parents was irrelevant to the illegitimate child's right to inherit.[243] The New York statute focused on the issue of proving paternity, an evidentiary issue involved in an inheritance claim by a putative illegitimate child; it is a procedural matter which directly affects the just and orderly distribution of a decedent's property.[244]

Second, the Court distinguished the New York statutory provision from the Illinois statutory provision based on the state interests purportedly and actually served by them. The Court noted that the Illinois statute was defended primarily on the ground that it was pro-marriage/pro-family.[245] The purported administrative state interest in the Illinois statute was at best overly broad and not "carefully tuned to alternative considerations."[246] In contrast, the Court concluded that the primary goal of the New York statute was not to encourage legitimate family relationships but rather to promote the just and orderly disposition of property at death—a legitimate administrative state interest.[247]

Having concluded that the New York statute was enacted to serve a legitimate state interest, the Court turned to the constitutional requirement that the differentiation based on legitimacy substantially serve the state interest—the just and orderly disposition of property at death. The Court agreed with the State of New York that requiring the illegitimate child to bring his or her paternity action during the purported

241. *See id*.
242. *See id*. at 266.
243. *Id.* at 267.
244. *See id.* at 267-68.
245. *Id.* at 267.
246. Trimble v. Gordon, 430 U.S. 762, 772-73 (1977) (quoting Mathews v. Lucas, 427 U.S. 495, 513 (1976)).
247. *Lalli*, 439 U.S. at 267-68.

father's lifetime enhanced the accuracy of the proceeding.[248] The Court also found that the "[t]he administration of an estate will be facilitated, and the possibility of delay and uncertainty minimized, where the entitlement of an illegitimate child to notice and participation is a matter of judicial record before the administration commences."[249] Inter vivos determination of paternity also reduced both the probability of fraudulent paternity claims being asserted and the probability that such fraudulent claims would succeed.[250] The Court concluded that the New York statutory classification based on illegitimacy was substantially related to the state's legitimate administrative interest in that it promoted the accurate and efficient distribution of property at death.

The illegitimate child in *Lalli* also argued, based on the Court's opinion in *Trimble*, that the New York statute was unconstitutionally overbroad because it excluded significant categories of illegitimate children who could be allowed to inherit without jeopardizing the state interest in promoting the timely and orderly distribution of their natural fathers' intestate property.[251] While the Court acknowledged that there was some truth to the appellant's assertion, the Court ruled that the question was not whether the statutory classification scheme adopted by the state was "fair" as an abstract matter.[252] The Court emphasized that the scope of its constitutional scrutiny was limited to "whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment."[253] Again, the Court distinguished the New York statutory classification from the Illinois statutory provisions that were declared unconstitutional in *Trimble v. Gordon*. The Court emphasized that the Illinois statutory scheme "was constitutionally unacceptable because it effected a total statutory disinheritance of children born out of wedlock who were not legitimated by the subsequent marriage of their parents. The reach of the statute was far in excess of its justifiable purposes."[254] The New York statutory scheme, on the other hand, was more carefully tuned so that it did not inevitably disqualify "an unnecessarily large number of children born out of wedlock."[255] As *Reed v. Campbell* summized, the Court concluded that the New York statutory classification based on illegitimacy bore "an evident and substantial

248. *See id.* at 271.
249. *Id.*
250. *See id.* at 271.
251. *Id.* at 272.
252. *Id.* at 272-73.
253. *Id.* at 273.
254. *Id.*
255. *Id.*

relation to the State's interest in providing for the orderly and just distribution of a decedent's property at death."[256]

E. Application of the Equal Protection Clause to the Stepparent Adoption Rule

Applying the factors the Court took into consideration in *Trimble v. Gordon* and *Lalli v. Lalli*, the stepparent adoption rule does *not* bear an evident and substantial relation to the legitimate state interest of promoting the orderly and just distribution of a decedent's property.

The first step analytically, as performed by the Court in *Lalli*, is to focus on the precise statutory test for inheritance.[257] Just like the constitutionally unacceptable Illinois statute in *Trimble v. Gordon*, the stepparent adoption rule focuses on the legal relationship between the custodial parent and the adoptive parent. It makes intermarriage of the custodial parent and the adoptive parent an absolute requirement and exclusive method by which a child adopted by the new partner of the custodial parent could qualify to retain the right to inherit from the non-custodial natural parent.[258] The marriage requirement argues against the constitutionality of the stepparent adoption rule.

The second step, as performed by the Court in *Lalli*, is to analyze the particular administrative state interest said to be served by the statutory classification.[259] Where a child is adopted by a third parent, the issue that naturally arises is whether the child should retain the right to inherit from the legally displaced parent. The argument is that the child should be permitted to retain the right to inherit from the legally displaced parent where the child had a sufficiently meaningful parent-child relationship with said parent. The courts could undertake a costly, case-by-case analysis of the parent-child relationship between the adopted child and the deceased non-custodial parent, with all the potential for increased administrative costs and fraudulent claims, or the state could simply adopt a bright line rule with respect to the issue either permitting or denying the right in all cases.[260] The stepparent adoption rule represents the legislative determination that a bright line approach is better. Rather than conducting a case-by-case, fact-sensitive hearing to determine when a child adopted by a stepparent should be granted the

256. Reed v. Campbell, 476 U.S. 852, 855 (1986) (citing *Lalli*).

257. *See supra* notes 241-42 and accompanying text.

258. *See Lalli*, 439 U.S. at 266.

259. *See id.* at 267-68.

260. Such a bright line approach could either grant the child adopted by a stepparent the continued right to inherit from the legally displaced parent in all cases, or it could deny the child adopted by a stepparent the right to inherit from said parent in all cases.

right to inherit from the legally displaced parent, *all* children adopted by a stepparent are granted such a right. The stepparent adoption rule promotes the orderly distribution of a decedent's property by assuming in all cases that the adopted child *had* a sufficiently meaningful relationship with the legally displaced parent to justify permitting the child to retain the right to inherit from and through said parent.[261]

The issue arguably is the same with respect to a child adopted by a step-*partner*. Where a child is adopted by a step-*partner*, the issue that naturally arises is whether the child should retain the right to inherit from the legally displaced parent. The courts could undertake a costly, case-by-case analysis of the parent-child relationship between the adopted child and the deceased non-custodial parent, with all the potential for increased administrative costs and fraudulent claims, or the state could simply adopt a bright line rule with respect to the issue. The failure to include step-*partner* adoptions within the scope of the stepparent adoption rule constitutes a bright line approach to the issue. It promotes the orderly distribution of a decedent's property by assuming in all cases that the adopted child did *not* have a sufficiently meaningful relationship with the legally displaced parent to justify permitting the child to retain the right to inherit from and through said parent.[262]

This approach, however, is constitutionally flawed as applied to the step-*partner* adoption scenario. First, there is no defensible distinction between a child adopted by a stepparent and a child adopted by a step-*partner* with respect to the issues of potential for increased administrative costs and fraudulent claims. With respect to both categories of children, there is a good chance that the child *may* have had a meaningful relationship with the non-custodial parent, one which *may or may not* continue after the adoption. But no doubt for some children,

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261. *See supra* notes 82-89 and accompanying text.

262. There is, however, nothing in the legislative history behind the stepparent adoption scenario to support the argument that this administrative function was the principal state interest behind the statutory scheme. In *Trimble v. Gordon*, the Supreme Court refused to entertain a claimed state interest that might have justified the statutory classification under scrutiny when the claimed state interest was not reflected in the legislative history of the statute. 430 U.S. 762, 774-75 (1977). The Court concluded "that the statutory provisions at issue were shaped by forces other than" the claimed state interest not reflected in statute's legislative history. *Id.* at 775. The same can be said about the stepparent adoption rule. Step-*partner* adoptions were not permitted when the stepparent adoption rule was developed. The first second-parent adoption did not occur until the mid-1980s. *See* David, *supra* note 115, at 927 n.40. The stepparent adoption rule was first adopted several years before that. *See* UNIF. PROBATE CODE § 2-109(1), 8 U.L.A. 66 (1982). The stepparent adoption rule was "shaped by [other] forces"—the desire to facilitate and encourage stepparent adoptions—and not any determination that children adopted by step-*partners* posed any greater administrative costs or threat of fraud. The legislative history behind the stepparent adoption rule does not support the argument that children adopted by step-*partners* were excluded to promote the orderly distribution of a decedent's estate. *See id.*

such will *not* have been the case. Any attempt to claim that the potential for increased administrative costs and fraudulent claims is different depending upon whether the child is adopted by a stepparent or a step-*partner* is indefensible.

Second, the issue of whether a child adopted by a third parent should retain the right to inherit from the non-custodial parent should turn on the parent-child relationship between the two. Any classification scheme which grants some children adopted by a third parent the right to inherit from the non-custodial parent, and denies the right to other adopted children, must be substantially related to the claimed state interest. The stepparent adoption rule grants children adopted by a stepparent the right to inherit from the non-custodial parent and denies the right to children adopted by a step-*partner*.[263] The focus of the stepparent adoption rule is not on the parent-child relationship or any evidentiary or administrative costs inherent in proving such a relationship. Instead, the focus is solely on whether the adoptive parent is married to the custodial parent.[264] The test employed by the stepparent adoption rule is not related to the parent-child relationship between the adopted child and the legally displaced non-custodial parent. The reach of the stepparent adoption rule is far in excess of its claimed justifiable purpose and is, therefore, unconstitutional.[265]

Similar to the Illinois statutory provision in *Trimble v. Gordon*, the stepparent adoption rule broadly discriminates between legitimate and illegitimate children relative to the status of the adopted child. Permitting a child adopted by a step-*partner* to retain the right to inherit from both natural parents would not compromise any claimed state interest in the accurate and efficient distribution of a decedent's property any more than permitting a child adopted by a stepparent does. The stepparent adoption rule discriminates against children adopted by step-*partners* without any offsetting administrative benefit. Just as with the Illinois statutory scheme at issue in *Trimble v. Gordon*, because the stepparent adoption rule categorically excludes all children adopted by step-*partners*, it is constitutionally flawed.[266]

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263. *See supra* notes 148-52 and accompanying text.

264. *See supra* note 149 and accompanying text.

265. *See supra* note 254 and accompanying text. While some might want to assume that, in the step-*partner* scenario, a meaningful parent-child relationship between the child and the non-custodial parent is less likely, such an assumption is (1) factually indefensible, and (2) irrelevant under the stepparent adoption rule. The sole test is whether the adoptive parent and the custodial parent are married at the time of the adoption. *See supra* note 149 and accompanying text.

266. *See* Lalli v. Lalli, 439 U.S. 259, 266 (1978) (distinguishing the statute at issue in *Trimble*, 430 U.S. 762). Yet another possible explanation for why step-*partner* adoption inheritance rights are treated differently from the stepparent adoption inheritance rights is that they are an added

VIII. CONCLUSION

Just as inheritance laws that excluded illegitimate children "sent a signal that childbearing ought to occur within the marital context,"[267] the prevailing stepparent adoption inheritance laws that exclude children adopted by a step-*partner* send a signal that adoption ought to occur within the marital text. The stepparent adoption rule discriminates against children adopted by step-*partners* with respect to inheritance laws. From a public policy perspective, this distinction is illogical and unjust. One would expect that, as the asymmetry in inheritance rights is made public, there should be support for granting a child adopted by a step-*partner* the right to inherit from both natural parents. Liberals should support such an approach because it broadens what constitutes a legally recognized parent-child relationship. Conservatives should support such an approach because it is in the best interests of the child. From a public policy perspective, the failure to extend the stepparent adoption rule to the step-*partner* adoption scenario is as illogical as the rule itself.

In addition, while there is no constitutional requirement that states permit step-*partner* adoptions or that states adopt the stepparent adoption rule, if a state has the stepparent adoption rule and it recognizes step-*partner* adoptions, the Equal Protection Clause of the Fourteenth Amendment requires the state to extend the stepparent adoption rule to children adopted by step-*partners*. Similarly situated children should be treated the same. At a minimum, the Uniform Probate Code's stepparent adoption rule should be amended to grant a child adopted by a step-*partner* the same inheritance rights as a child adopted by a stepparent so that family law, as embodied in the Uniform Adoption Act, and wills

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deterrent to same-sex couple adoptions. By granting the exception to the general adopted-child rule only in cases of stepparent adoptions, heterosexual adoptions are treated differently, and more favorably, than adoptions by same-sex couples. This argument is specious, however, for several reasons. First, if that were the logic underlying the distinction, the approach is overly broad. Not only are same-sex couple adoptions affected by the rule, but so too are unmarried heterosexual couple adoptions. Even assuming, *arguendo*, that as a matter of public policy a jurisdiction opposes same-sex adoptions, that opposition should be stated and taken upfront as a complete bar on same-sex adoptions, not indirectly by restricting inheritance rights in step-*partner* adoptions scenarios as opposed to stepparent adoption scenarios. In fact, the nexus between the treatment of the inheritance rights under the step-*partner* adoption scenario and the assumed goal of deterring same-sex adoptions is so tenuous, that it seems preposterous to even raise the argument but for the passion the issue engenders among its opponents.

267. Sean E. Brotherson & Jeffrey B. Teichert, *Value of the Law in Shaping Social Perspectives on Marriage*, 3 J.L. & FAM. STUD. 23, 37 (2001).

and trusts law, as embodied in the Uniform Probate Code, speak with one voice on this important emerging social and legal issue.[268]

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268. There are official movements towards just such an approach. Tentative Draft No. 4 of the Restatement Third of Property (Wills and Other Donative Transfers) (on file with author), approved by the American Law Institute at the May 2004 annual meeting, provides:

> § 14.6 Adopted Child as Child of Genetic Parent
>
> Unless the language or circumstances establish that the transferor had a different intention, an adopted child is not treated for class-gift purposes as a child of either genetic parent, except that:
>
> (1) If the adoption is by the spouse or domestic partner of a genetic parent, the child remains a child of the genetic parent who is married to or the domestic partner of the adopting parent.
>
> (2) If the adoption is by a relative of either genetic parent, or by the spouse or surviving spouse or domestic partner or surviving domestic partner of such a relative, the child remains a child of both genetic parents.
>
> (3) If the adoption occurs after the death or incapacity of either genetic parent, the child remains a child of both genetic parents if (i) the adoption is by someone nominated by a genetic parent to be the child's guardian, or (ii) the child does not subsequently become estranged from the genetic families.

Although Tentative Draft No. 4 of section 14.6 of the Restatement Third of Property expands the stepparent adoption rule to include domestic partners, this expansion arguably is not enough for the reasons set forth in this Article.

In addition, a draft of this Article was sent to a representative of the Uniform Law Commission. The Uniform Law Commission responded by acknowledging the merits of the article and that it is in the process of reviewing the issue. It offered the following as a draft revision of Uniform Probate Code § 2-115 on which it is working:

> SECTION 2-115. PARENT AND CHILD RELATIONSHIP; ADOPTED INDIVIDUAL.
>
> (a) This section applies for purposes of determining the status of an adopted individual under [this Part] [the laws of intestate succession].
>
> (b) An adopted individual is the child of his [or her] adopting parent or parents.
>
> (c) Except as provided in subsections (d) and (e), an adopted individual is not the child of his [or her] genetic parents.
>
> (d) An individual who is adopted by the spouse or by the [legally recognized] unmarried partner of either genetic parent continues to be the child of:
>
> (1) that genetic parent; and
>
> (2) the other genetic parent, but only for purposes of intestate succession from or through that other genetic parent.
>
> (e) An individual who, after the death or incapacity of either genetic parent, is adopted by any of the following continues to be the child of both genetic parents:
>
> (1) a relative of either genetic parent or the spouse or surviving spouse of such a relative;
>
> (2) an individual nominated by either genetic parent to be the child's guardian; or
>
> (3) [an individual who is acquainted with either genetic parent] [need a better formulation here, such as maintained a continuing family relationship or something like that].
>
> (f) If a child was adopted more than once, the term "previous adoptive parent" is substituted for "genetic parent" in subsections (d) and (e).

This new Uniform Probate Code section had not been finalized or adopted by the Uniform Law Commission by the time this Article was published nor adopted by any state.