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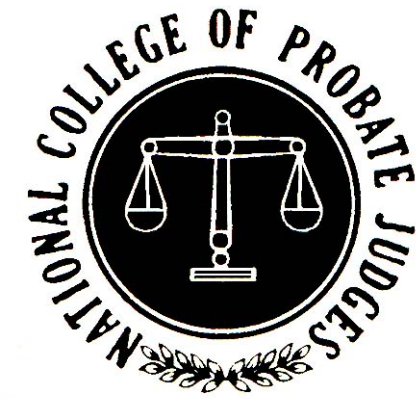

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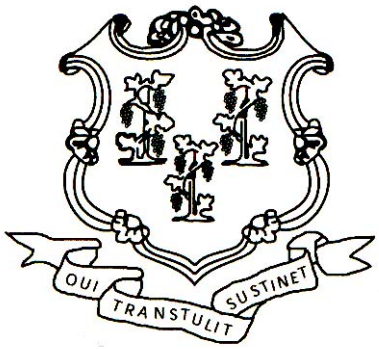

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OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: FRANK WISSNER

PROBATE COURT, NEW HAVEN DISTRICT

JULY 2016

EDITOR'S SUMMARY & HEADNOTES

Petitioner sought to place Mr. Wissner in the care of Respondent. Respondent contested the placement, and the Petitioner incurred attorney's fees as a result. The Petitioner then brought an action to recover attorney's fees under Conn. Gen. Stat. § 17a-275 (2016). The Court held that the legislative intent behind Conn. Gen. Stat. § 17a-275 was that the State pay "fees and expenses" associated with commitment, but that legislative intent was only relevant if the statute at issue was ambiguous or yielded an absurd or unworkable result. The Court held that while the State consented to be sued by undertaking the obligation to pay "fees and expenses" under Conn. Gen. Stat. § 17a-275, such "fees and expenses" did not include the attorney's fees that the Petitioner was seeking.

1. **Statutory Interpretation: Generally**

   The court's fundamental objective in statutory interpretation is to give effect to the apparent intent of the legislature.

2. **Statutory Construction: Plain Meaning Rule**

   The Connecticut legislature has adopted the plain meaning rule. Conn. Gen. Stat. § 1-2z (2016). The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and

unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.

3. Statutory Construction: Plain Meaning Rule Ambiguity

According to Conn. Gen. Stat. § 1-2z, the court must test whether the statute in question is plain and unambiguous.

4. Statutory Construction: Determination, Mandatory or Directory

The test for determining whether such a statutory requirement is mandatory or directory is whether the prescribed mode of action is of the essence of the thing to be accomplished, or in other words, whether it relates to matters material or immaterial–to matters of convenience or of substance. If it is a matter of convenience, the statutory provision is directory; if it is a matter of substance, the statutory provision is mandatory.

5. Sovereign Immunity: Generally

Generally, sovereign immunity will shield a state from suit.

6. Statutory Interpretation: Generally

Any statutory waiver of sovereign immunity must be narrowly construed.

Opinion

Facts of the Case

On November 3, 2014, Yale-New Haven Hospital ("Yale") sought a Petition for Placement of Frank Wissner with the Department of Developmental Services ("Department") under Conn. Gen. Stat. § 17a-274 (2016). The Petition for Placement was granted by the Probate Court on December 31, 2014. The Department then moved for reconsideration, but its request was denied. On March 26, 2015, the Department appealed to the Superior Court, but subsequently withdrew its appeal.

The issue before the Court is whether Yale should be awarded attorney's fees under Conn. Gen. Stat. § 17a-275 (2016) for the total amount of $36,070.50. Yale claims $24,976.50 in fees for the probate court proceedings, and $11,094.00 in fees for the appeal. The Department argues that § 17a-275 is only applicable to filing fees and expenses, not to attorney's fees, and that Yale's fee records are unreasonable as to amount.

This issue is a case of first impression.

Discussion of Law

A) The legislative history supports the Department's contention that the legislature discussed only whether § 17a-275 applied to fees and expenses owed to probate courts for hearings conducted for involuntary placements.

The legislative discussion underlying the adoption of § 17a-275 concerned the enabling of probate courts to receive payment for fees and expenses incurred for involuntary placement hearings.

On February 14, 1957, a public hearing was held by the General Assembly's Public Welfare and Human Institutes Committee. During this hearing, Norman Parsells testified that House Bill No. 740, Commitment Fees and Expenses, was proposed "to take the burden of commitment cost away from the legally liable relatives in all cases" and "to take care of the charges to the probate courts." *Conn. Joint Standing Comm. Hearings, Pub. Welfare and Humane Insts*., 1957 Conn. Gen. Assemb., 1958 Spec. Sess. 31 (Conn. 1957) (statement of Norman Parsells). The purpose of the Bill was to provide for the payment of costs to the probate courts for involuntary placements under § 17a-274.

On April 3, 1957, a Representative of the House, Mr. Roberts of Barkhamsted, explained prior to the passage of House Bill No. 740 that:

> [t]his bill will enable the state to pay the committal fees of a patient committed to mental hospitals. In the past it has been necessary to try to collect these fees from responsible relatives, etc. and has not worked out so well, and have been having difficulty in collecting any fees for these commitments.

31 H. R. Proc., Vol. 7, Pt. 2, 1957 Sess., 979 (Conn. 1957).

When the bill was brought for consideration to the Senate, Senator Sweeney explained that:

> …this bill provides $50,000 for payment of fees and expenses in connection with commitments. It was the intent of the 1955 Legislature that commitment fees such as these be paid [….] Briefly, the state owes the money to various judges, donors and officers of the law and this appropriation is to permit the state to pay its honest debt.

23 S. Proc., Vol. 7, Pt. 3, 1957 Sess., 1376 (Conn. 1957).

The testimony contained within the legislative history is limited: The discussion about § 17a-275 involved relieving probate courts of the financial burdens of commitment hearings held for involuntary placements. However,

despite such evidence of legislative intent, this Court may consider legislative history only upon a determination that the relevant statute at issue is ambiguous or yields an absurd or unworkable result.

B) Section 17a-275 does not encompass attorney's fees, which creates an inherent ambiguity.

[1][2] As a general principle of statutory construction, the court's:

> [F]undamental objective is to ascertain and give effect to the apparent intent of the legislature…. In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply….

Weems v. Citigroup, Inc., 289 Conn. 769, 779, 961 A.2d 349, 355 (2008). The Court's construction of Connecticut law must also conform to the interpretive strictures prescribed by Connecticut's plain meaning statute, Conn. Gen. Stat. § 1-2z (2016). The plain meaning rule provides the following guidance:

> The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.

Id.

[3] It is customary to examine the plain language of statutes. However, § 1-2z limits the court's interpretive purview to the plain *meaning* of the law. As recently addressed in the *Connecticut Law Review*, "plain meaning statutes purport to tell courts how to engage in the process of statutory interpretation." Thomas A. Bishop, *The Death and Reincarnation of Plain Meaning in Connecticut: A Case Study*, 41 CONN. L. REV. 825, 855 (2009). Such statutes "generally purport to limit the scope of a court's inquiry into legislative intent." *Id*. at 858. Proponents of the plain meaning rule would argue that the plain meaning of a statute is definitive and that "there is no need for interpretation if the statutory language at hand is clear." *Id*. at 846. Section 1-2z legislates adherence to such an approach. Thus, the court may not undertake to interpret Connecticut law where a statute is "clear" or free of ambiguity.

This Court's analysis will begin with the relevant statute. The General Statutes provide for the following: "[w]hen any person is involuntarily placed with the Department of Developmental Services pursuant to the provisions of section 17a-274, *all* fees and expenses incurred upon such proceedings shall be paid by the state. . ." Conn. Gen. Stat. § 17a-275 (emphasis added). The issue before this Court is whether the cited provision is properly construed to include

attorney's fees, billed as a result of the involuntary placement, or solely probate fees.

The Connecticut courts have established a very low bar for a court to overcome in order to find a statute ambiguous. A statute will be deemed ambiguous where there is "a slim but adequate reed on which to base a finding of ambiguity…." *State v. Salamon*, 287 Conn. 509, 575, 949 A.2d 1092, 1136 (2008). The test for ambiguity is "whether the statute, when read in context, is susceptible to more than one reasonable interpretation." *Weems*, 289 Conn. at 779, 961 A.2d at 355 (finding a statute ambiguous with regard to "[w]hether a bonus constitutes a wage under [Conn. Gen. Stat. §] 31-71a(3)").

Accordingly, there is a low threshold to overcome in order to find statutory language ambiguous. In this instance, it is possible to construe the absolute and unqualified language of 'all fees and expenses' as ambiguous. Additionally, the statute does not define either fees or expenses. As such, the meaning of these terms, as construed strictly by their plain meaning, cannot be interpreted to include attorney's fees.

Similarly, it is clear from the context of the provision that the use of "shall" in § 17a-275 is not ambiguous. Though "definitive words, such as must or shall, ordinarily express legislative mandates of a nondirectory nature. . .the use of the word shall. . .does not invariably establish a mandatory duty." *Francis v. Fonfara*, 303 Conn. 292, 302, 33 A.3d 185, 192 (2012). The test for whether a statutory requirement is mandatory and not directory turns on whether the statutory provision is a matter of substance: "[i]f it is a matter of convenience, the statutory provision is directory; if it is a matter of substance, the statutory provision is mandatory." *Id.* Furthermore, "the word 'shall' creates a mandatory duty when it is 'juxtaposed with [a] substantive action verb.'" *Rainforest Cafe, Inc. v. Dept. of Revenue Servs.*, 293 Conn. 363, 376, 977 A.2d 650, 659 (2009). Here, the statute provides such a verb, as it states that "all fees and expenses. . .shall be *paid*." § 17a-275 (emphasis added). *See also Pedro v. Miller*, 281 Conn. 112, 117, 914 A.2d 524, 527 (2007) (finding a mandatory duty where the statute provides "shall be served within one hundred twenty days of the return date"). The nature of the duty, as expressed in § 17a-275, is mandatory. The extent is unclear.

[4][5] Generally, sovereign immunity will shield a state from suit. However, "the state's sovereign right not to be sued may be waived by the legislature, provided clear intention to that effect is disclosed by the use of express terms or by force of a necessary implication." *Dept. of Pub. Works v. ECAP Constr. Co.*, 250 Conn. 553, 558-59, 737 A.2d 398, 401 (1999). A state will be immune from suit "unless, by appropriate legislation, it authorizes or consents to suit." *Mahoney v. Lensink*, 213 Conn. 548, 555, 569 A.2d 518, 522 (1990). "Moreover, because such statutes are in derogation of the common law, [a]ny statutory waiver of immunity must be narrowly construed and its scope must be confined strictly to the extent the statute provides." *Id.* at 555-56, A.2d at 522. In *Mahoney*, the court found that although the statutory language "[a]ny

person aggrieved. . .may bring a civil action for damages" did not expressly waive statutory immunity, the statute "must be considered. . .as a whole. . .in order to render an overall reasonable interpretation." *Id*. at 556, 569 A.2d 523 (emphasis omitted). Similarly, an interpretation that "all fees and expenses" in § 17a-275 includes attorney's fees is unreasonable. Under the express terms of the statute, the state has agreed to pay *all* fees and expenses. By accepting upon itself the obligation to pay, the state has also consented to be sued for a violation of this statutory obligation. However, the construction of this waiver, considered together with the statute's legislative history, does not permit an award of attorney's fees.

Conclusion

Filing fees are awarded, but no attorney's fees.

/s/

John A. Keyes, Judge

QUINNIPIAC PROBATE
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OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: ESTATE OF SHARON RITA DERENE (ORDER ENFORCEMENT)

PROBATE COURT, STRATFORD PROBATE DISTRICT

JUNE 2016

EDITOR'S SUMMARY & HEADNOTES

The children of the Decedent petitioned the Court to enforce the Court's Order that directed distribution of various items of personal property owned by the Decedent. On September 3, 2015, the Court entered an Order for the distribution of the Decedent's personal property by her surviving partner to her children. In letters to the Court, the Decedent's children alleged that the surviving partner had not complied with the Order and asked the Court to enforce the distribution of the missing items. The issue before the Court was to determine whether the Decedent's children proved that the surviving partner was not in compliance with the Court's Order. The Court found that the Decedent's children had failed to prove by clear and convincing evidence that any items remained in the surviving partner's possession, or that he failed to comply with the Court's Order.

1. Jurisdiction: Probate Court

Conn. Gen. Stat. § 45a-98(a)(3) (2016) gives a probate court the authority to determine title or rights of possession of tangible or intangible property that constitute all or any part of a decedent's estate.

2. Jurisdiction: Probate Court

Conn. Gen. Stat. § 45a-24 (2016) states that all orders, judgments, and decrees of a court of probate, rendered after notice and from which no appeal is taken, shall be conclusive.

3. **Jurisdiction: Probate Court**

Conn. Gen. Stat. § 45a-98(a)(7) (2016) grants probate courts the power to "make any lawful orders or decrees to carry into effect the power and jurisdiction conferred upon them by the laws of this state" and invoke any additional remedies.

4. Standard of Proof: Clear and Convincing

The burden of persuasion, therefore, in those cases requiring a showing of clear and convincing proof is sustained if evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probable true, that the probability that they are true to exist is substantially greater than the probability that they are false or do not exist.

Opinion

On September 3, 2015, this Court entered an Order ("2015 Order") after a contentious trial that determined who was entitled to the distribution of various items of personal property owned by the Decedent. No appeal was taken from that decision.

More than five months later, on February 22, 2016, the children of the Decedent notified the Court in writing that the Decedent's partner, Maurice Streicker ("Mr. Streicker"), had not turned over some of the items that the Court had ordered distributed to them. The letter stated that the "order was not met in full compliance" by Mr. Streicker. The Court forwarded a copy of the letter to all parties, and Mr. Streicker replied that he "promptly adhered to and cooperated to the letter of the Court's decision" and that "all items listed in the decision were delivered in a timely manner and in full and good condition." The Court then, on March 14, 2016, reminded all parties of the exact language of its decision.

On March 21, 2016, the Decedent's children filed an additional letter with the Court. This letter set forth a list of nine items that Mr. Streicker had allegedly not turned over to them. The Court scheduled a status conference on this matter on April 22, 2016, at which the Decedent's children appeared but Mr. Streicker did not. The Court scheduled a hearing on May 17, 2016, in order to further determine title to these items.

Mr. Streicker and the Decedent's children appeared at this hearing without counsel. The Court initially asked all parties whether it was necessary to determine title to these items, and all agreed that it was not, as the Court had already done so in its 2015 Order. The children's February 22, 2016, letter alleged that Mr. Streicker was not in compliance with the Court's 2015 Order, and their March 21, 2016 letter requested that the Court "make Mr. Streicker be compliant" with the 2015 Order. As a result, the Court proceeded to determine

whether or not Mr. Streicker was in compliance with its 2015 Order.

The 2015 Order was very specific. It stated: "[a]ny and all items of personal belongings that belonged to [the Decedent] prior to the beginning of her cohabitation with Mr. Streicker are the property of her children and heirs." *In re: Estate of Sharon Rita Derene*, 29 QUINNIPIAC PROB. L. J. 104, 111 (2016). In rendering its decision at that time, the Court relied upon a "List of Assets" which was introduced as evidence by her children, at that trial. Specifically, the Court ordered that "fine china in buffet and crystal assorted pieces…entire contents of living room curio cabinets (includes Yadro, Hummels, Wedgewood, etc…) . . . kitchen vase . . . and remaining artwork" and "personal pictures in a box, three to four hand knit Afghan blankets, and hand knit Yamakas" were to be distributed to the children. *Id.* at 110-11.

[1][2][3] Mr. Streicker initially questioned the jurisdiction of the Court to hear this matter. Conn. Gen. Stat. § 45a-24 (2016) states that "[a]ll orders, judgments and decrees of a court of probate, rendered after notice and from which no appeal is taken, shall be conclusive…." Conn. Gen. Stat. § 45a-98(a)(7) (2016) grants the Court the power to "make any lawful orders or decrees to carry into effect the power and jurisdiction conferred upon them by the laws of this state." The Court interprets these statutes as empowering it to retain jurisdiction to ensure that its judgments, orders, and decrees are being complied with. If there is an allegation of noncompliance, the Court must conduct its own inquiry. If it finds that there has been noncompliance, it is further empowered to apply appropriate remedies.

Rule 71 of the 2015 Probate Court Rules of Procedure addresses enforcement. Section 71.3 sets forth the different types of contempt that the Court may find. Summary criminal contempt, § 71.5, is defined as "misbehavior in the presence of the court that is directed against the dignity and authority of the court and obstructs the orderly administration of justice." Conn. R. Prob. § 71.5 (2016). The Court will note that the conduct of the parties at the hearing on May 7, 2015, came very close to summary criminal contempt. However, the Decedent's children allege noncompliance with a Court order, and not "misbehavior" in the presence of the Court.

Section 71.6(a) identifies nonsummary criminal contempt, and requires a finding of misbehavior under certain conditions. Again, the Court finds that the claims of the Decedent's children do not allege "misbehavior" by Mr. Streicker.

Section 71.7(a) states that "civil contempt" is the appropriate remedy for violation of a court order. The Decedent's children have alleged that Mr. Streicker has violated the 2015 Order by not distributing to them various items of the Decedent's personal property. The Court finds that both of the children's letters are in the form of "motions" as required by § 71.7(b), and shall proceed on that basis.

Items one through four of the Decedent's children's March 22, 2016, letter describe very specific property—the entire contents of the curio cabinet, which they allege was not returned by Mr. Streicker. The children testified that when they received the items that the Court had determined were theirs, these specific items were not included. Mr. Streicker testified that he personally wrapped each item and placed them in a box that he left outside his residence, together with all of the other items, for pick up by the Decedent's children. The Decedent's children alleged that he "picked and chose" which items to give them. They further alleged that he either continues to keep the missing items within his residence, has placed them in storage, or has otherwise disposed of them. As discussed later in this Decision, the burden is upon the children to prove that Mr. Streicker failed to return these items to them.

Item five on the March 22, 2016, letter is a "blue kitchen vase (held utensils on counter) that is hand molded ceramic clay painted blue, white and light green." The List of Assets lists "kitchen vase filled with utensils." Mr. Streicker testified that there were several kitchen vases within the premises and that he did return one to the children, while he kept the others. This is the first time that the Court is hearing that there was more than one kitchen vase. The Court's 2015 Order required the return of a "kitchen vase," as identified directly from the List of Assets. Only one is identified on the List of Assets, and one was returned to the children.

Item six on the March 22, 2016, letter identifies "crystal ass't pieces - Moms's crystal wine and water stemware (stored above oven)." The List of Assets states "buffet in dining room, which includes fine china, and crystal ass't pieces." The Court's Order required the return of the items listed on the List of Assets. The parties agreed that the Decedent's daughter removed and took various china and crystal pieces from the buffet. Again, this is the first time that the Court is hearing that there were other crystal pieces other than those within the buffet above the oven. The only crystal pieces requested by the children as set forth on their List of Assets, and ordered to be returned, were those within the buffet which they received.

Item seven states: "box of Mom's personal childhood pictures (my mom, her sister and parents) stored in the small wall closet behind TV." The Court did order that the Decedent's personal possessions, which she acquired prior to her cohabitation with Mr. Streicker, were to be returned to the children. However, Mr. Streicker testified that he delivered all of these items to the children. He testified that there is nothing remaining within this closet, and upon inquiry by the Court, that there is nothing remaining anywhere else within his residence or elsewhere.

Item eight refers to "only [one] hand knit blanket (afghan) turned over, there are more that my mother and grandmother hand knit." Again, Mr. Streicker testified that there are no other such items within his residence or anywhere else, and that all were turned over.

Finally, item nine identifies "any of [the Decedent's] personal belongings in those wall closets or back laundry room storage area." Once again, Mr. Streicker testified that no such belongings are within his residence or anywhere else.

Conn. R. Prob. § 71.7(d) (2016) states that:

> If the court finds by clear and convincing evidence that the person who is the subject of the motion violated a clear and unambiguous court order of which the person had actual knowledge, the court may impose sanctions to ensure compliance with the order and compensate another party for loss.

[4] Clear and convincing evidence is such that makes it "highly probab[le]" that there is a substantially greater probability that the facts are true rather than false. *Lopinto v. Haines*, 185 Conn. 527, 534, 441 A.2d 151, 155-56 (1981) (citing *Dacey v. Connecticut Bar Ass'n*, 170 Conn. 520, 537, 368 A.2d 125, 134 (1976)). Such a standard is to be applied in order to sustain claims "which have serious consequences or harsh or far reaching effects on individuals, to prove willful, wrongful and unlawful acts, to justify an exceptional judicial remedy, or to circumvent established legal safeguards…." *Shaffer v. Lindy*, 8 Conn. App. 96, 104, 511 A.2d 1022, 1027 (1986).

The Court's 2015 Order could not have been more clear and unambiguous. It was based upon the List of Assets which was provided by the children, and extensive and acrimonious testimony. Mr. Streicker had actual knowledge of this 2015 Order. The burden of proving that he failed to comply with this 2015 Order is upon the Decedent's children. Rule 71.7(d) specifically requires that they must satisfy this burden by clear and convincing evidence, showing that it is highly and substantially probable that the facts which they allege are true rather than false.

The Court finds that the Decedent's children have failed to prove by clear and convincing evidence that Mr. Streicker is noncompliant with the Court's 2015 Order. Mr. Streicker admitted that he retained several of the Decedent's vases, yet gave one identified vase on the List of Assets back to the children. He admitted that he retained, and even disposed of, certain crystal pieces that were above the oven within his residence, but he returned those that were within the buffet and identified on the List of Assets. It is not up to this Court to determine whether Mr. Streicker should have returned these items to the Decedent's children, out of good faith and knowledge that they belonged to the Decedent. The Court was presented with a List of Assets upon which its 2015 Order was based. The Court finds Mr. Streicker has complied with it.

The same pertains to the contents of the curio cabinet. Mr. Streicker testified that he personally packed each item and left them safely in a box for the children to pick up. The children attempted to prove by insinuation, surmise,

and accusation that he might have either "picked and chose" which items to return, continued to keep items within his home, placed them in storage, or otherwise disposed of them. However, they have offered no proof whatsoever in support of these allegations. They have failed to prove that any items remained in his possession either after the Court's 2015 Order or now. The Court does not doubt their testimony that they never received the items they anticipated, but they have failed to clearly and convincingly prove that Mr. Streicker failed to return them. Their obvious antipathy towards him has hindered their ability to prove their allegations.

As for the Decedent's other personal belongings, Mr. Streicker repeatedly and adamantly testified that he does not have them. The children have failed to prove that he does. Again, the Court does not doubt their testimony that they did not receive everything that they thought they would. However, they have failed to prove that any items remain in the possession of Mr. Streicker, and accordingly that he failed to comply with the Court's 2015 Order by clear and convincing evidence.

For the above reasons, the Motion of the Decedent's children is hereby DENIED.

Dated at Stratford, Connecticut, this 1st day of June, 2016

/s/

Kurt M. Ahlberg, Judge

QUINNIPIAC PROBATE

LAW JOURNAL

VOLUME 30 2017 ISSUE 2

OPINION OF THE CONNECTICUT PROBATE COURT

IN RE MINORS: C, R, AND E

PROBATE COURT, STRATFORD PROBATE DISTRICT

JUNE 2016

EDITOR'S SUMMARY & HEADNOTES

The Mother petitioned the Court to change the surnames of her three minor children from those which appear on their birth certificates to a hyphenated surname that includes the Mother's current spouse's surname. Considering the children's best interests, the Court held that it was appropriate for their names to be changes to the hyphenated version. The Mother met her burden by a preponderance of the evidence, proving that the continued use of the Father's surname was causing harm to the children, that the name change would not cause harm or embarrassment to the Father, and that his legal rights as the Father to the children would not be affected.

1. Name Change: Of a Minor

The standard of review of an application for a name change of a minor child is to determine the best interest of the child.

2. Name Change: Evidence

A proposed name change should not cause injury to another, and this burden must be supported by a fair preponderance of the evidence.

3. Name Change: Of a Minor

In considering the best interests of the child with respect to a change of name, the court may consider: child's preference, effect of the name change, child's relationship with each parent, community respect accorded each surname, and

difficulties or embarrassment to the child.

Opinion[1]

In July of 2016, the Mother of three minor children, ages seven, ten, and twelve, filed Petitions with the Court to change their last names from the surname which appears on their birth certificates to a hyphenated name reflecting the last names of their Father and the last name of the Mother's current spouse. After a divorce, the Mother remarried and took her current spouse's last name. The Mother desired to have her children's last name changed to the hyphenated last name of both the Father and Mother.

Notice of the Filing of the Petitions and of a Hearing was given to all interested parties in August of 2016. The Mother appeared with counsel, her spouse, and the Father was not represented.

The Mother testified that her children, for whom she is the custodial parent, were the impetus for these petitions. Her spouse has children of his own who use a hyphenated surname, and the Mother indicated that her children questioned why their siblings have one last name and they have another. The Mother testified that there were instances of confusion because she and the children had different last names. On at least one occasion at summer camp, a counselor refused to allow her own children to go home with her due to this issue.

The Mother further testified that she is the sole contact between the children and their schools, doctors, and extracurricular activities. Problems had arisen at school due to the children's different last names, and she anticipated that problems could arise should they travel out of the country with passports that contain different last names.

The three children addressed letters to the Court, which were introduced without objection as Exhibit A, indicating that they all desired to take the hyphenated surname requested by the Petitions. The parties stipulated that the Father had no contact with the eldest daughter since last fall, and that she desired to have no contact with him. Evidence was also presented that the Father had only five hours of visitation with the middle daughter throughout this period, and that she did not desire to have visitation with him. The Father disputed the allegation that he had no contact with the youngest daughter.

The Mother stated that she desired the change of name in order for the children to maintain a "connection" with her by using both their birth and her current last name. She maintained that the children need a "sense of family" in order to "connect" with their new family unit. The Mother indicated that she did not intend to "discount" the Father, and that the requested change of name

[1] This Opinion has been modified to maintain the privacy of minor children. Names and other identifying information of the parties have been edited to preserve confidentiality. To preserve the privacy of the minor children, some of the materials referred to herein have not been verified by the Editors of the Quinnipiac Probate Law Journal.

was a "compromise" so that the children could always maintain their connection with their Father as well.

The Father argued that the children were too young to understand what is being requested, and that they are being "manipulated" by the Mother and her spouse. He does not believe the children are old enough to make this decision on their own. He believes that they do not "grasp the significance" of the Petitions, and that the name change would be "detrimental" to them over time. He specifically objected to the use of the spouse's last name, as part of the children's proposed new last name, although this is the now last name of their Mother as well.

[1][2] The Connecticut Supreme Court held in *Don v. Don*, 142 Conn. 309, 312, 114 A.2d 203, 205 (1955), that when considering the change of name of a minor, the Court must take into consideration whether the name change will promote the child's best welfare. One factor the Court established was consideration of whether the change of name would cause injury to some other person with respect to his legal rights. *Id.* at 312, 114 A.2d at 204-05 (citing *Reinken v. Reinken*, 351 Ill. 409, 413, 184 N.E. 639, 640 (1933). The petitioner must meet this burden by a fair preponderance of the evidence, *Shockley v. Okeke*, 48 Conn. Supp. 647, 654, 856 A.2d 1054, 1060 (2004), and the focus must be upon the child's welfare and not the sensibilities of a parent. *St. Amour v. Carvalho*, No. FA044000030, 2005 WL 2128937, at *3 (Conn. Super. Ct. Aug. 11, 2005).

It is usually in the best interest of a child to change his surname to that of his custodian unless the purpose of doing so is to harm or embarrass the other party. *In re: A Minor*, 29 QUINNIPIAC PROB. L. J. 37, 42 (2012). Again, the standard for review of an application for a child's name change is whether it is in the best interest of the child. *Id.* at 41; *Shockley v. Okeke*, 48 Conn. Supp. at 653, 856 A.2d at 1060 (2004) (quoting *Peterson v. Peterson*, No. CV-990337876S, 2000 WL 739636, at *1 (Conn. Super. Ct. May 22, 2000); *Don*, 142 Conn. at 312, 114 A.2d at 205).

[4] This Court had the opportunity to expound upon the criteria for evaluating a change of name of a minor in *In re*: *Gregory*, 8 QUINNIPIAC PROB. L. J. 205 (1993). The court ruled that the child's best interest is the ultimate fact and material issue, and set forth numerous additional facts for the court to consider, including:

> [T]he child's preference, the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent, the length of time the child has borne the given surname, the degree of community respect associated with the present and proposed surname, and the difficulties, harassment or embarrassment that the child may experience from bearing the present and proposed surname …the expressed wishes of both parents, the stated reason[s] for

> the proposed change, the child's age and maturity, the nature of the family situation, the strength of the tie between the child and each parent, any misconduct toward or neglect of the child by the parent opposing the change, and whether the proposed surname is different from that of the custodial parent.

In re: *Gregory*, 8 QUINNIPIAC PROB. L. J. 205, 210 (1993); 57 AM. JUR. 2d *Name* §46 (1991).

The Court finds that the Father has had little, if any, interaction with the minors for almost one year, and that they do not desire to interact with him. There is very little tie between them. All of the children have indicated their preference to have their last name changed, and the custodial parent is the Petitioner. The children now live in a family unit where their "siblings" already have hyphenated surnames that include the name of which the Petitioner seeks. Further, there would be little difference between the children's current surname and the requested name, and they would in fact retain the Father's surname. The Court does not find that the purpose of the change is to embarrass or cause harm to the Father, and his legal rights as the Father to his children would not be affected. On the contrary, the Court finds that the continued use of solely the Father's name is now causing confusion and embarrassment to the children.

The Mother, as Petitioner, has met her burden of proof by a preponderance of the evidence. The Court finds that it would be in the best interest of the children and in their best welfare if the petitions are granted and that the last names of the children be changed to reflect the Petitions. Accordingly, the Court grants the Petitions.

It is so ORDERED.

Dated at Stratford, Connecticut, this 31st day of August, 2016.

/s/

Kurt M. Ahlberg, Judge

QUINNIPIAC PROBATE
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OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: ESTATE OF FRANCESCO SALA

PROBATE COURT, HARTFORD DISTRICT

AUGUST 2016

EDITOR'S SUMMARY & HEADNOTES

The Testator, a resident of Hartford, Connecticut, died in 2015 at the age of ninety-five. He had four children with his wife who predeceased him by two years. Two children provided care for their mother to avoid nursing home care and two did not. Upon the death of their mother the family became fractured. The two children who provided care for their mother also did so for their father. The other two no longer had any contact with their father. Shortly after his wife's death, the Testator utilized an attorney to draft a new Will that contained no provisions for those two children, that he had grown angry with.

The Court addressed three issues: whether the Testator was competent to execute the new Will; whether the Will execution met the requisite formalities; and whether the Testator was under undue influence upon executing the Will. First, the Court held that the Testator had the necessary testamentary capacity when executing his Will, finding that he had an awareness of what he was doing when asking his attorney to prepare it. Second, the Court held that the Will was duly executed as it was subscribed by the Testator, dated, and attested by two witnesses in accordance with Connecticut Law. Finally, the Court held that the Testator was not unduly influenced in executing his Will, finding that he possessed the capacity to make his own decisions and his judgment was not overpowered.

1. Testamentary Capacity: Burden of Proof

Due execution and testamentary capacity are statutory issues, and the burden of proof as to each is upon the proponent.

2. Undue Influence: Burden of Proof

The usual burden to prove undue influence is on the one asserting it.

3. Testamentary Capacity: Evidence of

Evidence in support of a finding of testamentary capacity as well as a lack thereof may exist prior to or after the actual execution of the will in question.

4. Testamentary Capacity: Evidence of

Optimal focus should be on the moment the will is signed; however, other probative evidence is admitted solely for such light as it may afford as to a person's capacity at that point in time when the will in question is signed, and diminishes in weight as time lengthens in each direction from that point.

5. Wills: Execution

Conn. Gen. Stat. § 45a-251 states that a duly executed will must be in writing, subscribed by the testator, and attested by two witnesses, each of them subscribing in the testator's presence.

6. Wills: Execution

If, because of inattention, forgetfulness, or even malice, an attesting witness fails to testify as to an essential element for admission of the will to probate it is not, in and of itself, fatal to the validity of the will. Any other competent, available evidence may be introduced in proof of that essential element.

7. Undue Influence: Generally

Undue influence is the exercise of sufficient control over a person, whose acts are brought into question, in an attempt to destroy his free agency and constrain him to do something other than what he would do under normal control.

8. Undue Influence: Circumstantial Evidence

Circumstantial evidence such as family relations, testator's mental or physical condition, and testator's dependence on others can be used to prove undue influence; direct proof is not necessary.

9. Undue Influence: Burden of Proof

A fiduciary relationship can raise a presumption of undue influence and shift the burden to the fiduciary to rebut the allegation. However, the shift of the burden of proof is more prevalent and important when a stranger, having established a relationship of trust and confidence, is a principal beneficiary.

Opinion

After several days of testimony and the submission of documentary evidence, the Court makes the following findings of fact and conclusions of law, and enters orders consistent therewith regarding the Petition to Admit a Will dated November 11, 2013, to probate and the appointment of Salvatore Sala as Fiduciary:

Francesco Sala was a resident of Hartford, Connecticut at the time of his death on March 12, 2015, at the age of ninety-five.[1] Mr. Sala was born in Sicily, Italy and immigrated to the United States as a young man. He was employed as a groundskeeper at a large insurance company in Hartford. He had an elementary-level education. He owned and lived in a three-family home in Hartford's South End with his wife, Giuseppa Sala, who predeceased him on March 1, 2013. Each unit in the three-family home was occupied by a member of the Sala family until just before Mr. Sala's death. His daughter Paola and her family resided on the second floor, and his daughter Franca and her family resided on the third floor. The Salas had four children. Their only son, Salvatore, and their other daughter, resided in homes in neighboring towns. The family had been very close and spoke Italian at home. Several witnesses at the hearing spoke Italian, and the court utilized a translator. The facts of this case illustrate the rapid and tragic disintegration of this close-knit family that occurred over a span of just a few years, commencing when Mrs. Sala became ill in 2011 and 2012.

Mr. Sala spoke Italian throughout his life, and had very limited proficiency in English speaking and writing. He did appear able to communicate sufficiently in English and Spanish to interact appropriately with his employers, medical personnel, and others. It is significant, however, that Mr. Sala clearly felt more comfortable communicating in Italian. This fact was demonstrated by his utilization of Attorney Angelo Cicchiello ("Attorney Cicchiello"), who could both converse and write in Italian.

The disintegration of the Sala family appeared to initially develop following the diagnosis of Mrs. Sala's dementia. The family, following Mr. and Mrs. Sala's wishes brought Mrs. Sala home, after she spent a period of time in a

[1] For consistency, in this decision, each child of the Decedent, Francesco Sala, will be referred to by his or her first name as it appears on the Last Will and Testament dated November 11, 2013. The Decedent will be referred to as Mr. Sala. His previously deceased spouse will be referred to as Mrs. Sala. The children are: Salvatore Sala (Salvatore), Franca Marfella (Franca), Paola D'Agostino (Paola), and Maria Scotella (Maria).

nursing home. The family provided for Mrs. Sala themselves, along with some outside assistance from home healthcare agencies and non-related individuals. At some point in time, tension developed among the family members over who was going to provide the required care and how much care each of them would provide. Ultimately, it became clear that daughters Maria and Paola were not willing to, or able to, provide the portion of the care that their parents required, or that Franca and Salvatore expected.

Franca and Salvatore spent significant time with their parents during this period, from 2012 to 2013. During this time, Mr. Sala provided some care for his wife. An agency also provided care, as did two of Franca's coworkers. The coworkers helped as requested, but did not receive any payment for their assistance.[2]

A clear fracture between the family members occurred at the time of Mrs. Sala's death in March of 2013. The reason for this fracture was not as important as the fact that it occurred: What may have once been quietly perceived as a split in the family had become open and visible. Maria and Paola were excluded from any involvement with their father's care after Mrs. Sala's death. Following Mrs. Sala's funeral and her memorial mass approximately thirty days later, Maria and Paola essentially had no direct contact or communication with their father. The same was true for other members of their family, including Mr. Sala's grandchildren and their spouses. This was the case even though daughter Paola continued to live in the second-floor unit until November of 2014, when she vacated.

In October of 2013, seven months after his spouse's death, Mr. Sala met with his attorney, Attorney Cicchiello, to discuss making changes to his will. Attorney Cicchiello had previously prepared wills in 2004 for Mr. and Mrs. Sala. The testimony was undisputed that Mr. Sala wished to make this appointment and change his estate plan, although Franca or Salvatore apparently made the appointment. Since he was not speaking to daughters Maria and Paola, they testified that they had no knowledge of their father's intention to see his attorney. Franca and Salvatore testified that their father initiated the visit. They accompanied their father and sat in the waiting room while their father met with his attorney.

Attorney Cicchiello testified extensively about the initial visit on October 31, 2013. Attorney Cicchiello also testified extensively about the second visit on November 11, 2013, when Mr. Sala's new Will and new health care directive were signed. Attorney Cicchiello is an attorney with many years

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[2] Notably, the Court points out that late in the testimony of one of these two aides, it was disclosed that she had become a tenant of the Sala home, occupying one of the three units–none of which are now occupied by a member of the Sala family. The credibility of this witness with respect to the issue of payment or consideration other than cash payment is left unresolved. Even so, the court finds credible her testimony regarding her time spent caring for Mr. and Mrs. Sala during the time in question.

of experience. He testified that he initially was a general practitioner of law, but now concentrated in personal injury litigation and workmen's compensation. His office is located in Hartford's South End. He testified that he is not an expert in estate planning. He had a long-term attorney-client relationship with Mr. Sala and his wife. In addition to the previously mentioned 2004 wills, Attorney Cicchiello also handled the probating of Mrs. Sala's estate. Attorney Cicchiello could, and did, primarily communicate with Mr. Sala in Italian, the language he was most comfortable using.

[1][2] The claims presented in this matter are: (1) whether Mr. Sala was competent to execute a new will in November of 2013; (2) whether that Will met the requisite formalities for due execution of a will under Connecticut law; and (3) whether Mr. Sala, at the time he executed the 2013 Will, was under the undue influence of his daughter Franca. "[D]ue execution and testamentary capacity are statutory issues…and the burden of proof as to each is upon the proponent." *Wheat v. Wheat*, 156 Conn 576, 578, 244 A.2d 359, 361 (1968). The burden to prove undue influence is on the one asserting it. *Stanton v. Grigley*, 177 Conn 558, 565, 418 A.2d 923, 927 (1979).

In order to properly address each of these issues, the Court will further examine the facts surrounding the execution of the Will, as well as Mr. Sala's conduct before and after the execution of the Will. The Court is mindful of the fact that Mr. Sala's capacity on the day on which he signed the will in question is the primary focus of its decision. However, determination of his capacity, freedom from coercion, and his exposure to the influence of others must occur within a reasonable context, including a reasonable span of time both before and after the will's execution.

[3][4] Evidence in support of a finding of testamentary capacity, or lack thereof, may exist prior to or after the actual execution of the will in question. The Court's focus should optimally be on the moment the will is signed. However, other evidence can be probative and relevant, such as a person's conduct, health, and apparent state of mind. Such evidence, however, is "admitted solely for such light as it may afford as to his capacity at that point [in] time [when the will in question is signed] and *diminishes in weight* as time lengthens in each direction from that point." *Bassford v. Bassford*, No. MMXCV-15-6012903S, 2016 WL 1552888, at *3 (Conn. Ct. Mar. 24, 2016) (citing *Jackson v. Waller*, 126 Conn. 294, 301, 10 A.2d 763, (1940)) (emphasis added).

In this case, testimony was offered regarding actions by and to Mr. Sala dating back to 2011 and 2012, and forward to the fall of 2014. The Court has largely focused its analysis of Mr. Sala's competency on the time following his wife's death in March 2013, which seemed to be a pivotal moment in this family's dynamic. It has also focused on the medical notes and observations in December 2013 and January 2014 following the will signing. *See Bassford*, 2016 WL 1552888, at *3.

With respect to the Will's preparation and subsequent execution on November 11, 2013, the Court finds that Mr. Sala met alone with Attorney Cicchiello on both days. Salvatore and Franca remained in the waiting room. Attorney Cicchiello conversed in Italian with Mr. Sala. The Court finds Attorney Cicchiello's testimony credible that he discussed with Mr. Sala his reasons for wanting to exclude two of his children from his will. While the proponents must carry the burden of proving due execution and testamentary capacity, the Court finds it reasonable to conclude from both the totality of the circumstances presented and Mr. Sala's relationship with Attorney Cicchiello, that Attorney Cicchiello, with his extensive experience, recognized the significant step Mr. Sala was taking in disinheriting two of his children. The document that Attorney Cicchiello eventually prepared, and that Mr. Sala signed, imparts the legal significance of such an action. Article V of that document expresses a firm statement of fact consistent with what Attorney Cicchiello testified Mr. Sala wanted. Attorney Cicchiello's copious notes of both of his 2013 meetings with Mr. Sala provide ample evidence that this 2013 Will represented what Mr. Sala wanted. Whether he was unduly influenced will be discussed later.

With regard to the formalities of the Will's execution, the Court observes that over many years of practicing law, attorneys and office staff have commonly developed their own rituals of will signing for clients, taking into account many different factors. They consider such things as who is in the room with the client, what witnesses do and say, what the attorney says, and the competency of the client to execute the documents. A will signing is part theater and part ritualized performance. Everyone involved generally acknowledges the significance of the moment: The client comprehends what will happen after his or her death. Therefore, in a review of the specific elements of the performance, the Court is not so much fixated on how the subscription, attestation, and determination of competency were made, but whether the ritual was conducted in a manner consistent with the usual practice of the attorney and staff. The witnesses were in the room; the testator was present; no one else was interfering with the task at hand. Based on the testimony offered by both of the witnesses and Attorney Cicchiello, which was confirmed by Attorney Cicchiello's notes, Mr. Sala acted appropriately for the occasion. He spoke when he should have; he signed where and when he was asked to; he appeared to be calm and deliberate.

The benefit of a formalized, ritualistic will signing procedure, such as the one described by Attorney Cicchiello and the two witnesses to Mr. Sala's will signing, is that it reduces the uncertainties and risk for error or ambiguity. Each person in attendance has a part to play and knows her role. *See Wheat*, 156 Conn. at 583 n.5, 244 A.2d at 364 n.5 (the court observed that, "the instant case is an excellent example of the trouble, litigation and expense flowing from attempts of a layman to execute, or supervise the execution of, a will without competent, informed, legal assistance.") This Court would observe that the opposite is true as well: This case demonstrates the value of the ritualistic will

signing practice of most law firms.

The court must give weight to the experience and professionalism of an attorney and staff performing a procedure they have performed many times before. The attorney's circumstances are similar to the doctor who approximately a month later performed an operation on Mr. Sala—he too followed a professional procedure. He met with the patient beforehand to prepare him, obtained consent, arranged staff, and performed the surgery. Within a span of two months, Mr. Sala went through a professional procedure with his attorney, his doctor, and a notary public, Mr. Quintino Cianfaglione. In December 2013, following the November Will signing, Mr. Cianfaglione assisted Mr. Sala with transferring property in Italy by gift to his daughter Franca and to his son, Salvatore. Within this brief span of time Mr. Sala, at the age of ninety-four, was able to satisfy the standards of three separate professionals who went on to perform important acts for him with the apparent belief that he was capable of consenting to their actions taken on his behalf and was partaking freely of his own volition.[3]

[5] The Court therefore concludes that Mr. Sala was aware of what he was doing when he asked Attorney Cicchiello to prepare a new Will in October of 2013, and when he executed the Will in November of 2013. The Court also finds that the Will was subscribed by the Testator, attested by two witnesses, dated as required by statute, and that Attorney Cicchiello's staff, who served as witnesses, executed a self-proving affidavit.[4]

[6] Even an error or oversight in the will signing process is not fatal to the ultimate validity of a will:

> If, because of inattention, forgetfulness or even malice, an attesting witness fails to testify as to an essential element for admission of the will to probate. . .it is not, in and of itself, fatal to the validity of the will. *Any* other competent, available evidence may be introduced in proof of that essential element.

Wheat, 156 Conn. at 584, 244 A.2d at 364 (emphasis added). The Court has made its conclusions as outlined above, and it finds that Mr. Sala acted freely and competently when signing his Will.

This leaves the Court to analyze the final claim of the case, undue

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[3] The Court is aware that Mr. Sala had signed a health care agent form and that his daughter, Franca, and son, Salvatore, would accompany him to medical appointments. Even so, the medical records indicate that Mr. Sala was able to interact with medical staff in an appropriate manner.

[4] The relevant statutes are: (1) CONN. GEN. STAT. § 45a-250 (2016) ("Any person eighteen years of age or older, and of sound mind, may dispose of his estate by will."); (2) *Id.* § 45a-251 ("A will or codicil shall not be valid to pass any property unless it is in writing, subscribed by the testator and attested by two witnesses, each of them subscribing in the testator's presence…."); (3) *Id.* § 45a-285 ("The sworn statement of any such witness so taken shall be accepted by the Court of Probate as if it had been taken before such court.")

influence. Essentially, the claim is that the actions of Mr. Sala's daughter, Franca, in the process of caring for her mother and father, exerted undue influence over her father. Franca was responsible for arranging for her parents' care, and the claim is that she caused Mr. Sala to become isolated, angry, bitter and depressed (all words used to describe Mr. Sala by various witnesses or in various documents), thereby causing him to "dispose[ ] of his estate in a manner contrary to a freely exercised will." *Stanton*, 177 Conn. at 566, 418 A.2d at 927. Beginning with the dispute over caring for Mrs. Sala in the family home, when Salvatore and Franca agreed with their father to have their mother moved home, Franca took control over her mother and father's lives. In the process, the family became deeply and forever divided. The opponents of the Will argue that by taking such complete control, Franca was thereafter able to exercise control and dominion over her father to the detriment of her siblings.[5]

[7] Those alleging that a person's actions were the result of the undue influence of another bear the burden of proving the allegation. "'Undue influence' is the exercise of sufficient control over the person, the validity of whose act is brought in question, to destroy his free agency and constrain him to do what he would not have done if such control had not been exercised." *Reynolds v. Molitor*, 184 Conn. 526, 528, 440 A.2d 192, 194 (1981).

[8] "Relevant circumstances [to prove undue influence] include. . .health and its effect upon his mental and physical functions, his dependence upon the person alleged to have influenced him, and the opportunity to exert influence. . . ." *Reynolds*, 184 Conn. at 529, 440 A.2d at 194 (citing *Collins v. Erdmann*, 122 Conn. 626, 632, 191 A. 521, 524 (1937)).

Attorney Cicchiello, in advocating for the proponents of the Will, insists that the contrary view is more accurate: Paola and Maria "abandoned" their parents. It is difficult to conclude that this "abandonment" was not at least in part attributed to the anger and tension that existed between the family members. Paola resided in the same building as her father, yet she did not stop to see him or have her children, his grandchildren, or even his great grandchildren visit him. When Paola or Maria did try to visit, they were rebuffed and made to feel unwanted. As Attorney Perri points out "Franca continued to control all aspects of Mr. Sala's daily life." She administered his medications, obtained and scheduled his caregivers, and sheltered him from her sisters. Eventually, she even had one of her coworkers and the former caregiver for her parents rent one of the apartments in the family home.

The Court takes note of the voided check placed into evidence during trial, which indicates that Franca was named on her parents' bank account. There was testimony that she had been paying their bills (with their money) for

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[5] For an "extended dissertation" of the elements needed for undue influence to be found and proven, see *Lee v. Horrigan*, 140 Conn 232, 237-39, 98 A.2d 909, 911-12 (1953).

them for many years. Franca lived upstairs and saw her parents all the time, including before she left for work in the morning and when she returned in the afternoon. Franca was in a position to control her parents' lives. Franca also had clearly placed herself in a "fiduciary" position with her parents in which they relied upon her to make all of their arrangements and payments. As such, Franca's activities must be carefully scrutinized. Once a person assumes a role as a fiduciary for another, any self-dealing or benefit at the expense of another must be analyzed in light of that fiduciary duty.

[9] Courts have observed that in cases where someone is in a relationship of trust and confidence with another and there is a claim of undue influence, such a relationship can "raise[ ] a presumption of undue influence" and shift the burden to that person to rebut the allegation. This shift of the burden of proof, however, is more prevalent and important when a stranger, having established a relationship of trust and confidence, is a principal beneficiary. *See Berkowitz v. Berkowitz*, 147 Conn. 474, 476-77, 162 A.2d 709, 710 (1968). *See also Downey v. Guilfoile*, 93 Conn. 630, 632, 107 A. 562 (1919); *In re Hotchkiss' Will*, 88 Conn. 655, 666, 92 A. 419 (1914); *Lockwood v. Lockwood*, 80 Conn. 513, 522, 69 A. 8 (1908). This rule is not applicable in the present case. Franca is a family member and is a natural object of the testator's bounty, as the expression is used. "[T]he law 'does not brand every legacy as prima facie fraudulent simply because the legatee enjoys the trust and confidence of the testator.'" *Berkowitz*, 147 Conn. at 477, 162 A.2d at 710-11 (quoting *Gager v. Mathewson*, 93 Conn. 539, 544, 107 A. 1, 3 (1919)). There "is a marked distinction between the situation where the beneficiary is a stranger and the situation where he is a child of the testator." *Berkowitz*, 147 Conn. at 477, 162 A.2d at 711 (citing *Lockwood*, 80 Conn. at 523, 69 A. at 12); *Hills v. Hart*, 88 Conn. 394, 396, 91 A. 257 (1914); *Page v. Phelps*, 108 Conn. 572, 587, 143 A. 890 (1928). The Court finds that it is appropriate that the burden of proof on the issue of undue influence remains with those alleging it.

The medical observations made during this time by Mr. Sala's providers picked up on Mr. Sala's mental state. He was described by Dr. Benever in his notes of December 11, 2013, as "a little blunted depressed." In another observation from that same visit with Mr. Sala, Dr. Benever stated, "I just worry that he's profoundly distressed after the loss of his wife…." He expressed a concern that this [surgery] "will not affect a rapid downhill course from his loss and depression." Other witnesses, including his new caregivers, described him as being sad and angry. This anger was directed at Paola and Maria, who Mr. Sala believed had "abandoned" him.

However, as apparent as Mr. Sala's anger may have been at times, he also apparently could be affable, courteous, businesslike, and self-assured. For instance, in his interactions with Mr. Quintino Cianfaglione concerning the translation of Mr. Sala's new Will into Italian and the conveyance of the Italian property to Salvatore and Franca, he is reported to have been confident and deliberate. He knew what he wanted to do. Similarly, when he met on two

separate occasions with Attorney Cicchiello and his staff, he projected confidence that he knew what he wanted to do and why he was there. When he met with his doctors shortly after the will execution, the same conclusions appeared to be accurate.

The Court finds that, even if his daughter Franca had control over what happened in much of his day-to-day life, Mr. Sala possessed the capacity to exercise his own will and make his own decisions. "The mere opportunity to exert undue influence is not alone sufficient. There must be proof not only of undue influence but that its operative effect was to cause the testator to make a will which did not express his actual testamentary desires." *Bassford*, 2016 WL 1552888, at *10.

It may be that Mr. Sala's actions eliminating two of his children from his estate distribution would seem harsh to a casual observer. However, in this case, based upon the totality of the evidence presented, his decision to do so in context appears consistent with his expressions of anger towards these children. "There must be proof not only of undue influence but also that its operative effect was to cause the decedent to make a will. . .which did not express [her] actual testamentary desires." *Ciccaglione v. Stewart*, No. CV-07-4008864, 2012 WL 671933, at *9 (Conn. Super. Ct. Feb. 8, 2012). *See also Bassford*, 2016 WL 1552888, at *10.

The Court finds that the facts in this case resemble in many ways those found in *Neff v. Whittemore*, No. CV 0061006S, 2000 Conn. Super. LEXIS 1968 (Conn. Super. Ct. Aug. 2, 2000).[6]

In the *Neff* appeal from probate, the testator, aged ninety-two and a nursing home resident, had his attorney revise his will to eliminate bequests to three of his six children. The request was made ten days after his wife died, principally because they had not attended their mother's funeral.

The claims presented to the court in *Neff* are similar to those here: undue influence by one of the children who did inherit; lack of testamentary capacity. The Putnam Probate Court disallowed the admission of the new will, finding that the testator lacked the necessary capacity and that he had been subject to undue

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[6] Note that there exists a companion case to the *Neff* case cited here. The cited unpublished opinion by Judge Sferrazza concerned the appeal from the decision of the Putnam Probate Court. *See Whittemore v. Neff*, No. CV 0064348, 2001 Conn. Super. LEXIS 1631 (Conn. Super. Ct. June 11, 2001). The companion case concerned the capacity of Mr. Whittemore to amend his inter-vivos trust and also to compel an accounting of a trust. The companion case opinion, written by J. Foley, came to the same result as the appeal from probate, finding that Mr. Whittemore possessed sufficient capacity to amend his trust as he did, but recognized that the "mental capacity to make a will may be different from the mental capacity to make an inter-vivos trust agreement." *Id.* at 17. In fact, the court concludes that the capacity needed to make a will would be less than required to make a trust: "Certainly, some inter-vivos trusts are far more complicated documents than some simple wills, and these documents would require that the settlor have a higher degree of mental capacity and understanding." *Id.*

influence.

The testator in *Neff* appeared, from the facts set forth in the decision, to have more significant medical problems at the time he signed his new will than Mr. Sala did at the November 2013 signing of his new Will. The court observed that "[he] suffered from, among other ailments, coronary and peripheral vascular disease, heart failure, emphysema. . .anemia. . .partial deafness, and he had recently broken his arm in a fall." *Id.* at *4. He was taking a "narcotic derivative" pain killer and a "mild antidepressant." *Id.* Nonetheless, the court found that "despite these afflictions. . .the testator was mentally lucid and oriented to person, place, and time."[7] *Id.* at *5. The court found that he was "strong-willed" and "curmudgeonly," but "for the most part, his mental state was sound and stable." *Id.*

Much of that court's observations could similarly be applied to Mr. Sala over the past two years of his life. He was "strong-willed" even if at times depressed. He was angry. He acted upon his anger. And, consistent with his anger, he decided to change his estate plan to the detriment of two of his children.

Therefore, based upon the above findings of fact and conclusions of law, the Court holds that:

The proponents of the Will have proven by a preponderance of the evidence that Mr. Sala possessed the requisite capacity to make the Will which is offered for probate.

The Will was duly executed.

The opponents of the admission of the Will in question have failed to prove that the Will was a product of undue influence. The Testator, despite his advanced age and illness, remained a strong-willed man whose judgment was not overpowered by his daughter, Franca.

The Will is therefore admitted to Probate. Salvatore Sala is appointed Executor. Bond is waived.

Dated at Willimantic, this 4th day of August, 2016.

/s/

John J. McGrath, Jr.,
Acting Judge

[7] "The well-established test for testamentary capacity is whether the testator had mind and memory sound enough to know and understand the business upon which he was engaged at the time of execution." *Ciccaglione*, 2012 WL 671933, at *5 (citing *City Nat'l Bank and Trust Co.'s Appeal*, 145 Conn. 518, 521, 144 A.2d 338, 340 (1958)).

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A CHINESE INHERITANCE

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The cultural values of a society are often discernable in its laws of succession and intestacy. These laws govern the distribution of a decedent's estate when there is no an estate plan in place. Intestacy schemes typically reflect basic societal values. Yet, perhaps remarkably, the laws of intestacy bear consistency across various countries, continents, and cultures, rewarding the closest surviving family members. Upon closer examination, unique characteristics also emerge. The most startling characteristic of Chinese inheritance law is its willingness to invoke judicial review of an heir's conduct in settling upon distribution percentages to govern intestacy. American succession law also considers an heir's conduct in this context, but it does so sparingly and formalistically while Chinese conduct-based intestacy is widespread and fluid. This article contrasts the American and Chinese approaches to conduct-based intestacy, identifies the underlying competing policies and values in play, and summarizes five recent Chinese judicial opinions as a way of assessing the operation of Chinese conduct-dependent intestacy formulas and America's counterparts.

INTRODUCTION

The legal history of China extends over thousands of years. China long enjoyed "ethics based law that blended dynastic codes with Confucian ethical principles."[1] The contemporary laws of inheritance in China are, by contrast, quite fresh. In 1949, the Chinese Communist Party founded the People's Republic of China.[2] The country started with a clean legal slate and eliminated all regulations and laws.[3] Roy Girasa encapsulates the legal history of China

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[1] Roy J. Girasa, *Legal Aspects of Doing Business in China*, 20 WESTCHESTER B.J. 305, 305 (1993).

[2] M. Ulric Killion, *Three Represents and China's Constitution: Presaging Cultural Relativistic Asian Realism*, 13 CURRENTS: INT'L TRADE L.J. 23, 24 (2004).

[3] Stephen L. McPherson, *Crossing the River by Feeling the Stones*: *The Path to Judicial Independence in*

following the Communists' victory:

> From 1949 to 1957, after abolishing all laws enacted by the previous government, a few laws were passed dealing with law reform, marriage and trade unions. Judges had to decide cases in accordance with governmental policy. Between 1958 to 1966, no laws were passed; rather 420 decrees were enacted. Anarchy reigned during the Cultural Revolution in the late 1960s and early 1970s. The death of Mao in 1976 led to significant reforms. The People's Congress, which previously merely approved pre-ordained mandates, became invigorated. Legislation was drafted and enacted that lent some credibility to the rule of law within China. The Ministry of Justice, which had ceased to exist in 1959, was re-established in 1979.[4]

China's Chairman, Mao Tse-Tung, died in 1976, and after China was opened to the outside world in 1979, a period of brisk legal reform ensued.[5] In 1982, a new constitution was adopted that emphasized the rule of law.[6] The People's Republic of China enacted its contemporary Law of Succession in 1985.[7] That law has remained unchanged ever since.

To the American lawyer, the most striking aspect of Chinese succession laws are intestacy provisions that vary the amount of an intestate share depending on whether an individual supported the decedent or relied upon the decedent for support. Article Fourteen of the Chinese Law of Succession ("Article Fourteen") states:

> An appropriate share of the [intestate] estate may be given to a person, other than a successor, who depended on the support of

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China, 26 PENN ST. INT'L L. REV. 787, 792 (2008).

[4] Girasa, *supra* note 1, at 305.

[5] Mo Zhang, *The Socialist Legal Tradition with Chinese Characteristics: China's Discourse for the Rule of Law and a Bitter Experience*, 24 TEMP. INT'L & COMP. L.J. 1, 13 (2010). Zhang explains:

> Mao's death in 1976 made it possible for China to move in a different direction. Most striking were the abandonment of Mao's class struggle theory and the re-positioning of China to focus on 'economic development' rather than 'political movements.' In 1978, a nationwide economic reform to modernize the country was initiated. Along with the economic reform there was an explosion of legislation resulting in numerous laws and regulations.

Id. at 13.

[6] XIANFA art. 1, § 1 (1982) (China); *see also* M. Ulric Killion, *China's Amended Constitution: Quest for Liberty and Independent Judicial Review*, 4 WASH. U. GLOBAL STUD. L. REV. 43, 52-9 (2005) (summarizing and contextualizing China's 1982 Constitution); *see also* Zhang, *supra* note 5, at 4 ("[s]ince 1999, when the Constitution of 1982 was amended to mandate that the country be governed according to law, the phrase 'ruled by law' has been used more frequently than 'rule of law.'")

[7] Law of Succession of the People's Republic of China (promulgated by Order No. 24 of the President of the People's Republic of China on April 10, 1985, effective October 1, 1985) P.R.C. Laws *available at* http://www.fmprc.gov.cn/ce/cgny/eng/lsqz/laws/t42224.htm [hereinafter "PRC Succession Law"].

> the decedent and who neither can work nor has a source of income, or to a person, other than a successor, who was largely responsible for supporting the decedent.[8]

Thus, Article Fourteen invites the court to 'place its finger on the scale' of intestacy due to support provided to or received by the decedent, even when that person is unrelated to the decedent. Similar provisions allow Chinese courts to expand or contract the amount passing to an intestate successor, such as a child, based on the same factors.[9] Contraction of a family member's intestate share due to lack of support also depends upon whether the person had the means to offer support to the decedent.[10] Consistent with the general tenor of civil law jurisdictions, the Chinese Law of Succession states general principles and lacks, for example, a statutory definition of the term "support" or any other guidance.[11]

The amount of judicial discretion invoked by these support-dependent intestacy rights is unsettling. By introducing a consideration of support or lack thereof, an outcome in an intestate estate proceeding is made less formalized and more unpredictable. Grieving family members may become adversaries, asserting or challenging the quality of support provided. Rulings by different judges are less likely to be consistent, making amicable settlements uncommon, or at least less efficient. Moreover, the lack of *stare decisis* due to China's civil law jurisdiction heritage, would seem to only exacerbate the problems inherent in a support-based intestacy scheme.[12] However, if intestacy outcomes in China

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[8] PRC Succession Law Art. 14.

[9] PRC Succession Law Art. 13; *see also* PRC Succession Law Art. 10 (expanding the definitions of "parents" and "children" to include stepparents and stepchildren if they provided or received support from the decedent).

[10] *See* PRC Succession Law Art. 13 (providing that "successors who had the ability and were in a position to maintain the decedent but failed to fulfill their duties shall be given no share or a smaller share….")

[11] *See* Sabrina DeFabritiis, *Lost in Translation: Oral Advocacy in a Land without Binding Precedent*, 35 SUFFOLK TRANSNAT'L L. REV. 301, 309-10 (2012) (describing the primary characteristics of civil law systems as contrasted with common law systems). DeFabritiis writes:

> Civil law is highly systematized and structured. It relies on declarations of broad, general principles and often ignores details. There are five basic codes typically found in a civil law jurisdiction: the civil code, the commercial code, the code of civil procedure, the penal code, and the code of criminal procedure. Civil law codes, as they have evolved from the *Corpus Juris Civilis*, provide the core of the law. General principles are systematically and exhaustively exposed in the codes while particular statutes complete them. But civil law statutes do not provide specific definitions; instead, they state principles in broad, general phrases. Code principles are not explained precisely. Rather, they are stated concisely so that they may be exhaustive.

Id. at 309, 310. At the same time, civil codes "were never intended to be a gapless system of legal rules, to comprise such a system in latent form, or to be treated as such a system for purposes of applying the law." *Id*. at 311.

[12] In China, even published judicial decisions are not governed by the outcome or reasoning of prior court decisions—nor vested with the power to influence future judicial outcomes—by means of *stare decisis*. *See* DeFabritiis, *supra* note 11, at 313 (recalling that in a "civil law system, judicial decisions are not a source of law.") Chinese judges, as civil law jurists, are not bound to follow precedent. In France,

are less predictable, and–by design–more litigious, are they necessarily less principled? Perhaps more importantly, are they less just? Is uncertainty too dear a price to justify laws that encourage and reward support?

Recent opinions from Chinese courts provide a lens through which we can examine these questions. Professor Francis Foster conducted a similar inquiry nearly twenty years ago.[13] She concluded that, by comparison, American inheritance laws were "embarrassing."[14] Professor Foster asserted that "[f]rom China we [ ] can draw a moral for our own country about the value of a more flexible, individualized approach to inheritance."[15] How is China faring with its Confucian-esque model of judicial adjustments to intestacy rights today? A handful of published decisions may provide a partial answer.

Before considering those decisions, however, an outline of American inheritance paradigms is required. In sketching American inheritance paradigms, which do consider conduct in the application of intestacy rules, we can also consider how conduct-sensitive intestacy rubrics (limited though they are) are faring in the United States jurisdictions that have adopted them. American jurisdictions increasingly inject heirs' conduct into the otherwise inflexible intestacy dogma of formulas and equal shares. Although support and conduct considerations in American intestacy are still rare, American lawmakers seem increasingly willing, like the Chinese National People's Congress, to direct judges to assess the relative worthiness of an heir.[16] Thus, any lessons from China's conduct-sensitive jurisprudence may also inform our own.

DISCUSSION

I. CONDUCT-BASED INTESTACY IN THE UNITED STATES

For the most part, intestacy rubrics in the United States are predictable, formulaic, and efficient, insofar as one-size-fits-all approaches can be.[17] The

another civil law country, for example: "[o]ne might even argue that there is an opposite rule: that it is *forbidden* to follow a precedent only because it is a precedent." MICHEL TROPER & CHRISTOPHE GRZEGORCZYK, *Precedent in France*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY, 115 (D. Neil MacCormick & Robert S. Summers eds., 1997) (emphasis added). However, "like many other contemporary civil law countries, the Chinese courts have developed a form of practical *stare decisis.* The Supreme People's Court, the country's highest court, provides descriptions to the lower courts on how law should be interpreted and applied." John J. Capowski, *China's Evidentiary and Procedural Reforms, the Federal Rules of Evidence, and the Harmonization of Civil and Common Law*, 47 TEX. INT'L L.J. 455, 473 (2012).

[13] Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199 (1999).

[14] *Id.* at 1256.

[15] *Id*. at 1258.

[16] *See infra* part I(B).

[17] *See* Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 U. MICH. J.L. REFORM 787, 787 (2012) (noting that "[t]he default rules–intestacy statutes–give the decedent's property to members of the decedent's family, following rigid relationship rules based on legal status.")

schemes are based primarily upon presumed majoritarian intent: intestacy answers the question, 'what would most people want in terms of a testamentary plan based on the family members of the decedent surviving?'[18] U.S. lawmakers believe that most individuals would want their assets to pass to their spouse, but if their spouse has predeceased them, then to their children in equal shares.[19] If the decedent was not survived by a spouse or any descendants, then intestacy law assumes that she would want her assets to be distributed to her parents, or to her siblings, and so on, stopping short when only 'laughing heirs' remain and, in that case, requiring an escheat to the government.[20]

Decedents are presumed to want equal shares for relatives of equal degrees of consanguinity.[21] Historically, the Uniform Probate Code extended the reach of intestacy as far as the descendants of a decedent's grandparents.[22] Under this rubric, when an intestate decedent is not survived by a spouse, issue, grandparents, or any of the descendants of her grandparents, her estate escheats.[23]

The settlement of an estate under intestacy is intended to be predictable.[24] With predictable, mathematical outcomes, estate administration should achieve savings in time and attorney's fees, as well as emotional cost savings for family members who avoid litigation. These are particularly salient considerations in view of the circumstances of estate administration: the death of a loved one. Grief coupled with adversarial proceedings involving family members makes for disagreeable and, some would argue, undesirable quarrels. Although we may get closer to the decedent's probable testamentary intent by considering which of the decedent's children she liked best, the inefficiencies and variable outcomes this scheme would produce weigh against asking those

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[18] *See* Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 884 (2012) (observing that "the rules of intestacy generally reflect the probable intent of the typical decedent.")

[19] *See, e.g.*, UNIF. PROB. CODE §§ 2-102, 2-103.

[20] UNIF. PROB. CODE §§ 2-103, 2-105 (2010). With certain exceptions, the surviving spouse takes the entire intestate share. UNIF. PROB. CODE § 2-103(a). Otherwise, if there is no surviving spouse, the estate passes in an order of surviving descendants. UNIF. PROB. CODE §§ 2-103(a)-(b); *see also* David V. DeRosa, Note, *Intestate Succession and the Laughing Heir: Who Do We Want to Get the Last Laugh?*, 12 QUINNIPIAC PROB. L.J. 153, 158 (1997) (explaining that "reformers believe that states should reform the law of intestacy granting the property to remote descendants who suffer no sense of loss or bereavement at the death of the decedent.") DeRosa also notes that "[t]wenty-two states have adopted an intestacy scheme that limits intestacy to the decedent's grandparents or the grandparent's descendants." *Id.* at 168.

[21] *See generally* UNIF. PROB. CODE §§ 2-101-14.

[22] *But see* UNIF. PROB. CODE § 2-103(b).

[23] UNIF. PROB. CODE § 2-105.

[24] *See* Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 55 (2009) ("[a]s a solution to provide for the *orderly* disposition of property in the absence of a will, all states have intestacy statutes that govern who shall receive a decedent's property.") *Id*. (emphasis added). *See also* UNIF. PROB. CODE § 1-102 (b)(3) (2010) (identifying one of the purposes of probate as being "to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors…").

kinds of questions. Fairness gives way to efficiency. If a widow dies intestate leaving behind three children, each child will get an equal share. Rigidity is favored. The conduct, relative worth, and behavior of those children toward their mother is irrelevant in nearly all contexts.

Jurisdictions in the United States, however, do share with China a willingness to take conduct into account in certain narrowly defined circumstances. That willingness seems to be growing. The "slayer rule" bans inheritance of a killer from the killer's victim.[25] A parent's failure to support a child can be a trigger for statutory disinheritance.[26] Cruel behavior may eliminate a child's right to a forced share in Louisiana.[27] Additionally, in a wrongful death context, the amount of a claimant's recovery depends upon the maintenance and support she received from the deceased.[28] This occasional willingness to deviate from rigidity and comparative certainty in intestate proceedings represents important exceptions to the general rule in American succession law. Each exception is explored below.

A. *The Slayer Rule*

The first exception to the general rule of disinterestedness in the heir's conduct in American succession law is the slayer rule. Under slayer statutes, if an heir takes the decedent's life, the heir's status as an heir is erased.[29] Murderers cannot be successors to their victim, whether in intestacy or testacy. Note the relatively straightforward application of the slayer rule: we do not consider why the heir killed; whether it was with an eye towards inheriting, or borne of hatred or mercy. Note further the narrow application of the slayer rule: the heir who ridiculed, libeled, or even tortured the decedent, so long as the torturing did not result in death, is undisturbed from his status.[30] Only the intentional killing of the decedent results in disinheritance of the killer. The Uniform Probate Code formulates the slayer rule as follows:

> An individual who feloniously and intentionally kills the decedent forfeits all benefits under this [article] with respect to

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[25] RESTATEMENT (THIRD) OF PROP. WILLS AND OTHER DONATIVE TRANSFERS § 8.4 (2003); *supra* part I(A).

[26] *See generally* 26B C.J.S. *Descent and Distribution* § 41 (2016); *supra* part I(B).

[27] EDWARD E. CHASE, JR., 11 LA. CIV. L. TREATISE, *Trusts* § 11:1 (2nd ed. 2015); *supra* part I(C).

[28] *See* RESTATEMENT OF THE LAW OF TORTS § 925 cmt. b(1) (1979) (explaining that an element of damages in a wrongful death claim is represented by "an amount to compensate them for the loss of the advice, assistance, training and companionship that [the survivors] probably would have received"); *supra* part I(D).

[29] Every U.S. state has a "slayer rule" – three by case law, the rest by statute. Marie Rhodes, *Consequences of Heirs' Misconduct: Moving from Rules to Discretion*, 33 OHIO N.U. L. REV. 975, 979 (2007). For the Chinese codification of the slayer rule see *infra* note 112.

[30] *But see* Lisa C. Dumond, Note, *The Undeserving Heir: Domestic Elder Abuser's Right to Inherit*, 23 QUINNIPIAC PROB. L.J. 214 (2010) (proposing that perpetrators of elder abuse be disinherited by statute); *see also In re Estate of Haviland*, 177 Wash. 2d 68, 76-78, 301 P.3d 31, 36 (2015) (en banc) (refusing retroactive application of a statute which prevents financial abusers from inheriting).

> the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, exempt property, and a family allowance. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed his [or her] intestate share.[31]

The slayer rule allows for a factual determination: Did the heir kill the decedent? Yet the rule still retains a formalistic flavor as an all-or-nothing proposition. Still, legal nuances manage to occasionally permeate its application, and thereby frustrate the aim of prompt and predictable distributions of estates.[32] Some level of litigiousness on account of the slayer rule is an acceptable price to pay for ensuring that slayers do not benefit financially from their wrongful act.[33]

It might be assumed that the public policy rationale for slayer legislation is deterrence of murder, or at least to ensure that a killer does not reap the benefit of a particularly heinous criminal act.[34] Seen in this light, the slayer rule partakes of equitable rules such as the doctrine of unclean hands.[35] Perhaps, the slayer rule functions on some level to disincentivize a murderous heir who wishes to accelerate her right to inherit by killing. However, it seems that the more accepted rationale for the slayer rule is simply to not indirectly reward a particular criminal act.[36] Probate as a system may wish to avoid being despoiled

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[31] UNIF. PROB. CODE § 2-803(b) (2010). The slayer rule operates both in intestate and testate proceedings. *Id.*

[32] *See, e.g., In re Estate of Blodgett*, 147 P.3d 702, 706 (Alaska 2006) (considering the "manifest injustice" statutory exception to Alaska's slayer rule); *Diep v. Rivas*, 357 Md. 668, 679, 745 A.2d 1098, 1103-04 (2000) (holding that Maryland's slayer rule does not prohibit a killer's siblings from inheriting); *see In re Estate of Schunk*, 314 Wis.2d 483, 760 N.W.2d 446 (Wis. Ct. App. 2008) (considering whether heirs who allegedly assisted the decedent commit suicide would have committed a "killing" under Wisconsin's slayer statute).

[33] Even when the slayer rule is invoked, it is justified as being part of an "orderly" system of estate administration. *See Riggs v. Palmer*, 70 Sickels 506, 511, 22 N.E. 188, 190 (Ct. App. N.Y. 1889). In *Riggs*, the court asked, rhetorically:

> What could be more unreasonable than to suppose that it was the legislative intention in the general laws passed for the orderly, peaceable, and just devolution of property that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate? Such an intention is inconceivable.

Id.

[34] *See* Joseph T. Latronica, 8 MARYLAND LAW ENCYCLOPEDIA, *Descent and Distribution* § 7 (2016) (observing that the public policy behind the slayer rule and suggesting that the rule was "designed to prevent one from taking advantage of his or her own wrong…").

[35] *See* Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 550-51 (1986) (criticizing the imposition of equitable principles in a slayer rule context).

[36] *See Price v. Hitaffer*, 164 Md. 505, 165 A. 470, 470 (Ct. App. Md. 1933). There, the court held:

> [T]he common-law principle of equity [holds] that no one shall be permitted to profit by his own fraud, to take advantage of his own wrong, to found any claim upon his own iniquity, or to acquire property by his own crime, and hold[s] that provisions of a will and the statutes of descent and distribution should be interpreted

with inheritors receiving wealth from those they have killed.[37] Still another potential rationale for the slayer rule is simply presumed majoritarian intent: Legislators might reasonably assume that most people would not desire that their killer inherit part or all of their estate.[38] All of these aims may coalesce in the slayer rule to affect the disinheritance of an heir deemed unworthy to receive their bequest or intestate share on account of their conduct.[39]

B. *Nonsupport of a Child*

In three separate contexts, American jurisdictions are willing to consider the conduct or relative worth of heirs in determining the distribution of an estate. First, 'deadbeat dads' of illegitimate children may face disinheritance by judicial decree.[40] Second, children born of reproductive technology whose parents never in fact 'functioned as a parent,' such as mere surrogates or sperm donors, avoid characterization as parents for purposes of intestacy, despite their biological connection to a child.[41] Third, a parent's parental rights that could have been terminated on account of abuse or neglect during the child's lifetime can have their parental status severed in a kind of post-mortem termination of rights proceeding before the probate court.[42] Each of these three subtypes is explored below.

1. The Illegitimacy Context

Illegitimacy is another context where we find an exception to the generally applicable rubric in which intestacy ignores the conduct and relative merit of heirs. Generally, the penalization of illegitimacy in older intestacy frameworks has been undone.[43] Certain outmoded intestacy rules penalized

> in the light of those universally recognized principles of justice and morality; that such interpretation is justified and compelled by the public policy embraced in those principles or maxims, which must control the interpretation of law, statutes, and contracts.

Id. In most cases, however, courts are reluctant to graft equitable principles onto intestate distribution statutes unless the legislature has done so. *See, e.g*., *Pogue v. Pogue*, 434 So.2d 262, 263-64 (Ala. Civ. App. 1983) (rejecting a mother's contention that a father's share of a child's estate should be subjected to a constructive trust in order to avoid unjust enrichment when the father had failed to support his son).

[37] *See* Karen J. Sneddon, *Should Cain's Children Inherit Abel's Property?: Wading into the Extended Slayer Rule Quagmire*, 76 UMKC L. REV. 101, 102 (2007) (explaining that the slayer rule is "driven by a jumble of moral, equitable, and legal principles.")

[38] *See* Kevin Bennardo, *Slaying Contingent Beneficiaries*, 24 U. MIAMI BUS. L. REV. 31, 37 (2015) (noting that since, when an unlawful killing takes place "a victim usually will lack an opportunity to update her estate plan" so as to disinherit the killer, "the law intervenes to carry out the victim's likely wishes.")

[39] *See also Estate of Foleno v. Estate of Foleno*, 772 N.E.2d 490, 493-94 (Ct. App. Ind. 2002) (describing the feudal origins of the slayer rule).

[40] *See infra* part I(B)(1).

[41] *See infra* part I(B)(2).

[42] *See infra* part I(B)(3).

[43] UNIF. PROB. CODE § 2-117 (2010) (explaining that "a parent-child relationship exists between a child and the child's genetic parents regardless of their marital status"); *but see* N.C. ESTATE SETTLEMENT

illegitimacy as an attempt to shape behavior of heirs (or at least their parents).[44] The reasoning may have been that by withholding intestate status from illegitimate issue, the state felt it could incentivize parents to marry. But the rules are also aimed at increasing the likelihood that will probating is accomplished without any factual issues, such as doubt as to male parentage. The presumption that a child born to a married couple was sired by the husband was a convenient evidentiary rule that bypassed the path of factual questions and made probate more likely to be free of evidentiary hearings.

Modern reforms are linked to the constitutional recognition of illegitimate children as a quasi-suspect class. As a result, intestacy penalties against illegitimates are typically invalid.[45] The Uniform Probate Code proclaims, "a parent-child relationship exists between a child and the child's genetic parents, regardless of the parents' marital status."[46] An intestate inheritance, however, "from or through the [illegitimate] child by a birth parent or that birth parent's kindred is precluded unless that birth parent has openly treated the child as kindred, and has not refused to support the child."[47] In other words, a parent may not inherit from an illegitimate child when the parent has been derelict in his support duties to that child.

The State of North Carolina extended this deadbeat parent rule to legitimate children in 1927, and a few other states followed.[48] In 2013, California expanded the rule to legitimate children as well.[49] Thus, in North

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PRACTICE GUIDE § 20:20 (2d ed. 2016) (stating that except in four delineated circumstances, "the intestacy laws [of North Carolina] treat an illegitimate and his putative father, and the putative father's family, as complete strangers.")

[44] *See, e.g.*, *Levy v. State Through Charity Hosp. of La. at New Orleans Bd. of Admin.*, 192 So.2d 193, 195 (Ct. App. La. 1966) (stating: "[d]enying illegitimate children the right to recover in such a case is actually based on morals and general welfare because it discourages bringing children into the world out of wedlock") *rev'd*, *Levy v. Louisiana*, 391 U.S. 68 (1968).

[45] *See Mathews v. Lucas*, 427 U.S. 495, 505, 96 S.Ct. 2755, 2762 (1976); *Mills v. Habluetzel*, 456 U.S. 91, 99, 102 S.Ct. 1549, 1554-55 (1982) (citations omitted). Classifications based on illegitimacy "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest." *Id*.

[46] UNIF. PROB. CODE § 2-117.

[47] S.D. CODIFIED LAWS § 29A-2-114(a) (1995).

[48] Child's Estate, ch. 231, sec. 1-3, § 37(6), 591-92 (1927). "[A] parent, or parents, who has willfully abandoned the care, custody, nurture and maintenance of such child to its kindred, relatives or other person, shall forfeit all and every right to participate in any part of said child's estate…." *Id.* The other states that extended the deadbeat parent rule to legitimate children are: Connecticut, Montana, New York, Pennsylvania, and Virginia. *See infra* note 50.

[49] CAL. PROB. CODE § 6452 (2014). A parent may not inherit from a child (or through the child) "on the basis of the parent and child relationship" when:

> The parent did not acknowledge the child. [Or] [t]he parent left the child during the child's minority without an effort to provide for the child's support or without communication from the parent, for at least seven consecutive years that continued until the end of the child's minority, with the intent on the part of the parent to abandon the child. The failure to provide support or to communicate for the prescribed period is presumptive evidence of an intent to abandon.

Carolina, California, and a few other states, parents' inheritance rights can be voided by a parent's failure to support the child; this is an all-or-nothing proposition.[50] Inheritance is either preserved or eliminated based upon this factual contingency.[51]

One case involving a contemporary statute which penalizes a parent's failure to support a child, whether the child is legitimate or illegitimate, is *Estate of Pessoni*.[52] There, a mother argued successfully that the father of her child should be declassified as an intestate heir of the child under a statute banning inheritance if the parent "abandoned" his child.[53] The father had separated from the mother when the boy was very young. Within a few years, he had remarried and had a son with his new wife. With the exception of a few letters, he never saw or spoke with his son from the time the son was fifteen years old through his death. He did meet his child support obligations, and asserted that his estrangement was the fault of the mother, who "poisoned" the son against him.[54] The court rejected his arguments, noting: "Justice is not fostered by rewarding in any fashion a parent who purposefully fails to provide any emotional or nurturing support to a child. No dividend should be permitted to flow from the dereliction of that duty."[55]

Id.

[50] *See* CONN. GEN. STAT. § 45a-439(a)(1) (2016) (providing that a "parent who has abandoned a minor child and continued such abandonment until the time of death of such child" may not receive an inheritance in intestacy); MONT. CODE ANN. § 72-2-124(3) (2016) (precluding intestate inheritance "unless that natural parent has openly treated the child as the parent's and has not refused to support the child"); N.Y. EST. POWERS & TRUSTS LAW § 4-1.4 (McKinney 2016) (withholding intestate rights by a parent when, while his child was under the age of twenty-one, the parent "has failed or refused to provide for the child or has abandoned such child, whether or not such child dies before having attained the age of twenty-one years, unless the parental relationship and duties are subsequently resumed and continue until the death of the child"); OHIO REV. CODE ANN. § 2105.10 (West 2016) (barring a parent who "failed without justifiable cause to communicate with the minor, care for the minor, and provide for the minor's maintenance or support . . . for a period of at least one year immediately prior to the date of the death of the minor" from receiving an intestate share); 20 PA. STAT. AND CONS. STAT. ANN § 2106(b) (West 2016) (providing: "[a]ny parent who, for one year or upwards previous to the death of the parent's minor or dependent child, has: (1) failed to perform the duty to support the minor or dependent child or who, for one year, has deserted the minor or dependent child… shall have no right or interest" to inherit via intestacy); VA. CODE ANN. § 64.1-16.3(B) (West 2016) (removing intestacy rights for a parent who "willfully deserts or abandons his minor or incapacitated child and such desertion or abandonment continues until the death of the child"). *See also* V.I. CODE ANN. tit. 15, § 87 (2016) (omitting intestate shares from children for "a parent who has neglected or refused to provide for such child during infancy or who has abandoned such child during infancy whether or not such child dies during infancy, unless the parental relationship and duties are subsequently resumed and continue until the" child's death).

[51] *See also* CONN. GEN. STAT. § 45a-436(g) (2016) (providing that a "*spouse* shall not be entitled to . . . an intestate share . . . if such surviving spouse, without sufficient cause, abandoned the other and continued such abandonment to the time of the other's death.") (emphasis added).

[52] *In re Estate of Pessoni*, 810 N.Y.S.2d 296, 11 Misc.3d 245 (2005).

[53] *Id*. at 299, 11 Misc.3d at 245-46 (citing N.Y. EST. POWERS & TRUSTS § 4-1.4).

[54] *Pessoni*, 810 N.Y.S.2d at 301, 11 Misc.3d at 249.

[55] *Id*. at 302, 11 Misc.3d at 250 (citing *Mtr. of Caldwell v. Alliance Consulting Group, Inc.*, 775 N.Y.S.2d 92, 95, 6 A.D.3d 761, 764 (Ct. App. N.Y. 3rd Dept. 2004)) (internal citation omitted).

2. The Surrogate and Related Contexts

Amendments to the Uniform Probate Code now expand the reach of intestacy to include stepchildren.[56] The stepchild expansion reflects the greater frequency of 'blended families' in contemporary American society.[57] Amendments also expanded intestacy to certain children born of reproductive technology.[58] Older rules may have generated unjust outcomes when applied to contemporary scenarios involving surrogates, stepparents who bond with their stepchildren, and reproductive advances. When a man's sperm and a woman's eggs form a child, that child may technically be the biological issue of the genetic donor even though that donor did not act or function in the role of a parent. Similarly, a surrogate who carries a child may or may not *really* be the child's mother, while a stepfather may be much more of a father than the biological dad.[59] In updating the Uniform Probate Code to account for children born of reproductive technology, a test for whether a parent was, in fact, a parent was needed.[60] That test came in definitional format. The phrase "functioned as a parent of the child" was defined as:

> [B]ehaving toward a child in a manner consistent with being the child's parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual's child, materially participating in the child's upbringing, and residing with the child in the same household as a regular member of that household.[61]

A genetic parent can establish a parent-child relationship for purposes of intestacy, *inter alia*, by proving that he "functioned as a parent of the child no later than two years after the child's birth."[62] While these surrogate rules do not directly test parental support, the inquiry into whether the individual "perform[ed] functions that are customarily performed by a parent" considers the same kind of evidence as an inquiry into whether a parent supported his child.[63]

3. The Abandonment or Abuse Context

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[56] *See generally* Terin Barbas Cremer, *Reforming Intestate Inheritance for Stepchildren and Stepparents*, 18 CARDOZO J.L. & GENDER 89 (2001); *see also* UNIF. PROB. CODE § 2-103(b) (now providing for intestate rights for "[deceased] spouse's descendants by representation").

[57] *Id.* at 89.

[58] *Id.* at 93.

[59] *But see Arredondo v. Nodelman*, 622 N.Y.S.2d 181, 182, 163 Misc.2d 757, 759 (1994) (holding, where husband's sperm and wife's egg were implanted in gestational carrier, intent controls to find husband and wife are the parents).

[60] *See generally* Kristine S. Knaplund, *Children of Assisted Reproduction*, 45 U. MICH. J.L. REFORM 899 (2010).

[61] UNIF. PROB. CODE § 2-115(4) (2010).

[62] UNIF. PROB. CODE § 2-120(f)(2)(A) (2010).

[63] UNIF. PROB. CODE § 2-115(4).

The contemporary Uniform Probate Code also describes a scenario in which a parent could be removed as an intestate heir of a minor child. When a child dies as a minor "and there is clear and convincing evidence that immediately before the child's death the parental rights of the parent *could* have been terminated. . .on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent toward the child" then that parent may not inherit from or through the child.[64] The pre-mortem termination of parental rights must be supported by clear and convincing evidence as a matter of constitutional law.[65] The Uniform Probate Code carries this heightened burden of proof forward into the postmortem intestacy parental status context.[66] Any termination of parental rights carries with it the legal destruction of the parent-child relationship for purposes of intestacy.[67] However, absent statutory authority, postmortem termination of parental rights is not an option.[68] Under the Uniform Probate Code rule, parents may not inherit from or through children they abandoned to such a degree that their legal status as parent *could* have been terminated prior to the child's death, even where such a judicial finding is not entered until after the child's demise.[69]

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[64] UNIF. PROB. CODE § 2-114(a)(2) (emphasis added). "[A] parent who is barred from inheriting under this section is treated as if the parent predeceased the child." UNIF. PROBATE CODE § 2-114(b).

[65] *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982).

[66] *See* UNIF. PROB. CODE § 2-114(a)(2) (requiring "clear and convincing evidence"); *but see In re Estate of Fisher*, 443 N.J. Super 180, 198, 128 A.3d 203, 215 (2015) (applying a preponderance of the evidence standard and rejecting any "best interests" considerations in deciding that a father's inheritance rights were lost when he abandoned his child). *Fisher* applied a New Jersey statute which lacked an evidentiary standard and withheld a parent's intestate succession rights if the parent "abandoned the decedent when the decedent was a minor by willfully forsaking" the child. N.J. STAT. ANN. § 3B:5-14.1(b)(1)(West 2016).

[67] *See* UNIF. PROB. CODE §§ 2-114(a), (a)(1) (providing that "[a] parent is barred from inheriting from or through a child" when "the parent's parental rights were terminated and the parent-child relationship was not judicially reestablished"); *see also In re Estate of Fleming*, 98 Wash. App. 915, 921, 991 P.2d 128, 132 (2000) (holding that an order which a mother was divested of all parental rights permanently divested her of right to intestate inheritance from her biological son despite the fact that he was never adopted).

[68] *See Crosby v. Corley*, 528 So.2d 1141, 1144 (Ala. 1988) (reversing a trial court's postmortem termination of parental rights for intestacy purposes because the applicable Child Protection Act "is simply not applicable in postmortem situations.")

[69] Section 2-114(a)(2) of the Uniform Probate Code bites off a great deal when it incorporates other state law provisions which permit postmortem termination of parental rights fact-finding, perhaps more than it can chew. Arizona, for example, allows for the termination of parental rights on a number of grounds. The Uniform Probate Code § 2-114(a)(2) only permits postmortem termination of parental rights for purposes of inheritance on account of four enumerated grounds and one catch-all: "nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parents toward the child." UNIF. PROBATE CODE § 2-114(a)(2). Yet, all eleven enumerated grounds in the Arizona statute would arguably fall within the catch-all, including felony convictions or chronic abuse, except for the parent who is unknown. ARIZ. REV. STAT. ANN. §§ 8-533(B)(3), (4), (9) (2016)(West). It is also not entirely clear how a probate court would apply all of the relevant termination considerations from the parental rights termination statutes. For example, under Arizona law, "the court shall consider the availability of reunification services to the parent and the participation of the parent in these services." ARIZ. REV. STAT. ANN. § 8-533(D) (2016) (West). Reunification services would be unavailable as a practical matter after the death of the child. Should a parent be permitted to testify about their hypothetical participation in

C. Unsavory Conduct and Intentional Disinheritance

Among state probate codes, only the State of Louisiana provides statutory protection for the intentional disinheritance of a child. Forced heirship for children, derived originally from French law, is called a *legitime*.[70] Thus, a child whose parent executed a will disinheriting the child may petition for *legitime*. Since 1995, *legitime* has been limited to children that are under age twenty-four or permanently disabled.[71] Thus, only disinherited children with disabilities or those who are twenty-three years of age or under may petition for a forced share when a parent disinherits them. An exception for forced heirship rights is recognized when a child is disinherited for "just cause", which includes when:

(1) The child has raised his hand to strike a parent, or has

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reunification services, or is reunification simply unavailable as a consideration as a matter of law in a postmortem parental inheritance rights termination context? *See, e.g.*, *In re Estate of Koehler*, 314 Mich. App. 667 (2016) (ruling that inheritance rights are not terminated when an unmarried father dies before his child is born, even though no evidence shows he would have willingly supported the child). The Uniform Probate Code does not answer these kinds of questions.

[70] JESSE DUKEMINIER AND ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 556 (9th ed. 2013). *Legitime* was ultimately derived from Roman law:

> France was, in its early period, a land of written and unwritten (or customary) law. The southern portion of France, lying closest to Rome, and greatly influenced thereby, derived its law from the written law of the Romans. In the northern portion the law sprang from the customs of the people settling there from Germany and other countries. Consequently, the doctrines of legitime and disinherison formed a part of the written law of southern France and were interpreted in the light of the Roman concept. These doctrines, on the other hand, being foreign to the customary law of northern France, formed no part thereof. We do find, however, a provision very similar to those which established the 'legitime' in southern France, called in the customary law the 'reserve.' We also find that heirs who were deprived of this 'reserve' were able to bring an action called 'ab irato' and prove this deprivation arose from motives of hatred.

Successions of Lissa, 198 La. 129, 137, 3 S.2d 534, 536 (1941). *See also* Paula A. Monopoli, *"Deadbeat Dads": Should Support and Inheritance be Linked?*, 49 U. MIAMI L. REV. 257, 259 n.8 (1994) ("civil law systems have a much richer tradition of unworthy heir litigation due to forced heirship provisions in their inheritance schemes."); P.R. LAWS ANN. tit. 31 § 2261 (2016) (banning intestate inheritance by parents from children on account of "unworthiness" such as parents who have "prostituted their daughters or made attempts against their chastity.")

[71] *See In re Succession of Boyter*, 756 So.2d 1122, 1125 (La. 2000) (narrating how after the voters of Louisiana approved a state constitutional amendment, the legislature passed a statute–re-enacted, to be more precise–that abolished forced heirship except when the child was "age 23 or younger or permanently disabled when the testator died.") Since forced heirship was limited to individuals who may be immature, whether on account of age or impairment, the Louisiana Legislature was concerned that the children may not appreciate the seriousness of actions giving rise to just cause for a parent deciding to disinherit them. KATHRYN VENTURATOS LORIO, 10 LA. CIV. L. TREATISE, *Successions and Donations* § 10.14 (2nd ed. 2015). Therefore:

> [A] new provision was added to the Code, providing a defense against disinherison for a forced heir who, because of his age or mental capacity, was not 'capable of understanding the impropriety of his behavior,' or who could show that the behavior was either 'unintentional or justified under the circumstances.'

Id. (quoting LA. CIV. CODE ANN. art. 1626 (2016)).

> actually struck a parent [ ]; (2) The child has been guilty, towards a parent, of cruel treatment, crime, or grievous injury; (3) The child has attempted to take the life of a parent; (4) The child, without reasonable basis, has accused a parent of committing a crime for which the law provides that the punishment could be life imprisonment or death; (5) The child has used any act of violence or coercion to hinder a parent from making a testament; (6) The child, being a minor, has married without the consent of the parent; (7) The child has been convicted of a crime for which the law provides that the punishment could be life imprisonment or death; (8) The child, after attaining the age of majority and knowing how to contact the parent, has failed to communicate with the parent without just cause for a period of two years, unless the child was on active duty in any of the military forces of the United States at the time.[72]

The incident or occurrence validating a child's disinheritance must have occurred prior to the parent's act of disinheritance, not after.[73] Thus, Louisiana considers a child's conduct when determining whether to honor a parent's intentional disinheritance of that child. The testator must articulate her reasons for choosing to disinherit the child in the will or codicil.[74] Ultimately, a judge must agree with the testator's decision to disinherit the wayward son or daughter based upon the child's conduct.[75] Judges, it seems, do so with reluctance.[76] In Louisiana, attempts to intentionally disinherit a child ("disinherison") are rarely successful due to a failure to adhere to the formalities of a disinherison or because of parent-child reconciliation.[77]

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[72] LA. CIV. CODE ANN. art. 1621(A) (2016).

[73] LA. CIV. CODE. ANN. art. 1621(B).

[74] *See* LA. CIV. CODE ANN. art. 1619 (2016) (stating that "[t]he disinherison must be made expressly and for a just cause; otherwise, it is null. The person who is disinherited must be either identified by name or otherwise identifiable from the instrument that disinherits him.")

[75] *See* LA. CIV. CODE ANN. art. 1617 (2016) (providing that "[a] forced heir shall be deprived of his legitime if he is disinherited by the testator, for just cause"); *Successions of Lissa*, 198 La. 129, 152, 3 So.2d 534, 542 (noting that disinherison is not a self-operative testamentary disposition; the testator "must mention the cause for the disinherison, and the other heirs, under penalty of nullity, must prove the facts on which the disinherison is founded.")

[76] *See* LORIO, *supra* note 71, at § 10.14 (observing: "Over the years, disinherison was hardly ever successful.")

[77] *Id*. One exception to the general rule of ineffective disinherison cited by Lorio is the 1982 *Chaney* case, *Succession of Chaney*, 413 So.2d 936, 941 (La. Ct. App. 1st Cir. 1982). There, the cause for a father's disinherison, as recited in the will, was his son's striking and cursing him. *Id*. at 937-38. The son defended unsuccessfully on the basis of reconciliation, pointing out that his father had permitted him to visit him in the nursing home. *Id*. at 941. The court rejected the son's assertions, concluding that: "The evidence offered by plaintiff does not establish his father forgave him for the striking." *Id*. *See also Succession of Vincent v. Vincent*, 527 So.2d 23, 24-5 (La. Ct. App. 3d Cir. 1988) (upholding disinherison where the will recited that "my son struck me three (3) times and fired at me with a .22 caliber automatic

For example, in *Successions of Lissa*, an adult daughter, Adele Spiro, was disinherited by both her mother and father's wills.[78] She was disinherited because, as a minor, she married without parental consent.[79] Following the deaths of her parents, Adele Spiro's three siblings were required to "prove the facts on which the disinherison [was] founded."[80] Spiro resisted, claiming that her parents had, in fact, given consent to her marriage, and alternatively, that her parents forgave her and she reconciled with them, thereby nullifying the disinherison.[81]

The trial court found ample evidence to support a finding that just cause was established for Spiro's disinherison; that she had, in fact, married her husband without her parents' consent.[82] The Louisiana Supreme Court affirmed this finding.[83] However, the trial court's rejection of Spiro's evidence on the issue of reconciliation was reversed.[84] Her mother had attended celebrations with her daughter over the years, and the court felt that the two had reconciled.[85] Her father, while slower to forgive, "did become reconciled to his daughter's marriage during the period of approximately thirty years intervening between 1905, the year of her marriage, and 1934, when she again lost the good grace of her father because of some difficulty had with her sister…."[86] The court, therefore, allowed Spiro her forced share from both estates.

D. Wrongful Death

Finally, one of the state approaches to examining lifetime support that merits mention is the wrongful death cause of action. Wrongful death is a statutory creation of relatively recent vintage.[87] When a wrongdoer causes a death, the law permits recovery under tort law to compensate certain surviving family members for the support and companionship that they lost. The wrongdoer might be liable for negligence or an intentional tort. Because recovery is for the loss of support and companionship that the decedent would otherwise have provided, the degree to which family members received support becomes a relevant consideration.

Importantly, the relevancy of support in a wrongful death context is framed differently than support in an intestacy context. In a wrongful death

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rifle…").

[78] *Successions of Lissa*, 198 La. 129, 131, 3 So.2d 534, 535.

[79] *Id*. at 132, 3 So.2d at 535.

[80] *Id*. (citing *Succession of Lissa*, 195 La. 438, 196 So. 924 (1940)).

[81] *Id*. at 133, 3 So.2d at 535.

[82] *Successions of Lissa*, 198 La. at 133, 3 So.2d at 535.

[83] *Id*.

[84] *Succession of Lissa*, 198 La. at 149, 3 So.2d at 541.

[85] *Id*. at 148, 3 So.2d at 540.

[86] *Id*. at 149-50, 3 So.2d at 541.

[87] *See Cummins v. Kansas City Public Service Co.*, 334 Mo. 672, 676-78 66 S.W.2d 920, 922-23 (Mo. 1933) (en banc) (identifying the first wrongful death statute dated 1848).

context, the degree of support is relevant to proving the loss caused by the wrongdoer.[88] These damages are paid by the wrongdoer. In an intestacy context, support may be relevant according to a particular statute in dividing up the decedent's estate. The matters are distinct, yet the type of evidence relevant to either is typically very similar.[89] When a wrongdoer settles for a certain sum in a wrongful death lawsuit, a dispute among family members as to how to allocate those settlement proceeds may play out in court. These disputes may be resolved nearly identically to the way we would expect Chinese courts to allocate estate assets based upon support or the lack thereof. We turn now to Chinese models of conduct-based inheritance.

II. CONDUCT-BASED INTESTACY IN CHINA

Chapter Two of the Chinese Probate Code provides the rules of intestacy or "statutory succession." Article Ten sets forth the general scheme. It provides that a decedent's estate will be distributed as follows:

> First in order: spouse, children, parents. Second in order: brothers and sisters, paternal grandparents, maternal grandparents. When succession opens, the successor(s) first in order shall inherit to the exclusion of the successor(s) second in order. The successor(s) second in order shall inherit in default of any successor first in order. The 'children' referred to in this Law include legitimate children, illegitimate children and adopted children, as well as step[ ]children who supported or were supported by the decedent.[90]

A separate article confirms that if a child of the decedent has predeceased the decedent, the predeceasing child's issue inherits by right of representation.[91] Adoptive children and illegitimate children are encompassed within the definition of "children."[92] Parents may also inherit from or through

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[88] *See generally* Emile F. Short, *Parent's desertion, abandonment, or failure to support minor child as affecting right or measure of recovery for wrongful death of child*, 53 A.L.R.3d 566 (1973).

[89] *See generally* L.S. Tellier, *Division among beneficiaries of amount awarded by jury or received in settlement upon account of wrongful death*, 171 A.L.R. 204 (1947); *Hurley v. Hurley*, 191 Okla. 194, 195, 127 P.2d 147, 149 (Okla. 1942) (holding a father entitled to one-fourth and mother three-fourths of settlement proceeds from the wrongful death of their child, where the father had abandoned his family and, while an insane asylum inmate, had escaped therefrom). *See also In re Estate of Pessoni*, 810 N.Y.S.2d at 303 n.3, 11 Misc.3d at 251 n.3 (noting, in a case involving both estate assets and a wrongful death claim, after concluding that a father was disinherited from the estate because he abandoned his child under a New York statute, that because "a wrongful death award is divided between the eligible distributes in proportion to their pecuniary loss" that "even if the father were eligible to share a distributive award, it would appear that his share would be negligible, if any") (internal citation omitted). *Pessoni* is discussed *supra* at the text accompanying notes 52-55.

[90] PRC Succession Law Art. 10; PRC Succession Law Art. 13 ("[s]uccessors same in order shall, in general, inherit in equal shares").

[91] PRC Succession Law Art. 11.

[92] PRC Succession Law Art. 10.

an adopted or illegitimate child.[93] Within this basic framework, the Chinese intestacy rules share commonality with American states' general approaches to intestacy laws.

At this juncture, however, the Chinese law of intestate succession diverges and introduces the notion of support as a determinative factor in several broad contexts. First, as provided by Article Thirteen, any intestate successor may have his or her share increased due to support of the decedent, or decreased due to a failure to fulfill a duty of support when the successor had the ability to do so:

> [S]uccessors who have made the predominant contributions in maintaining the decedent or have lived with the decedent may be given a larger share. . . .[S]uccessors who had the ability and were in a position to maintain the decedent but failed to fulfil their duties shall be given no share or a smaller share of the estate.[94]

Second, under Article Fourteen, non-heirs may be treated as intestate successors if he or she gave support to, or depended on the support of, the decedent:

> An appropriate share of the estate may be given to a person, other than a successor, who depended on the support of the decedent and who neither can work nor has a source of income, or to a person, other than a successor, who was largely responsible for supporting the decedent.[95]

Thus, a generous paramour could be held to exclude a surviving spouse; an attentive caregiver could take priority over surviving children; a nanny might be elevated over a surviving mother if they were "largely responsible for supporting the decedent."[96]

Third, Article Ten defines the term "parents" in the Chinese succession code to include "step[]parents who supported or were supported by the decedent" and siblings include "step[ ]brothers and step[]sisters who supported or were supported by the decedent" as well.[97] And fourth: "Widowed daughters-in-law or sons-in-law who have made the predominant contributions in maintaining their parents-in-law shall, in relationship to their parents-in-law, be

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[93] *See id*.

[94] PRC Succession Law Art. 13. ("At the time of distributing the estate, due consideration shall be given to successors who are unable to work and have special financial difficulties"); *see also* PRC Succession Law Art. 19 (providing: "[r]eservation of a necessary portion of an estate shall be made in a will for a successor who neither can work nor has a source of income.")

[95] PRC Succession Law Art. 14.

[96] *Id*.

[97] PRC Succession Law Art. 10.

regarded as successors first in order."[98] Consequently, relative support, maintenance, and dependence are potential factual issues in every Chinese intestate estate administration.[99] We now turn to examining these rules in operation within five Chinese judicial opinions.

III. FIVE RECENT REPORTED DECISIONS FROM THE PEOPLE'S REPUBLIC OF CHINA[100]

A. *Estate of Zhang*

Estate of Zhang, involved the unique situation of a claim based on support against the possibility of an escheat, since the decedent left no statutory intestate heirs.[101] Mr. Zhang and Miss Xu married in 1977. It was Mr. Zhang's first marriage and he was childless; Miss Xu had an adult son from a prior relationship, Xu Hua. Their marriage lasted ten years and ended in divorce. In 2011, Mr. Zhang died intestate without having remarried.

Mr. Zhang had no children or siblings. Only children are not uncommon under China's "One Child Policy."[102] His parents and grandparents had predeceased him, raising the possibility of an escheat under Chinese intestacy law.[103] Although, as outlined above, stepchildren can qualify as intestate heirs in China if they contributed to their stepparent's support, the court reasoned that Xu Hua's status as a stepchild terminated upon the divorce of his mother from decedent Zhang in 1988. Xu Hua's assertion of inheritance rights from his former stepfather's estate thus depended entirely upon his ability to demonstrate a support relationship with Mr. Zhang.

When his mother married Mr. Zhang, Xu Hua was twenty-six years old, but he continued to live with the couple. Evidence of the close relationship between Xu Hua and Mr. Zhang during this time was shown by the fact that Xu Hua merged his hukuo with Mr. Zhang's family hukuo.[104] Following the

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[98] PRC Succession Law Art. 12.

[99] A support-sensitive inquiry can also surface in Chinese testate proceedings. *See supra* note 95.

[100] These five probate cases from China came to the Quinnipiac Probate Law Journal through the author, Professor Simmons. The Editors were able to obtain the original copies of these opinions and have them on file for reference. In checking these cases, the Editors relied on the translated copies that one of Professor Simmons' students created for use in his research. There are no pin cites for these opinions as a result.

[101] *Case No. 02053* (Beijing First Intermediate People's Court, Apr. 20, 2015). (It is unclear from the appellate decision whether the government of China was a party to the proceeding.)

[102] *See generally* Tamika S. Laldee, Note, *A Proposal for Change in Immigration Policy: Asylum for Traditionally Married Spouses*, 41 CASE W. RES. J. INT'L L. 149, 152-56 (2009) (outlining China's One Child Policy). The policy was relaxed in 2015. Louise Watt, *China's repeal of one-child policy praised*, NORTHJERSEY.COM (Oct. 29, 2015, 7:50 a.m.), http://www.northjersey.com/news/china-to-end-decades-old-1-child-policy-allow-2-children-1.1444165.

[103] PRC Succession Law, Art. 32. ("An estate which is left with neither a successor nor a legatee shall belong to the state or, where the decedent was a member of an organization under collective ownership before his or her death, to such an organization.")

[104] *See* Kam Wing Chan and Will Buckingham, *Is China Abolishing the* Hukou *System?*, CHINA

divorce, Xu Hua and Mr. Zhang remained in close contact. Xu Hua visited Mr. Zhang frequently, providing him with emotional comfort until his death. Following Mr. Zhang's death, Xu Hua made all the funeral arrangements and paid for them. The Beijing First Intermediate People's Court held that Xu Hua qualified under Article Fourteen and deserved an appropriate share of Mr. Zhang's estate, at least when an escheat would otherwise have resulted. In this case, that share amounted to the entire estate.[105]

B. *Estate of Wang*

In *Estate of Wang*, an adult son opposed his father's second wife.[106] Following his father's remarriage and death, this adult son claimed a share of the estate. The decedent and the son's mother had divorced in 1984. Mr. Wang died soon after his remarriage to Mrs. Dai. Although Mrs. Dai was the sole heir in intestacy as the decedent's surviving spouse, the surviving adult son claimed a share of the estate, arguing that he had supported his father.

Key to the court's decision was a writing from the decedent introduced into evidence by Mrs. Dai. Mr. Wang wrote that his adult son had not cared for him following the divorce because he had not fulfilled his own post-divorce financial obligations to his adult son's mother. Testimony revealed that Mrs. Dai had taken good care of Mr. Wang, but that his adult son had seldom visited. Other evidence suggested that the son had, in fact, lived with his father during his last years and had discharged maintenance obligations to his father. After considering this conflicting evidence, the court held that the estate should be divided seventy percent to Mrs. Dai and thirty percent to the adult son. A retrial later reached the same conclusion.[107]

C. *Estate of HuaBing*

Estate of HuaBing involved litigation between two surviving adult children.[108] Mr. HuaBing and his wife had two children: a son, HuaJia, and a daughter, HuaYi. In 2001, Mr. HuaBing suffered a major stroke. HuaJia moved in and helped care for him. HuaYi, Mr. HuaBing's daughter, had also lived with her parents during her adulthood, but only when they were both healthy. After Mr. HuaBing's stroke, he was permanently impaired and was unable to live

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QUARTERLY 582, 587 (2008), *available at* http://faculty.washington.edu/kwchan/Chan-WSB-Hukou-Abolition-CQ2008.pdf. (*Hukuo* is a household registration system with roots in imperial China; an important state institution which regulates population mobility and entitlement to public benefits.) *Id.*

[105] *See Board of Educ. of Montgomery Co. v. Browning*, 635 A.2d 373, 381, 333 Md. 281, 295 (Md. 1994) (Eldridge, J., dissenting) (emphasizing that, under American law, "[b]ecause 'society prefers to keep . . . property within the family *as most broadly defined*, or within the hands of those whom the deceased has designated,' escheat is disfavored and is enforced only as a last resort.") (citation omitted) (emphasis in original).

[106] *Case No. 02053* (First Middle People's Court, Beijing, Apr. 20, 2015).

[107] *Id.*

[108] *Case No. 175* (ZheJiang Province Hangzhou Intermediate People's Court, Mar. 3, 2015).

independently. In 2004, Mr. HuaBing's wife died of cancer. HuaJia continued to live with his father until 2011. In December of 2012, Mr. HuaBing died without a will.

HuaJia claimed a greater share of his father's estate under Article Thirteen.[109] He introduced evidence that his sister had purchased a home in 2004, and argued that she had the financial ability to support her father, but had failed to do so.[110] His sister countered that she got along well with her father and contributed to his maintenance. HuaJia identified one witness who claimed that HuaYi had once forced her mother to "do something unpleasant with a knife" and had burnt her clothes. A second witness would have testified that she had been paid by the son to assist with caregiving for his parents and had never seen HuaYi visit her parents. Both of these witnesses failed to appear, however. Accordingly, the court discounted their allegations. The court accepted evidence from a community council that showed that HuaJia had lived with his ill parents and provided good care for them. It also considered conflicting evidence that HuaJia had helped his parents purchase their home in 1994.

The court held that Mr. HuaBing's estate should be divided equally between his son and his daughter. The holding was affirmed on appeal. Although seemingly irrelevant for purposes of Article Thirteen, the court may have been influenced by the fact that the son had collected rents from his father's house for two years after his father's death without sharing them with his sister.[111] The Chinese succession laws make no reference to the relevance of post-death heir conduct, aside from destroying a will or killing another successor in fighting over the estate.[112]

D. *Estate of Xue*

Estate of Xue involved a support claim asserted by an unmarried surviving partner who had provided caregiving services to the decedent.[113] Mr. Xue died in 2013, survived by his daughter, Miss He, and a stepson from another marriage, Guo. Mr. Xue had been married twice to Miss He's mother, but both marriages ended in divorce. His third marriage to a Mrs. Zhao ended when he became a widower in 2008. Mrs. Zhao had a son, Guo, from a prior relationship. Beginning in 2009, and continuing until Mr. Xue's death, Mr. Xue lived with Ms. Yan. The two became close. Although they never married, Ms. Yan

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[109] PRC Succession Law Art. 13 (quoted *supra* at the text accompanying note 94).

[110] *See* PRC Succession Law Art. 13 (allowing for adjustment to successors' shares if they "were in a position to maintain the decedent but failed to fulfill their duties.")

[111] *Case No. 175*.

[112] Article 7 of the Chinese succession law provides for a successor's disinheritance on account of an: (1) intentional killing of the decedent; (2) killing any other successor in fighting over the estate; (3) a serious act of abandoning or maltreating the decedent; or (4) a serious act of forging, tampering with or destroying the will. PRC Law of Succession Art. 7.

[113] *Case No. 00590* (Second Middle People's Court, Beijing, Feb. 11, 2015).

claimed that she had supported Mr. Xue for four years prior to his death.

The court identified the decedent's daughter as his sole statutory heir. It rejected a claim to successor rights by Guo, the stepson, since there was no evidence that a support relationship had ever formed between Mr. Xue and Guo. Here, the court assumed that stepchild status was not terminated by the death of the child's mother. The court allocated approximately seventy percent of the estate (71,557 RMB, or about $11,000 U.S.) to Miss He, the decedent's daughter, and the remaining thirty percent to Ms. Yan, based upon her having provided four years of support prior to Mr. Xue's death.[114]

E. *Estate of HuMoumou*

Finally, in *Estate of HuMoumou*, an adoptive grandson, an unrelated caregiver, and a caregiver-sibling all claimed a share of an estate.[115] Mr. HuMoumou was unmarried and his only child had predeceased him without issue. His closest living relatives were his brother, Mr. HuYi, and his nephew, HuBing. Some twelve years before his death, Mr. HuMoumou legally adopted his grandnephew HuJia as his grandson, a procedure recognized under Chinese family law. Under Chinese intestacy law, HuJiaawas the sole heir in intestacy, at least without regard to support considerations. HuJia lived with his adoptive grandfather for many years.

After Mr. HuMoumou's death, a Mr. Zhang came forward and claimed that he had cared for Mr. HuMoumou in his final days. The brother, Mr. HuYi, and the adoptive grandson, HuJia, both asserted that they had provided care and support to the decedent as well. One witness testified that HuJia had provided poor care to the decedent and that the two did not always get along. Other evidence was admitted relating to support and assistance provided on behalf of the three claimants at one time or another.[116]

After accounting for certain administrative expenses and costs of the estate, the court determined that the adoptive grandson HuJia should inherit the entire estate. No serious analysis was devoted to the fact that both Mr. Zhang and Mr. HuYi had seemingly also provided some level of maintenance and support. Implicit in the court's conclusion is a rejection of Mr. Zhang's and Mr. HuYi's credibility.

IV. ASSESSMENT

Occasionally, an individual will intentionally structure her estate plan to encourage and reward support. Often elderly persons will structure their estate plans in order to encourage their heirs to offer support. An example can be

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[114] *Id.*

[115] *Case No. 511* (HeNan Sheng Luo Yang City JianXi District People's Court, Mar. 3, 2015).

[116] *Id.*

found in the estate plan of Emily Shull.[117] In 1889, Shull, a resident of Indiana, made her will. Omitting the attestation clause, it read, in its entirety:

> The following is the last will and testament of Emily J. Shull of Salem, Indiana, to wit: So far as my property which I leave at my death is concerned, I declare the following to be my desire and will: 1st. Any valid debts due from me at my death shall be paid. 2nd. I command that my funeral at my death shall be decent, and rendered in a proper manner. 3rd. Also I direct my executor to erect at my grave a proper monument not to cost less than seventy-five dollars ($75.00). 4th. Whoever shall take good care of me, and maintain, nurse, clothe, and furnish me with proper medical treatment at my request, during the time of my life yet when I shall need the same, shall have all of my property of every name, kind, and description left at my death. 5th. The person or persons whom shall be selected by me to earn my estate, as provided in 4th clause, shall have a written statement signed by me to that effect, to entitle her, him, or them to my estate. 6th. Samuel B. Voyles of Salem is nominated for my executor of this will. [Signed] Emily J. Shull.[118]

Six years passed. Then Emily Shull wrote a letter to her adult granddaughter, Ella Holsapple:

> Well, Ella, I am sick. I want you to come, and stay with me. I don't think I can live many weeks. If you don't come, I will try and get some of Lina Clark's to stay. If you don't come, you will rue it. I have made my will, and whoever stays with me at my last hours gets everything I leave except funeral expenses paid. I don't want your father or the Shulls to have a cent of my earnings, and want you to have everything I have after my death and funeral expenses are paid. Don't fail to come. Emily J. Shull.[119]

Ella Holsapple came as she was bid, and she cared for her grandmother, who died several months later.[120] Objections that the will was invalid for failure to name a devisee were rejected. The opinion noted that courts "in the main entertain great respect for the will of those who are dead…."[121] Emily Shull succeeded in crafting a will that accomplished the same aims as the support-

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[117] *Dennis v. Holsapple*, 148 Ind. 297, 47 N.E. 631 (Ind. 1897).

[118] *Id.*

[119] *Id.*

[120] *Id.* (The opinion does not list the decedent's date of death but the letter is dated January 6, 1895, and the will was probated a year and a day later).

[121] *Id.*

dependent provisions of Chinese intestacy law. As in Chinese support-dependent intestacy law, a contested evidentiary hearing was a prerequisite to a final determination of heirship.

The primary method by which intestate schemes in the United States are crafted is presumed majoritarian intent. The drafters of intestate rules try to guess how most people would have wanted to dispose of their assets after death. Since most married persons who make wills leave their entire estate to their spouse, most intestacy schemes provide for this outcome. Since most unmarried persons with children who make wills dispose of their estates to their children in equal shares, this is the default outcome in intestacy. Very few individuals make wills like Emily Shull, linking inheritance rights to a performance of support obligations. This observation suggests that an intestacy scheme modeled on a plan that very few individuals adopt consciously should be rejected.

There are, however, other societal and policy justifications for modeling intestacy schemes than simply matching majoritarian intent.[122] Although very few wills dispose of property to the government, a legislature could enact an intestacy scheme that provided for escheat when a decedent was not survived by a spouse or issue. Indeed, a statute could conceivably provide for escheat in any intestacy proceeding.[123] These kinds of proposals would not be justified by presumed majoritarian intent, since an infinitesimal number of wills are intentionally devised to the government.[124] Rather, justifications for widespread escheat would rest on achieving societal benefits in the form of increased government revenues which could then be devoted to public ends. That this kind of a proposal would undoubtedly be controversial is beside the point. The point is that intestacy schemes *can* be created with the goal of achieving what lawmakers believe most individuals would have intended if their intent had been preserved in an enforceable testamentary instrument.[125] However, intestacy schemes—like support-dependent intestacy provisions—can also derive from objectives of social good, irrespective of presumed majoritarian intent.[126] The

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[122] Ronald J. Scalise, Jr., *Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents*, 37 SETON HALL L. REV. 171, 173-76 (2006).

[123] Exceptions could be considered for minors or individuals with severe impairments who never achieved the ability to exercise testamentary freedom.

[124] One example of an individual who did intend to leave their estate to the government (although not a state government, as required by state probate codes), was United States Supreme Court Justice Oliver Wendell Holmes. *See* Richard A. Paschal, *Constitutional Birth Pains*, 10 GREEN BAG 2d 125, 125 (2006) (noting that Holmes' will "contained numerous bequests but the residuary clause left all remaining assets to the United States.")

[125] "[T]he [U.S.] Constitution does not require that intestacy statutes distribute property according to principles of probable intent." Weisbord, *supra* note 18, at 884.

[126] For example, given the world's aging population, an intestate share–or even 'forced shares' in testate proceedings–could be enacted for elderly parents as a means to arrest the runaway costs of long term care otherwise borne by taxpayers when individual resources are exhausted. Elevating elderly parents' intestate shares above that of children or even spouses of the decedent would seldom square with majoritarian intent, but it would advance a particular social agenda.

primary social good, presumably advanced by support-dependent intestacy provisions, is to encourage and reward adult children who support their parents, financially or emotionally.

To be sure, there are costs to intestacy formulas with fact-dependent outcomes. Litigation in the aftermath of a family member's death can be expensive and unsettling. Grief coupled with a contested court proceeding where family members vie against one another for a share of an estate carry significant costs. Those costs can include delays, financial and emotional costs to survivors, and additional demands on our courts and judges. Judicial decisions in China may lack the same level of consistency that American lawyers would expect and American families may demand.[127] John Capowski has observed: "Chinese courts are more concerned with substantive justice than with consistent results."[128] American lawyers, by contrast, are accustomed to consistency as represented by the doctrine of *stare decisis*. That *stare decisis* can, in fact, interfere with the aim of justice can be seen in a judicial decision applying a statutory intestacy-adjustment formula.

In *Estate of Moyer*, a tragic car accident resulted in the death of a toddler.[129] The child's grieving mother then battled in court against her own mother over an intestate inheritance.[130] The grandmother asserted that the mother's failure to support her young son should result in her disinheritance. Indeed, the mother had largely failed in her financial and moral obligations of support. The trial court, despite feeling that the child himself would have desired that his grandmother inherit to the exclusion of his biological parent, felt bound by precedent. The trial court wrote: "[i]f this court were free to base its decision on fairness and common sense rather than appellant precedent, we would sign a forfeiture order as soon as it could be prepared."[131] Instead, the trial court found itself constrained by precedent, which had interpreted the legislative phrase "failed to provide any duty of support" in a strictly literal sense and acknowledged "any crumb a parent throws in front of a child."[132] *Moyer* illustrates the distasteful, unseemly, and costly spectacle of estate litigation encouraged by support-dependent formulas. It also illustrates the point that if American jurisdictions do invoke support factors in settling intestacy rights, that they might achieve fairer outcomes by relaxing some of the requirements of rigidity and consistency.

CONCLUSION

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[127] *Compare Estate of Wang* with *Estate of HuMoumou*, discussed *supra* part III(B), (E).

[128] Capowski, *supra* note 12, at 473. Capowski asserts: "[w]hile a focus on substantive justice may create inconsistency, in a moral and ideally functioning legal system, correct outcomes should merge with consistency." *Id*. at n. 142.

[129] *In re Estate of Moyer*, 2000 Pa. Super 227, 758 A.2d 206 (2000).

[130] *Id.*

[131] *Id*. at 210 (quoting the lower court's opinion).

[132] *Id*. (quoting the lower court's characterization of precedent).

Whether courts are appropriate mediums to discharge family responsibilities after a death should be explored and argued, no one should doubt the primal importance of family duties, regardless of nationality. The legal expression of those values takes various forms in China, the United States, and elsewhere. On balance, China's support-dependent intestacy rules appear functional to perhaps a surprising degree, suggesting that the costs associated with greater uncertainty and postmortem squabbles are offset by an ability to reward the expression of support. As United States' jurisdictions inch towards greater tolerance of fact-dependent intestacy rubrics, these costs should not be ignored.

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MAKE NO BONES ABOUT IT: THE NEED TO REFORM THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

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It is most unpleasant work to steal bones from a grave, but. . . someone has to do it....

—Franz Boas, father of American Anthropology[1]

I. Introduction

Pemina Yellow Bird is a member of the Mandan, Hidatsa, and Arikara Nations of North Dakota.[2] One day in 1984, a security guard escorted her to a vault where she met the state archaeologist.[3] The security guard unlocked and opened the door, and they entered a large warehouse-like room.[4] What Yellow Bird saw inside overwhelmed her.[5] The room contained innumerable shelves and boxes, each filled with Native American remains.[6] One of the boxes caught her eye.[7] It was marked "66 pieces of human skeletal remains."[8] The state archaeologist informed her that he did not know whether the box contained sixty-six pieces of one person or the remains of sixty-six different people.[9] The

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1 Julian Smith, *Who Owns the Dead?*, 64 ARCHAEOLOGY 1, 16 (2011).
2 *See* Pemina Yellow Bird, *NAGPRA At Twenty: A Report Card*, 44 ARIZ. ST. L.J. 921, 921 (2012).
3 *Id.*
4 *Id.*
5 *Id.*
6 Yellow Bird, *supra* at note 2, 921.
7 *Id.*
8 *Id.*
9 *Id.*

sight horrified her.[10] The archaeologist told Yellow Bird that the remains were there in order to be studied, but the state lacked the resources to do so.[11] The struggle for respectful treatment of these remains, and the countless others across the country, would consume Yellow Bird's life for decades.[12] Yellow Bird dedicated herself to the Native American Repatriation movement,[13] passionately advocating for the return of Native American remains to their descendants. She hoped to never again see Native American remains sitting forgotten on shelves in nondescript boxes, awaiting study that might never occur.

Since the founding of the New World, Native American gravesites and remains have been treated with tremendous disrespect. The very first Pilgrims to set foot on Plymouth Rock returned to the Mayflower with stolen corn and artifacts.[14] In the 1840's, Dr. Samuel Morton collected a great number of crania in an attempt to prove that Native Americans were an inferior race.[15] In 1868, the United States government instructed the army to procure Native American crania and body parts for use in the Army Medical Museum, resulting in the taking of more than 4,000 heads from battlefields, hospitals, and graves across the country.[16] The drive to procure Native American body parts resulted in competitive expeditions between museum collecting crews to obtain Native American remains.[17] The unscrupulous have looted gravesites and sold both remains and valuable funerary objects for profit.[18] As the law did not historically protect unmarked Native American graves,[19] some of these sites may simply have been abandoned and forgotten, their memory lost to the passage of time.

In 1990, Congress enacted the Native American Graves Protection and Repatriation Act ("NAGPRA") in an effort to remedy these injustices.[20] This Note first examines the turbulent history of the federal government's relationship with Native Americans. The government has dehumanized and disrespected Native Americans, and has stripped them of their rights and their land. More specifically, the government has disrespected the remains of Native Americans by treating them as resources and exhuming them to be studied and consigned to

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[10] *Id.*

[11] Yellow Bird, *supra* at note 2, 921.

[12] *Id.*

[13] This movement was devoted to repatriating Native American remains and cultural materials that had been removed from their lands. *Id.*

[14] Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 40 (1992).

[15] *Id.*

[16] *Id.*

[17] *Id.* at 41.

[18] *Id.* at 40.

[19] Trope & Echo-Hawk, *supra* note 14, at 46.

[20] *See* Ryan M. Seidemann, *NAGPRA at 20: What Have the States Done to Expand Human Remains Protections?*, 33 MUSEUM ANTHROPOLOGY, no. 2, 2010, at 199.

museums.[21] Next, this Note examines NAGPRA's provisions and considers some of the issues that have arisen since its implementation. Many Native American remains lie outside the scope of NAGPRA because it has a rather limited reach.[22] For instance, NAGPRA does not apply to tribes that are not federally recognized, leaving these unrecognized tribes with little recourse. Finally, this Note sets forth specific reforms that Congress should enact in order to enhance protections for the cultural materials of Native Americans. Congress should allow coalition claims, permitting unrecognized tribes to partner with recognized tribes and enter claims under NAGPRA to ensure that remains are transferred to current living descendants. Congress should create distinct classes of remains to protect these unrecognized tribes. To conclude, this Note analyzes why Congress should expand NAGPRA to cover more territory and grant protection to additional cultural materials outside NAGPRA's current limited scope. These are simple, common-sense reforms that, if implemented, would promote respect for Native Americans and prevent further injustice.

II. **The Act**

a. Pre-NAGPRA History

Historically, the relationship between the United States government and Native American tribes has been filled with cruelty and tragedy. Over time, the government has in many ways regarded and treated Native Americans as subhuman. This attitude is illustrated in *Johnson v. M'Intosh*. In 1823, the United States Supreme Court held that Native Americans' title to their land was extinguished upon European discovery of America, so tribes did not possess the power to convey their own territory.[23] Consequently, the *Johnson* court held that American citizens could not purchase land from Native American tribes because Native Americans did not possess valid title to it.[24] The Court reasoned that "a nation that has passed under the dominion of another is no longer a sovereign state."[25] Chief Justice Marshall specifically noted that Native Americans were savages, and therefore could not be treated as civilized people.[26] Chief Justice Marshall further found that Native Americans were clearly inferior to the rest of American society, and as a result should not be incorporated into that society.[27] Accordingly, Native Americans retained only the right to occupy their territory, while the United States government assumed both the title and the power to

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[21] *See* Kelly E. Yasaitis, *NAGPRA: A Look Back Through the Litigation*, 25 J. LAND, RES., & ENVTL. L. 259, 260-262 (2005) (describing a federal policy to collect Native body parts for the Army Medical Museum and Thomas Jefferson being labeled "America's first scientific grave robber.")

[22] Seidemenn, *supra* note 20, at 199. ("NAGPRA only applies to federal and tribal land and to the sale or transfer of Native American human remains. Thus, NAGPRA leaves unregulated countless burial sites…") (internal citations omitted).

[23] *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823).

[24] *Id.* at 562.

[25] *Id.* at 568.

[26] *Id.* at 590.

[27] *Id.* at 591.

convey the land.[28]

The historical roots of Native American reform date to the time of Thomas Jefferson, who sought to integrate Native Americans into white society.[29] Since the dominant white society believed Native Americans to be inferior savages, integration in this context meant imposing "white standards of civilization and education" upon them.[30] Under this integration policy, Native Americans were taught Western agricultural practices such as spinning and weaving.[31] Native Americans had to adapt to an entirely new and unfamiliar culture, while their own culture was slowly eliminated.[32]

In the midst of this period of forced integration, Congress passed the Dawes Severalty Act of 1887.[33] This legislation allowed the President to divide Native American land into private lots and assign each lot to individual tribal members.[34] The idea of private land ownership was unfamiliar to Native Americans, whose land had traditionally belonged to the entire tribe.[35] Unfortunately, this practice resulted in countless Native Americans losing their land through sales, defaulted mortgages, and tax forfeitures.[36] Through sales and outright theft, the federal government and private individuals acquired vast swaths of tribal lands.[37] In fact, by 1934, Native American tribes had lost approximately ninety million of their one hundred and forty million acres of land.[38] Ultimately, the tremendous loss of territory that resulted from this misguided attempt at assimilation even forced some tribes to disband.[39]

Following this tragic episode, Congress passed the Antiquities Act of 1906 ("Antiquities Act").[40] The Antiquities Act's principal aim was to protect archaeological resources from looters.[41] The Antiquities Act was a landmark bill that focused on ensuring the preservation of historically and scientifically

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[28] *M'Intosh*, 21 U.S. 543 at 574.

[29] KATHLEEN S. FINE-DARE, GRAVE INJUSTICE, THE AMERICAN INDIAN REPATRIATION MOVEMENT AND NAGPRA 58 (1st ed. 2002).

[30] *Id.*

[31] *Id.*

[32] *See generally* Yasaitis, supra note 21, at 261 (arguing that while NAGPRA is a step in the right direction, it is not enough in resolving the numerous problems related to Native American culture).

[33] General Allotment Act, Ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-34, 339, 341, 342, 348, 349, 354, 381).

[34] David A. Chang, *Enclosures of Land and Sovereignty: The Allotment of American Indian Lands*, 109 RADICAL HISTORY REVIEW 108, 108 (Winter 2011).

[35] *See generally* Steve Titla & Naomi Thurston, *The Apache and NAGPRA*, 44 ARIZ ST. L. J. 803, 803 (2012) (explaining the conflict between the Apache Tribe and NAGPRA concerning property).

[36] Chang, *supra* note 34, at 109.

[37] Fine-Dare, *supra* note 29.

[38] *Id.* at 59.

[39] *Id.*

[40] Antiquities Act, 34 Stat. 225 (1906) (codified as amended at 54 U.S.C. §§ 320301-320303 (2014)).

[41] Fine-Dare, *supra* note 29, at 62.

significant sites on federal lands.[42] Despite these noble goals, the Antiquities Act had terrible consequences for Native Americans. Shockingly, it defined Native American remains as "archaeological resources."[43] As such, it converted any remains interred on federal lands into federal property.[44] The Antiquities Act authorized the President to create national monuments, granted the executive the power to establish areas for preservation, and required that institutions obtain permits in order to conduct research on a site.[45] As a result, the Antiquities Act authorized the government to issue permits to dig up Native American graves and 'preserve' the remains in museums.[46] Museums then proceeded to exhume thousands of Native American 'archaeological resources' that were considered federal property.[47] These 'archaeological resources' were the dead bodies of Native Americans, which deserved the same dignity accorded to the remains of other cultures.

In 1979, the Archaeological Resources Protection Act ("ARPA")[48] attempted to protect Native American remains and required the government to provide notice to Native American tribes when government action might disturb sites of religious or cultural importance to a tribe.[49] In ARPA, Congress finally recognized that existing protections could not effectively safeguard archaeological sites from robbery and destruction.[50] While limiting the government's authorized excavation, ARPA also banned the unauthorized excavation of Native American remains and cultural materials, and set criminal penalties for violations.[51] Native American tribes were exempt from ARPA's permit requirements, and were allowed to take cultural materials from the reservations on which they lived.[52]

Congress passed the National Museum of the American Indian Act ("NMAIA") in 1989.[53] NMAIA finally addressed the issue of the disposition and repatriation of Native American cultural materials.[54] Unfortunately, its scope was quite limited. NMAIA dealt exclusively with the Smithsonian Institution ("Smithsonian"); it required the Smithsonian to inventory and document the Native American remains and funerary objects in its possession

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[42] Richard West Sellars, *A Very Large Array: Early Federal Historic Preservation—The Antiquities Act, Mesa Verde, and the National Park Service Act*, 47 NAT. RES. J. 291, 294 (2007).

[43] Trope & Echo-Hawk, *supra* note 14 at 42.

[44] *Id.*

[45] *Id.*

[46] Sellars, *supra* note 42.

[47] Trope & Echo-Hawk, *supra* note 14 at 42.

[48] Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm (2014).

[49] *Id.* § 470cc(c).

[50] *Id.* § 470aa(a)(3).

[51] *Id.* §§ 470ee (a), (d).

[52] *Id.* § 470cc(g)(1).

[53] National Museum of the American Indian Act, 20 U.S.C. §§ 80q-80q-15 (2016).

[54] *See Id.* § 80q-9(c).

and attempt to identify their origins.[55] When the Smithsonian identified an object's tribal origin by a preponderance of the evidence, NMAIA provided for the repatriation of cultural materials to culturally affiliated, federally recognized tribes.[56]

b. Passage of NAGPRA

A 1987 meeting of the Senate Select Committee on Indian Affairs[57] provided the foundation for the passage of NAGPRA.[58] Robert McCormick Adams, the Secretary of the Smithsonian at the time, stunned Native Americans and the scientific community when he revealed that the Smithsonian housed the remains of more than 14,000 Native Americans.[59] Native American tribes were outraged, and demanded the return and proper burial of their ancestors' remains.[60] In February of 1990, the Panel for a National Dialogue on Museum/Native American Relations issued a report that called for federal legislation to codify the repatriation policies of museums.[61] On May 14, 1990, Congress held hearings on two bills designed to address repatriation issues—the Native American Graves and Burial Protection Act[62] and the Native American Repatriation of Cultural Patrimony Act.[63] These hearings culminated in the creation and passage of NAGPRA.

c. Terms of NAGPRA

i. Objectives of the Act

NAGPRA has two principal objectives.[64] First, it aims to control the removal of Native American remains and cultural items from federal and tribal lands.[65] Second, it directs the disposition of Native American remains and cultural items held by federal agencies and museums.[66] Only certain types of cultural materials can be repatriated through the provisions of NAGPRA: human remains, i.e., the physical body of a deceased Native American individual;[67] and certain other cultural materials, such as funerary objects and sacred objects.[68]

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[55] *Id.* §§ (a)(1)(A), (B).

[56] *Id.* § (b).

[57] This committee deals with issues regarding Native American tribes.

[58] Yasaitis, *supra* note 21, at 266.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] Native American Grave and Burial Protection Act, S. 1021, 101st Cong. (1990).

[63] Native American Repatriation of Cultural Patrimony Act, S. 1980, 101st Cong. (1990).

[64] *See* 25 U.S.C. §§ 3001-13 (2016).

[65] Yasaitis, *supra* note 21, at 267.

[66] *Id.*

[67] 43 C.F.R. § 10.2(d)(1) (2016).

[68] *Id.* §§ 10.2(d)(2), (3).

ii. Cultural Materials Subject to NAGPRA

Associated funerary objects may be repatriated through NAGPRA.[69] These objects include materials that were placed with human remains at death or after death as part of a cultural death rite or ceremony, where both the remains and the objects are in the possession of a federal agency or museum.[70] Unassociated funerary objects are also subject to repatriation.[71] Unassociated objects were similarly placed with remains at the time of death or after, but the remains are not in the possession of a federal agency or museum.[72] Sacred objects also fall under NAGPRA repatriation authority.[73] Sacred objects are traditional ceremonial objects used by Native Americans in religious practice.[74] Finally, materials referred to as objects of cultural patrimony may be repatriated through NAGPRA.[75] Those objects are materials that have some ongoing historical, cultural, or traditional importance to the Native American group.[76] Essentially, these are community-owned items. An individual Native American cannot own such objects, and consequently, no one person has the ability to alienate or convey them.[77]

iii. Inventory Requirement of NAGPRA

NAGPRA requires museums and federal agencies in possession of Native American remains or funerary objects to make an inventory of those objects and to identify their cultural affiliation "to the extent possible based on information possessed" by the agency or museum.[78] Should a museum or agency determine that such an affiliation exists, it must notify the relevant Native American tribe of the identified remains and objects, as well as those objects that, due to the circumstances surrounding their acquisition, are reasonably believed to be affiliated with a tribe.[79] Upon request of a known lineal descendent of the tribe, the museum or agency is required to return the material or remains in question.[80] Organizations must return remains and objects whose origins cannot be determined to a tribe that can establish cultural affiliation by a preponderance of the evidence.[81]

iv. Excavated Cultural Materials

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[69] 25 U.S.C. § 3005(a)(1) (2016).
[70] *Id.* § 3001(3)(A).
[71] *Id.* § 3005(a)(2).
[72] *Id.* § 3001(3)(B).
[73] *Id.* § 3005(a)(2).
[74] 25 U.S.C. § 3001(3)(C).
[75] *Id.* § 3005(a)(2).
[76] *Id.* § 3001(3)(D).
[77] *Id.*
[78] *Id.* § 3003(a).
[79] 25 U.S.C. § 3003(c).
[80] *Id.* § 3005(a)(1).
[81] *Id.* § 3005(a)(4).

NAGPRA determines ownership of remains and objects excavated on federal lands by a hierarchy.[82] First, the museum or agency must return materials to any lineal descendants.[83] In the absence of lineal descendants, NAGPRA first assigns ownership to the tribe whose land contains the remains.[84] Next, the museum or agency in possession of the remains or objects must give them to the tribe with the closest cultural affiliation.[85] Finally, NAGPRA grants possession to a tribe with aboriginal lands in the area of discovery, only if the tribe files a claim for the materials.[86] However, if a different tribe can show by a preponderance of the evidence that it has a stronger relationship with the cultural materials, NAGPRA awards ownership to that tribe provided the tribe states a claim.[87]

v. NAGPRA Review Committee

NAGPRA establishes a committee empowered to oversee the inventory, identification, and repatriation processes that the Act provides.[88] The committee reviews and makes findings regarding the cultural identity of objects and remains and their repatriation to descendants.[89] NAGPRA also charges the committee with resolving disputes between Native American tribes, federal agencies, and/or museums relating to the return of cultural materials.[90]

III. Major Issues With the Act

a. Culturally Unidentified Remains & Tribes that are not Federally Recognized

NAGPRA contains three requirements to determine cultural affiliation: 1) a presently existing tribe with standing to make a claim; 2) an earlier Native American group; and 3) a shared identity between the two groups.[91] A failure to fulfill one of the three requirements can result in culturally unidentifiable remains; for example, when remains are clearly identifiable as Native American in origin yet share no common group identity with any present-day tribe.[92] In some cases, the remains truly are unidentifiable—they may be part of a collection of remains sitting in a box with little hope of ever being identified,

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[82] *Id.* § 3002(a).
[83] *Id*. § 3002(a)(1).
[84] 25 U.S.C. § 3002(a)(2)(A).
[85] *Id.* § 3002(a)(2)(B).
[86] *Id.* § 3002(a)(2)(C)(1).
[87] *Id.* § 3002(a)(2)(C)(2).
[88] *Id*. § 3006(a).
[89] 25 U.S.C. §§ 3006(c)(3)(A), (B).
[90] *Id.* § 3006(c)(4).
[91] Matthew H. Birkhold, *Tipping NAGPRA's Balancing Act: The Inequitable Disposition of "Culturally Unidentified" Human Remains Under NAGPRA's New Provision*, 37 WM. MITCHELL L. REV. 2046, 2064 (2011).
[92] *Id.* at 2066.

like those in the introductory anecdote.[93] In some other cases, the remains may belong to a tribe that was eradicated or one that is simply not federally recognized.[94] When remains belong to existing tribes that are not federally recognized, the result is cultural affiliation in fact, but not in law.[95] Such remains are clearly associated with a Native American group, yet the law treats them as unidentified.[96]

When a tribe requests control of culturally unidentified remains, the museum or agency in possession must initiate a consultation with the tribe within ninety days.[97] Additionally, whenever an agency cannot prove that it has the right to possess a set of culturally unidentified remains, it must arrange for their disposition.[98] There is an order of priority for the disposition of such remains.[99] The tribe on whose land the remains were discovered has the first priority.[100] Should no such tribe be identified, the museum or agency must then offer the remains to the tribe from whose aboriginal land the remains were taken.[101] Should neither of these tribes accept custody, the museum or agency may transfer the remains to another federally recognized tribe.[102] In the alternative, the agency may request special permission from the Secretary of the Interior to transfer the remains to a tribe that is not federally recognized—however, this can only occur if the tribes on whose land or aboriginal land the remains were taken do not object.[103] Consequently, remains that are culturally related to non-federally recognized tribes can only be returned to those tribes if the museum or agency requests special permission and the other tribes with higher priority of ownership do not object.[104]

In general, NAGPRA prefers cultural connections over geographic connections because early Native Americans traveled across great distances, and their tribal territories shifted significantly over time.[105] As a result, any geographic connections between cultural materials and tribes may be utterly meaningless.[106] Based on these standards, non-federally recognized tribes with cultural connections to remains should have the strongest legal claim to the

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[93] Rebecca Tsosie, *Native Nations and Museums: Developing an Institutional Framework for Cultural Sovereignty*, 45 TULSA L. REV. 3, 13 (2009).

[94] *Id.*

[95] Birkhold, *supra* note 91 at 2067-68.

[96] *Id.* at 2068.

[97] 43 C.F.R. § 10.11(b)(1)(i) (2016).

[98] 25 U.S.C. § 3005(c).

[99] 43 C.F.R. § 10.11(c)(1).

[100] *Id.* § 10.11(c)(1)(i).

[101] *Id.* § 10.11(c)(1)(ii).

[102] *Id.* § 10.11(c)(2)(i).

[103] *Id.* § 10.11(c)(3).

[104] Birkhold, *supra* note 91, at 2076.

[105] Rex Dalton, *Rule Poses Threat to Museum Bones*, 464 NATURE 662, 662 (2010).

[106] *Id.*

remains.[107] Unfortunately, under NAGPRA these non-federally recognized tribes have no claim at all. Such a system is arguably quite unjust because it grants remains to recognized tribes that have a geographic connection to remains, but no cultural connection.[108]

The best way to demonstrate respect for culturally affiliated remains is to transfer them to their current living descendants.[109] Transferring remains to tribes to which the remains are not culturally affiliated demonstrates a clear lack of respect for the remains and for non-federally recognized tribes.[110] Moreover, transfers of this sort encourage fighting among tribes and marginalize non-federally recognized tribes.[111] This practice also threatens to create a hierarchy among tribes, where those who are federally recognized are favored over those who are not.[112] Museums and scientists must make every attempt to determine the cultural affiliation of remains. When cultural affiliation is impossible to determine, the remains should be respectfully stored until such a determination is possible.

b. Ancient Remains

Bonnichsen v. United States,[113] the Kennewick Man case,[114] concerned ancient remains that were discovered in 1996 on property owned by the Army Corps of Engineers.[115] The Corps determined that these remains were between 8,340-9,200 years old, and possessed characteristics that were neither solely Native American nor solely European.[116] Although local tribes requested that the remains be returned to them, the Smithsonian asked that the remains be moved to the museum so that they could be studied.[117] The Army Corps of Engineers sided with the Native American tribes and ceased all testing.[118] The matter was then referred to the Secretary of the Interior who ruled that the remains were, in fact, Native American for the purposes of NAGPRA.[119] In response to a suit filed in opposition to the Secretary's decision, the district court agreed with the scientists and barred the return of the remains to the Native American tribes.[120] On appeal, the Ninth Circuit held that there were no

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[107] Birkhold, *supra* note 91, at 2083.
[108] *Id.* at 2084.
[109] *Id.* at 2086.
[110] *Id.*
[111] *Id.* at 2089.
[112] Birkhold, *supra* note 91, at 2089.
[113] *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004).
[114] *Id.* at 364. (So named because the remains in question were discovered in Kennewick, Washington).
[115] *Id.* at 869.
[116] *Id.* at 869.
[117] *Id.* at 870.
[118] *Bonnichsen*, 367 F.3d at 870.
[119] *Id.* at 872.
[120] *Id.* at 872.

connections between the remains of the Kennewick Man and any presently existing tribe.[121] Oral histories supported the tribes' claims, but the Ninth Circuit found that these histories were insufficient to show a significant relationship between the remains and the tribe due to the remains' age.[122] Accordingly, the Ninth Circuit held that the remains were not Native American and NAGPRA did not apply to them,[123] which meant essentially that the remains were too old to be Native American.[124]

c. Remains Not Discovered on Federal Lands

Under 25 U.S.C. § 3002(a), NAGPRA applies only to remains that are discovered on federal or tribal lands. This issue was highlighted in *Romero v. Becken*.[125] In this case, Universal City ("City") planned to build a golf course with the assistance of the United States Army Corps of Engineers.[126] After conducting a required archaeological survey, scientists discovered human remains.[127] Daniel Castro Romero alleged that he was a lineal descendant of the great Apache Chief Cuelgas de Castro.[128] Castro Romero claimed that the golf course was built on Apache burial grounds, and demanded that the uncovered remains be returned to the Apaches.[129] On orders from the Texas Historical Commission, the City reburied the remains in the same place they were found, and Castro Romero sued arguing *inter alia* violations of NAGPRA.[130] After the district court dismissed his case, the Fifth Circuit held that there was a "fundamental flaw" in Castro Romero's claims—namely that the remains were found not on federal or tribal lands, but on municipal property.[131] NAGPRA's application is limited to "federal or tribal lands," and the City undisputedly discovered the remains on its own municipal land.[132] Even though a federal agency, the Army Corps of Engineers, was involved, the statute was inapplicable because the City did not discover the remains on federal land within the meaning of the statute.[133]

As the federal government and Native American tribes own merely a

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[121] *Id.* at 880.

[122] *Id.* at 881-82.

[123] *Bonnichsen*, 367 F.3d at 882.

[124] Following a DNA study, the Army Corps of Engineers finally determined in April 2016, that Kennewick Man was Native American and, as a result, was subject to NAGPRA. *See* Laura Frazier, *Army Corps Finds that Kennewick Man is Native American, Subject to Federal Burial Act*, OREGONIAN (Apr. 27, 2016, 11:25 a.m.), http://www.oregonlive.com/pacific-northwest news/index.ssf/2016/04/army_confirms_that_kennewick_m.html

[125] *Romero v. Becken*, 256 F.3d 349 (5th Cir. 2001).

[126] *Id.* at 352.

[127] *Id.*

[128] *Id.*

[129] *Id.* at 352-353.

[130] *Romero*, 256 F.3d at 353.

[131] *Id.* at 354.

[132] *Id.*

[133] *Id.*

small fraction of American land, NAGPRA's reach is quite limited. As a result, remains discovered on any non-federal lands are not subject to the protections of NAGPRA, and culturally affiliated tribes may have no legal right or means by which to repatriate the remains of their ancestors. This system is in direct opposition to not only the goals of NAGPRA, but also to justice and basic fairness.

IV. Suggested Reforms

a. Allowing Coalition Claims

The disposition of unrecognized tribes' cultural materials is a serious issue due to the number of Native American tribes without federal recognition. For instance, on June 16, 2008, one website reported that there were 226 federally non-recognized tribes.[134] However, it is difficult to determine the exact number of groups that claim Native American ancestry, but lack recognition by the federal government at any given time. This number is in constant flux because the recognition process is ongoing.[135] It is evident that this lack of recognition results in a huge number of remains that are effectively blocked from being repatriated.

One possible solution for tribes lacking federal recognition is for the government to allow coalition claims. Coalition claims would allow federally non-recognized tribes to enter a NAGPRA claim alongside a tribe that has already received federal recognition.[136] The two groups could then work together to obtain control of the remains, and ultimately transfer them to the tribe of origin. Such a system would grant remains belonging to unrecognized tribes a needed measure of respect.[137] Allowing coalition claims would have the ancillary benefit of encouraging greater understanding between tribes.[138] Its chief benefit, however, would be for unrecognized tribes to finally have a say in the disposition of their own culturally affiliated materials. Granting these tribes a measure of control over the remains of their ancestors would eliminate an injustice.

Many states, however, do not have any federally recognized tribes.[139] As a result, unrecognized tribes in those areas would still be in an inferior position because they would have no tribe with which to partner in order to bring claims.[140] Allowing coalition claims would also arguably place unrecognized

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[134] *U.S. Federally Non-Recognized Tribes*, MANATAKA.ORG, http://www.manataka.org/page237.html (last visited Nov. 2, 2016).

[135] Birkhold, *supra* note 91, at 2056.

[136] Birkhold, *supra* note 91, at 2091.

[137] *Id.*

[138] *Id.* at 2092.

[139] James A.R. Nafziger, *The Protection and Repatriation of Indigenous Cultural Heritage in the United States*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 175, 198 (2006).

[140] *Id.*

tribes in a subservient position to those that are recognized, as they would need to seek the assistance of recognized tribes before their claims could be heard.[141] Coalition claims also face stiff opposition from federally recognized tribes, and so coalitions may be quite difficult to form, as most recognized tribes oppose the expansion of unrecognized tribes' rights.[142]

b. Creating Classes of Remains

Differentiating between classes of remains may be helpful to unrecognized tribes, and would be more fair overall than the current system. Remains could be separated into three distinct categories: 1) remains culturally related to recognized tribes; 2) remains culturally unrelated to any tribe; and 3) remains culturally related to unrecognized tribes.[143] Museums and agencies could repatriate the first category to its affiliated tribe seemingly without controversy, as a link would exist between the materials and an existing recognized tribe. The second category of remains should not be repatriated, as its origins are unknown. Instead, these remains should be held by museums and scientists until their origins can be determined. Museums could segregate the third category, those remains that are culturally related to unrecognized tribes, and prohibit their disposition.[144] This suggested reform would effectively pause the repatriation of the remains in question while the unrecognized tribe to which they belong works to achieve federal recognition.[145] Of course, achieving recognition could potentially take many years, and place the remains in a "timeless limbo."[146] There is also the possibility that such recognition may never actually occur. Ultimately, should a tribe be awarded recognition, the remains will be eligible for repatriation.[147] While this reform would not lead directly to unrecognized tribes receiving their affiliated cultural materials, it would at least prevent the injustice of other tribes being granted their possession.[148] Although this is clearly not a perfect solution, it is still preferable to the status quo.

c. Applying NAGPRA to State Lands

Reforming NAGPRA by applying it to state lands would be a great benefit to Native American groups. It would permit tribes to repatriate remains and cultural objects discovered on lands owned by the states, and therefore greatly expand the existing protections. This reform would enlarge the sheer area of land that falls under the NAGPRA's protection, and permit repatriation

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[141] Birkhold, *supra* note 91, at 2092.

[142] *Id.*

[143] *See generally id.* at 2064-68.

[144] *Id.* at 2095-96.

[145] *Id.*

[146] Birkhold, *supra* note 91, at 2095.

[147] *Id.* at 2095.

[148] *Id.* at 2096.

of countless remains that would otherwise fall into possession of the states. This option, however, would raise strong constitutional objections on grounds of federalism.[149] The reach of the federal government is limited under the Constitution, and some areas of legislation—including property law—have traditionally been left to the states.[150] However, the states themselves have begun to address this problem. Many states have enacted their own laws, analogous to NAGPRA, to fix the loophole created by NAGPRA's limited scope.[151]

d. Applying NAGPRA to Private Lands

A reform applying the protections of NAGPRA to land owned by private citizens might be controversial, since such a scheme would apply NAGPRA to the vast majority of the land in the country. Private citizens would likely not appreciate the added expense and regulation that applying NAGPRA to their land would require, but it would be optimal for Native American tribes because it would empower them to bring claims for nearly all cultural materials discovered on American soil. However, this potential reform raises serious Fifth Amendment concerns.[152] Private property is protected from use or burden by the government unless just compensation is paid.[153] There is, however, an argument that the Fifth Amendment does not apply under these circumstances, because no one can own human remains.[154] It is unclear, then, whether the Constitution would allow for such a provision. Some states, however, have already begun to address this issue. For instance, California's version of NAGPRA[155] extends protections to all nonfederal public and private property in the state.[156]

e. Conditional Federal Grants

Perhaps the most efficient way to implement reforms to NAGPRA is through the use of conditional federal grants. Under Article I, Section 8 of the Constitution, Congress has the broad power to "lay and collect Taxes. . . to pay the Debts and provide for the common Defence and general Welfare."[157] Congress may, and often does, attach certain conditions to the receipt of this money.[158] The landmark case in this area of the law, *South Dakota v. Dole*, involved a dispute over South Dakota's state drinking age, which at the time was

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[149] Seidemann, *supra* note 22, at 200.

[150] *Id.* at 205.

[151] *Id.* at 199.

[152] *Id.* at 200.

[153] *Id.* at 205.

[154] Seidemann, *supra* note 22, at 205.

[155] California Native American Graves Protection and Repatriation Act of 2001, CAL. HEALTH & SAFETY CODE §§ 8010-30 (2016).

[156] *Id.* § 8012(b).

[157] U.S. CONST. art. 1 § 8, cl. 1.

[158] Brian Galle, *Federal Grants, State Decisions*, 88 B.U. L. REV. 880, 882 (2008).

nineteen.[159] Congress enacted 23 U.S.C. § 158 (1982), which allowed the Transportation Secretary to withhold a percentage of federal highway funds from states with a legal drinking age under twenty-one.[160] South Dakota argued that Congress was imposing a national drinking age in violation of the Twenty-first Amendment.[161] The Supreme Court held that this statute constituted only an encouragement to state action, and was constitutional as a result.[162] Through such a system, Congress can encourage the states to take actions that the federal government itself does not have the power to do.

Under such a scheme, Congress can grant money to the states for the preservation of Native American cultural materials, and condition the grants on the states' adoption of a system like NAGPRA. States do not face the same constitutional barriers as the federal government. They could, as California has already done, extend protection to materials found on state lands, and those found on private lands as well.[163] Such an expansion would exponentially increase the amount of land where cultural materials are protected, potentially encompassing the entirety of the country.

The greatest obstacle to such a plan would be its cost. Congress would need to appropriate the money to fund state grants, and it is very unlikely to do so. The federal government is currently seeking to cut its budget rather than expand it, and the protection of Native American graves is unlikely to be seen as a priority for government spending. Consequently, this path is not likely to succeed. A second option is to emulate the scheme in *South Dakota v. Dole*. Congress can tie states' adoption of a NAGPRA-like system to existing funding, and withhold a portion of the money from states that do not comply. This option involves funding that has already been appropriated, so there is no concern about increased federal spending. It would, accordingly, likely be more acceptable to national policy makers.

On the other hand, states that opt into such a plan would be responsible for administering the plan and paying for it. So the costs would merely be shifted from the federal government to state governments, the majority of which are experiencing serious budget problems themselves. For this reason, the states would most likely strenuously object to this idea. In addition, if NAGPRA were applied to private lands by the states, the private sector would be burdened with the expenses of implementation. As a result, this plan would raise objections from both businesses and private citizens, neither of whom would be eager to pay for it. Ultimately, it will take a good amount of persuasion to convince state policymakers and the public that extending NAGPRA protections to state and

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[159] *South Dakota v. Dole*, 483 U.S. 203, 205, 107 S. Ct. 2793, 2795 (1987).

[160] *Id.*

[161] *Id.*

[162] *Id.* at 212, 107 S. Ct. at 2798.

[163] *See* CAL. HEALTH & SAFETY CODE § 8012(b).

private lands is worth the cost.

V. Conclusion

Since the adoption of NAGPRA, Native American tribes now have tools they can use to repatriate cultural materials and remains that they never had access to in the past. However, the passage of time has revealed some areas of NAGPRA that can be improved. Unrecognized Native American tribes are shut out of the process entirely. Huge areas of land are left completely unprotected. To an extent, the states have stepped in and provided a measure of relief. Nonetheless, the time has come for the federal law itself to be improved. With a few common sense reforms, NAGPRA protections can be extended to new tribes and new areas. Confusion and injustice can be minimized, and the letter of the law brought more in line with the spirit of NAGPRA.

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