Consequences of Heirs’ Misconduct: Moving from Rules to Discretion.

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ANNE-MARIE RHODES*

INTRODUCTION

Disposing of property at the owner’s death can be a daunting and complex task today. There are federal and state tax concerns, probate court filings, and non-probate financial institution forms to complete.\(^1\) Blackstone would be amazed at the number of institutional players involved in the process, and probably by the number of decedents who have property to be distributed.\(^2\) But he would not be amazed at the primary takers.\(^3\) The tables of heirship in the main have changed little in the two and a half centuries since his Commentaries appeared.\(^4\) The circle of takers still revolves around spouse and family members: children, parents and siblings.

While the basic structure of primary takers has changed little since Blackstone, statutes have slowly expanded the number of those allowed in the circle, essentially by adding adjectives to the original descriptives. Adopted and non–marital children are two obvious examples where the common law

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\(^1\) The complexity of the United States transfer tax system seems limitless. Even an estate that has successfully navigated the questions of inclusion of assets in the gross estate, determined its eligibility for various deductions, and then calculated its estate tax, can find that the actual payment of tax itself raises complex and interrelated tax issues. See Wendy C. Gerzog, Equitable Apportionment: Recent Cases and Continuing Trends, 41 REAL PROP. PROB. & TR. J. 671 (Winter 2007).

\(^2\) William Blackstone (1723-1780) introduced the study of English Law at Oxford University, publishing his lectures from 1765-1769 as the four-volume COMMENTARIES ON THE LAWS OF ENGLAND.

\(^3\) At common law, of course, a surviving spouse was not an heir of the decedent spouse. Rather, the surviving spouse was provided for through either the dower or curtesy interest. Today this difference has generally disappeared with a surviving spouse now being categorized and included as an heir. The references to heirs and the tables of heirship comprehend this current, more inclusive meaning.

\(^4\) Some commentators have characterized the shift to include a surviving spouse as an heir as “[o]ne of the great transforming trends that has marked the development of Western family law over the past two centuries ….” MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 238 (1989). I do not dispute this family law characterization. My purpose in this paper is much more limited: merely to focus on who the statutory law provides for at the decedent’s death in the distribution of the decedent’s property, not the size or extent of the benefit.
norm of family for inheritance purposes has evolved.\(^5\) Reproductive technology today presents challenges, in ways unthinkable to Blackstone, to further expand the embrace of inheritance.\(^6\) These demands on inheritance, where certainty and stability are traditionally prized, lead some to say enough, "no-more-heirs."\(^7\)

Newton’s third law of motion, simplified, is that for every action there is an equal and opposite reaction. As the number of those who may be considered heirs increases, on the one hand, there naturally may emerge an interest in statutory disinheritance, on the other hand. Presumptive heirs may lose their status because of their misconduct. The slayer statute is the most commonly enacted statute that strips heirship status.\(^8\) Modern research into the destructive societal and individual consequences of dysfunctional families heightens awareness of the importance of behavior, especially with respect to its impact on children.\(^9\) Best interests of a child may require the child’s removal from the family when the conduct of the family is toxic. When an heir’s behavior relative to the decedent is inconsistent with societal expectations, there may be a collective demand for an “heir-no-more.”\(^10\)

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6. See Woodward v. Comm’r of Soc. Sec., 760 N.E.2d 257 (Mass. 2002), determining that the twin girls posthumously conceived by the decedent’s wife were the intestate heirs of the decedent whose frozen sperm was used. See also Kathleen R. Guzman, Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth, 31 U.C. DAVIS L. REV. 193 (1997).


8. See discussion infra at notes 20-33.

9. For a particularly poignant discussion of the impact of abuse and neglect on children, see RICHARD J. GELLES, THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN’S LIVES 148 (1996) (“If we have learned anything in the past thirty years, it is that we cannot achieve the delicate balance between keeping abused children safe and keeping them with their parents.”); see also ELIZABETH BARTHOLET, NOBODY’S CHILDREN (1999), and Elizabeth Barthalet, The Challenge of Children’s Rights Advocacy: Problems and Progress in the Area of Child Abuse and Neglect, 3 WHITTIER J. CHILD & FAMILY ADVOC. 215 (2004). Removing children from abusive environments presents new and difficult questions of alternative placements. See Sasha Coupet, Swimming Upstream Against the Great Adoption Tide: Making the Case For 'Impermanence,' 34 CAP. U. L. REV. 405 (2005).

10. See discussion infra at notes 38-47. Individual demands may well precede collective demands. See Brian Donohue, Victory for an Absentee Father, STAR LEDGER, (Newark, N.J.), July 26, 2006, at 1 (reporting that a judge had determined that Ruben Martinez was entitled to share in his deceased daughter’s estate, even though he had little contact with her during life, over the strenuous objections of the mother,
This expansion and contraction of the universe of heirs, who’s in and who’s out, raises some fundamental questions about the role of the legal system in transferring property from the decedent to others. Who should decide who takes the property and how much? Does the decedent’s intent matter? Is there a societal interest at stake? What is the standard to determine the taker under the circumstances, and which circumstances? It is a classic pull as the legal system matures from objective rules within a fairly homogenous society to subjective norms across an economically and culturally diverse society.

This paper will examine the current statutory bars to inheritance of a presumptive heir in the United States, primarily from the perspectives of the statutory conduct required, the theory underlying the statute (whether decedent’s intent or public policy), and the consequences on inheritance of that conduct. Legislatures have not moved boldly in this area, perhaps reflecting a general reluctance to wade too far into family matters, allowing a zone of privacy for the day to day details of family affairs. This recognition of legislative limits may proceed from notions of individual autonomy and liberty in consensual matters, or more pragmatically, from concerns about institutional efficiency. We know that every family has issues, and we just don’t want to go there. A third possibility is the traditional perspective that the criminal code, not the probate code, is the proper venue for such concerns about misconduct.

And yet as much as the inheritance system would prefer not to deal with such issues, human conduct is not always benign. It can careen across the lines of acceptable conduct, even if those lines are repositioned over time. In crossing those lines, the political and judicial processes may be involved and then, reluctantly or otherwise, they are forced to act. How the legal system responds to such conduct in the sphere of an individual’s inheritance provides a current reflection on the balance between an individual’s and society’s views of control over property, and more specifically, on the balance between a decedent’s particular intent and society’s collective judgment of public policy in light of the misconduct. It is the thesis of this paper that the legislative

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Rosa Rogiers, who vowed to lobby the New Jersey legislature for a change in law to bar abandoning parents from inheriting).

11. See, e.g., Linda Kelly Hill, No-Fault Death: Wedding Inheritance Rights to Family Values, 94 KY. L.J. 319, 322, 348-54 (2005-06) (forcefully advocating for the abolition of all statutes that would deny a surviving spouse inheritance rights based on emotional harms, such as bigamy, adultery, abandonment and so forth premised on the "proper deference to the right of marital privacy"); but see Frances Foster, Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment, 32 U.C. DAVIS L. REV. 77 (1998) (describing a system that specifically considers behavior, good and bad, in inheritance).

12. “It is now well accepted that the matter dealt with is not exclusively criminal in nature but is also a proper matter for probate courts.” UNIF. PROB. CODE § 2-803, comment (1990).
reluctance to bar inheritance based on misconduct continues and that the existing disinheritance statutes reflect a confusion of purpose and an ambiguity of theory. A handful of newer disinheritance statutes may be charting a new course by moving beyond the historic tradition of enacting an objective rule that covers all cases to instead granting a judge discretion to custom tailor a result based on the facts of the particular case. This nascent recognition of the limits of legislative pronouncements in discrete misconduct cases fits within the context of succession law reform that similarly adopts a more nuanced approach to modern day inheritance, where nontraditional families may outnumber traditional ones, and property transfers at death no longer pass primarily through the probate process.

Part I considers the traditional adultery and murder bars to inheritance, and examines their underlying theories and the statutory consequences of the misconduct. Part II moves to the newer statutory bars of abandonment and abuse and similarly examines their theories and consequences. Part III considers the limits of legislative pronouncements on misconduct in the larger context of succession law reform.

II. STATUTORY BARS TO INHERITANCE: ADULTERY AND SLAYER STATUTES

A. Adultery

One of the earliest statutory bars to inheritance in the common law system was the Statute of Westminster II in 1285 that barred a woman from dower if she had abandoned her husband and lived in an adulterous relationship with another.¹³ In our early history, this common law statutory bar was adopted, expressly or by implication, in a number of jurisdictions in the United States.¹⁴ As time moved on, so did the public policy perception of such conduct as a bar to inheritance. Today there are five states that specifically address inheritance in some measure by an adulterous spouse.¹⁵ Each of these jurisdictions provides a nondiscretionary automatic bar to inheriting the designated property by the adulterous spouse, but the bar is soft in all five states. If the husband and wife reconcile and resume living together, then the prior adultery does not bar the inheritance in Kentucky and Missouri.¹⁶ Both North Carolina and Ohio provide an escape from the disinherition if the aggrieved party condones the adulterous relationship.¹⁷

¹³. STATUTE OF WESTMINSTER II, 13 EDW. I, c.34 (1285).
¹⁶. KY. REV. STAT. ANN. § 392.090(2) (West 2007); MO. ANN. STAT. § 474.140 (West 2007).
while Indiana requires that the adulterous relationship continue until the
decedent spouse’s death. 18

Though these statutes continue to recognize and provide for the historic
bar to inheritance because of spousal misconduct, the statutes also allow the
parties themselves, by their subsequent intentional conduct, effectively to
reinstate inheritance. The Scarlet Letter can be removed by the individuals
involved, suggesting that the underlying theory of adultery as disinheriting
conduct today is no longer society’s unmovable presumed intent of the
presumably aggrieved decedent; rather it is this decedent’s particular intent.
If the spouse’s subsequent actions do not corroborate the societal presumed
intent, then that collective judgment yields to the intent inferred from the
individual’s particular actions.

The limited number of jurisdictions that have a specific statute on
adultery today also supports the significance of the decedent’s intent theory,
as opposed to a collective public policy against such conduct. No fault
divorce is a common process today and, for those marriages that cannot
survive adultery, the legal relationship can be undone. 19 As inheritance is
based on spousal status, once undone, the inheritance disappears completely.

B. Slayer Statutes

All jurisdictions in the United States address inheritance by the
decedent’s slayer, with the overwhelming majority, 48 of 51, doing so by statute. 20 The remaining three do so by case law. 21 Although murderous heirs

19. “By 1985, all states had adopted some form of no-fault divorce, either by designating a no-fault
ground as the exclusive basis for divorce or by adding such a provision to existing fault grounds.” JOHN
20. See ALA. CODE § 43-8-253 (2007); ALASKA STAT. § 13.12.803 (2007); ARIZ. REV. STAT. ANN.
§ 14-2803 (2007); ARK. CODE ANN. § 28-11-204 (West 2007); CAL. PROB. CODE §§ 250-258 (West 2007);
COLO. REV. STAT. ANN. § 15-11-803 (West 2007); CONN. GEN. STAT. ANN. § 45a-447 (West 2007); DEL.
CODE ANN. tit. 12, § 2322 (2007); D.C. CODE § 19-320 (2007); FLA. STAT. ANN. § 732.802 (West 2007);
GA. CODE ANN. § 53-1-5 (West 2007); HAW. REV. STAT. ANN. § 560:2-803 LexisNexis 2007; IDAHO CODE
ANN. § 15-2-803 (2007); ILL. COMP. STAT. ANN. § 5/2-6 (2007); IND. CODE ANN. § 29-1-2-12.1
(West 2007); IDAHO CODE ANN. § 633.535 (West 2007); KAN. STAT. ANN. § 59-513 (2007); KY. REV. STAT.
ANN. § 381.280 (West 2007); LA. CIV. CODE ANN. art. 946 (2007); ME. REV. STAT. ANN. tit. 18-A, § 2-803
(2007); MICH. COMP. LAWS ANN. § 700.2803 (West 2007); MUS. REV. STAT. ANN. § 524-2-803 (West 2007);
MISS. CODE ANN. § 91-1-25 (West 2007); MO. STAT. ANN. § 461.054 (West 2007); MONT. CODE ANN. §
72-2-813 (2007); NEB. REV. STAT. § 30-2354 (2007); NEV. REV. STAT. ANN. § 41B (West 2007); N.J. STAT.
ANN. §§ 3B:7-5 to 7-7 (West 2007); N.M. STAT. ANN. § 45-2-803 (West 2007); N.Y. EST. POWERS &
TRUSTS LAW § 4-1.6 (McKinney 2007); N.C. GEN. STAT. ANN. §§ 31A-3 to -12 (West 2007); N.D. CENT.
CODE § 30.1-10-03 (2007); OHIO REV. CODE ANN. § 2105.19 (West 2007); OKLA. STAT. ANN. tit. 84, § 231
(West 2007); OR. REV. STAT. ANN. §§ 112.455 to .555 (West 2007); PA. CONSENT. STAT. ANN. §§ 8801-
8815 (West 2007); R.I. GEN. LAWS §§ 33-1.1-1 to 33-1.1-16 (2007); S.C. CODE ANN. § 62-2-803 (2007);
are not a new phenomenon, there is remarkable variation among the statutes dealing with the issue. Some of the common differences include the type of killing required by the statute, whether a conviction is necessary, and the property covered by the statute. 

By and large, the act of killing must be intentional, unjustifiable, felonious, and in some states, there must be a conviction. In other words, the killing that leads to disinheritance must be an unambiguously egregious act. The statutes set a very high bar before disinheriting the presumptive heir and that bar, once set, is very firm. Two aspects of the slayer statutes are of particular interest in assessing the balance between decedent's particular intent and society's collective judgment of public policy.

First, of the 48 jurisdictions with slayer statutes, only Louisiana and Wisconsin statutorily provide for the possibility of the slayer nevertheless receiving the inheritance. Louisiana with its civil law origins follows the civil law tradition of unworthy successors. Among those deemed unworthy to succeed to the decedent's property are those convicted of the intentional killing or attempted killing of the decedent as well as those judicially determined to have participated in the same. If the otherwise unworthy successor can prove a reconciliation with the decedent, the successor will not be declared unworthy and can therefore inherit. Reconciliation appears to be possible only with cases of attempted murder, where the victim and heir would...
have the time and opportunity to reconcile after the failed attempt. Appearances can be deceiving.

Wisconsin's statute contains unique provisions that push the timeframe of reconciliation in the other direction. If the decedent's will makes specific reference to the Wisconsin slayer statute and provides that it is not to apply, then the slayer may receive property from the decedent.27 The Wisconsin statute thus effectively allows a potential murder victim to fully anticipate her killing and to be reconciled in advance to the killer and the killing. This unusual provision may be aimed at mercy killings,28 but vulnerable victims of domestic violence may also be within its reach.

In addition, the Wisconsin statute allows the court, on its own, to vary the statutory disposition of property based on the "factual situation created by the killing" if the judge determines that the decedent's wishes would best be carried out by another disposition.29 This discretion represents a remarkable shift in power between the legislature and the judge, as well as between the legislature and the individual decedent. It underscores that the dominant theory underlying the Wisconsin slayer statute is the particular intent of the individual decedent, and not society's collective judgment of public policy.

Like most of the adultery statutes, the Louisiana and Wisconsin slayer statutes provide for the particularized intent of the decedent, whether specifically stated or proved by conduct, to prevail over the statute's general presumed intent. The theory underlying the slayer statutes in most jurisdictions, however, encompasses more than the presumed intent of the slain decedent. The majority reflects also a collective sense of public policy clearly set against killing, whether based on respect for life, notions of social cohesion, respect for rule of law, deterrence or other concerns.30 Thus if the slayer has met the high threshold for disinheritance, that act in virtually all jurisdictions is an absolute bar, regardless of the decedent's particular intent.

The second interesting aspect of the slayer statutes in assessing the balance between a decedent's particular intent and society's collective

28. See Sherman, supra note 23, at 876; see also 2 WIS. PROB. LAW & PRACT. § 15:9, n.17 (8th ed.) ("The most likely use of a waiver would be in a situation of assisted suicide.").
30. Hill, supra note 11, at 348-51 (discussing the philosophical debate on the law's relevance to private morality (say spousal misconduct) compared to public morality (say spousal murder) and stating that despite deeply held divisions on those issues, all seem to agree there is a sufficient degree of "intolerance, indignation, and disgust," a "strength of belief," regarding murder.").
judgment is that at least six statutes specifically address the issue of extending the slayer’s disinherance to others.\textsuperscript{31} Evenly divided, three provide that the slayer’s issue can inherit,\textsuperscript{32} while three provide that they cannot.\textsuperscript{33} This split reflects the ambiguous dual theory of the slayer statute. The presumed intent of a slain decedent seems clear with respect to the killer, but is less so, say, regarding the slayer’s children, that is, the decedent’s innocent grandchildren. On the other hand, the public policy theory is concerned with the act and actor, not other recipients. From a larger perspective, each slayer statute generally holds one paradigm in mind— the murderous beneficiary—and deals decisively to bar inheritance by that beneficiary. What to do next is more nuanced and messy, and neither theory of decedent’s intent nor public policy leads conclusively to a legislative pronouncement. The uncertainty these slayer statutes display highlights a structural concern, that is, who should decide the actual recipients of property and on what basis.

Whether more legislatures, once having spotted an issue, can move from pronouncement of objective rules for all cases to a grant of discretion for some more nuanced cases is itself an interesting question. The following discussion on disinheritance statutes based on abandonment or abuse may provide some additional insight into this larger question.

II. STATUTORY BARS TO INHERITANCE: ABANDONMENT AND ABUSE

A. Abandonment of Spouse or Child

Spouse and children are primary heirs in all jurisdictions; the familial relationship is key. At common law, that relationship involved affirmative legal obligations, most importantly, the duty of a husband to support his wife and children.\textsuperscript{34} Abandonment of those duties or that family was not a specific concern of the inheritance statutes. Today at least nine states\textsuperscript{35} have statutes

\begin{footnotesize}
31. CAL. PROB. CODE § 250(b)(1), 21110 (West 2007); GA. CODE ANN. § 53-1-5(c) (West 2007); LA. CIV. CODE ANN. Art. 946(B) (2007); N.C. GEN. STAT. ANN. § 31A-4(2) (West 2007); R.I. GEN. LAWS § 33-1.1-2 (2007); VA. CODE ANN. § 55-402 (West 2007). In addition, Maryland, while without a direct slayer statute, does essentially extend the disinherance to the slayer’s issue by its statutory definition of issue. See supra note 21.
32. Those states are Georgia, Louisiana, and North Carolina. See supra note 31.
33. Those states are California, Rhode Island, and Virginia. See supra note 31.
34. See Gregory, supra note 19, at 69-70; see, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES *442 (“The husband is bound to provide his wife necessaries by law . . . .”).
35. CONN. GEN. STAT. ANN. § 45a-436(g) (West 2007); IND. CODE ANN. § 29-1-2-15 (West 2007); MICH. COMP. LAWS ANN. § 700.2801(2)(e) (West 2007); MO. ANN. STAT. § 474.140 (West 2007); N.H. REV. STAT. ANN. § 560:18 (2007); N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(a) McKinney 2007); N.C. GEN. STAT. ANN. § 31A-1 (West 2007); 20 PA. CONS. STAT. ANN. § 2106(a) (West 207); VA. CODE ANN. § 64.1-16.3 (West 2007). Other jurisdictions may also acknowledge spousal abandonment. See, e.g., HAW. REV. STAT. § 533-9 (2007); MASS. GEN. LAWS ANN. ch. 191, § 15, ch. 209, § 36 (West 2007).
\end{footnotesize}
concerning spousal abandonment while at least eleven states have statutes concerning child abandonment.

1. Spousal abandonment

The nine spousal abandonment statutes may be seen as vestiges of the adultery statutes. In fact, Missouri and North Carolina are the only two states that have both, and their provisions on adultery and on abandonment are found in the same section. Like the bar for adultery, the bar of inheritance in spousal abandonment is soft because as long as the spouses have resumed their duties at the time of death, for most of these statutes prior abandonment is specifically irrelevant. The intent of the decedent presumed by the legislature from the original act of abandonment once again yields to the intent of the specific decedent inferred by the legislature from that decedent's subsequent conduct. Public policy concerns over issues of spousal abandonment today, just like adultery, are not significant enough to outweigh the decedent's particular intent inferred from subsequent actions.

2. Child Abandonment

The abandonment of parental obligations owed to a child is a much newer addition to statutory disinheriance. Eleven jurisdictions today have specific statutes on child abandonment for inheritance purposes. The first was enacted in 1927 in North Carolina in response to a court decision confirming an inheritance by an abandoning father. It was followed by a New York statute in 1941, and then more than four decades later, in 1984, Pennsylvania became the third state to enact a child abandonment statute barring inheritance. Since 1984, there have been eight more states with statutes disinheriting parents who abandon their children. Nine of those


40. Those jurisdictions are Connecticut, Illinois, Kentucky, Maryland, Ohio, Oregon, South Carolina, and Virginia. See supra note 36. For this purpose, I am not including jurisdictions that have enacted Uniform Probate Code sec 2-114-type statutes regarding paternity that could arguably be used to
bar the inheritance, but like the spousal abandonment and spousal adultery statutes, the child abandonment bar is soft. If the abandoning parent returns and resumes care, then the statutory bar is inapplicable. Also, in some jurisdictions disinheritance occurs only if the child is a minor at the time of death, perhaps reflecting a legislative belief that the collective judgment of presumed intent can only apply when the child cannot act. The decedent who was an abandoned child, once testamentary capacity is achieved, now bears the burden of particularizing her intent.

Child abandonment in the context of a presumed intent is not the parallel of spousal abandonment. There the reconciliation is between two fully participating, autonomous, consenting adults, and hence a sense of the parties’ intent seems fairly iner able and general public policy properly yields to their intent. With respect to child abandonment, however, the parties are in vastly different legal positions. Here, the “reconciliation” is not between two equals, rather there is the resumption of legal duty owed by one party to the other. By definition, a child lacks testamentary capacity, and hence only the returning parent’s intent may be inferred. Because in the calculus of who can express testamentary intent a child is excluded, the legal theory underlying these statutes may not be the particularized intent of the child decedent. Rather, the theory may be a combination of a generalized deemed intent of any child who disinherit abandoning parents. See, e.g., ALA. CODE § 43-8-48 (2007); ALASKA STAT. § 13.12.114 (2007); ARIZ. REV. STAT. ANN. § 14-2114 (2007); COLO. REV. STAT. ANN. § 15-11-114 (West 2007); HAW. REV. STAT. ANN. § 560-2-114 (LexisNexis 2007); IDAHO CODE ANN. § 15-2-109 (2007); ME. REV. STAT. ANN. tit. 18-a, § 2-109 (2007); MICH. COMP. LAWS ANN. § 700.2114(4) (West 2007); MO. ANN. STAT. § 474.060(2) (West 2007); MONT. CODE ANN. § 72-2-124(2) (2007); NEB. REV. STAT. § 30-2309(2) (2007); N.M. STAT. ANN. § 45-2-114(C) (West 2007); N.D. CENT. CODE § 30.1-04-09(2) (2007); S.D. CODIFIED LAWS § 29A-2-114 (2007); TENN. CODE ANN. § 31-2-105 (West 2007); UTAH CODE ANN. § 75-2-114 (West 2007).

41. Those states, but not including Illinois and South Carolina, are listed supra note 36.


43. There is some variation among the states as to the age of testamentary capacity. Most jurisdictions use the age of 18, but some do not. Georgia, for example, "still" sets the age at 14. See Mary F. Radford and F. Skip Sugarman, Georgia’s New Probate Code, 13 GA. ST. U. L. REV. 605, 671 (1997), who state: "New Code section 53-2-10(a) still allows a testator to make a valid will in Georgia at the age of fourteen." That "still" may be even older than Georgia’s recent revision of their probate code. The civil law required a male to be at least 14 and a female at least 12 in order to execute a will. See 2 WILLIAM BLACKSTONE, COMMENTARIES *497.

In some jurisdictions, the age may be lower if another triggering event has occurred prior to the stated age. For example, marriage, emancipation, or joining the armed services may waive the statutory age requirement. See, e.g., TEX. PROB. CODE ANN. § 57 (Vernon 2007).
has been abandoned, coupled with a general public policy of privacy, that is, noninterference in family matters except in egregious circumstances. As long as the family is intact and the parents do not willfully fail to meet their legal obligation of support, the particular intent of the child is irrelevant. Two jurisdictions, Illinois and South Carolina, provide for a different consequence, where the judge is to determine the extent to which the parent's abandonment should affect the parent's presumptive inheritance.

The two statutes that grant a judge discretion to determine the impact of the child abandonment are particularly noteworthy and may take a different perspective on a child's particular intent. Like the Wisconsin slayer statute, this legislative grant of discretion to the judge shifts power from the legislature to the judge, and in a limited sense to the child decedent. In doing so, it affirms the centrality of this particular decedent's situation, even though a child, and not a generic template. An individualized custom determination is to be made based on the actual events of the particular individuals before the judge. By shifting from an objective rule to judicial discretion in the circumstances of child abandonment, the legal system may be underscoring the public policy of protecting a particularly vulnerable population.

44. This generalized deemed intent of a child who has been abandoned is problematic. "It may seem intuitively correct that an abused or neglected child would not want his abusive or neglectful parent to inherit, but that intuition may not be correct." Richard Lewis Brown, Undeserving Heirs?: The Case of the "Terminated" Parent, 40 U. RICH. L. REV. 547, 561 (2006), noting studies that show children continue to bond with parents who have abused or abandoned them. A child's desire to please, and not to be abandoned, but to be accepted, is very strong. It may therefore well be that a child who has been abandoned will nevertheless wish the abandoning parent to be included. The question then becomes which is the relevant intent, that of this particular child decedent or the substituted intent of our collective judgment. This conflict comes up in other contexts as well. See, e.g., Diane Geraghty, Ethical Issues in the Legal Representation of Children in Illinois: Roles, Rules and Reforms, 29 LOY. U. CHI. L.J. 289 (1998), discussing the difficult ethical questions an attorney faces when appointed to act as both an attorney and guardian ad litem for a minor child.

45. 755 ILL. COMP. STAT. ANN. § 5/2-6.5 (West 2007) ("a parent who . . . has willfully deserted the minor or dependent child shall not receive any property, benefit, or other interest . . . unless and until a court of competent jurisdiction makes a determination as to the effect on the deceased minor or dependent child of the parent's . . . willful desertion . . . and allows a reduced benefit or other interest that the parent was to receive by virtue of the death of the minor or dependent child, as the interests of justice require.").

46. S.C. CODE ANN. § 62-2-114 (2007) ("Notwithstanding any other provision of law, if the parents of the deceased would be the intestate heirs . . . upon the motion of either parent or any other party . . ., the probate court may deny or limit either or both parent's entitlement for a share of the proceeds if the court determines, by a preponderance of the evidence, that the parent or parents fail to reasonably provide support for the decedent . . .").

47. See discussion supra at notes 27-29.
B. Abuse

Another statutory bar to inheritance is abuse of the decedent. These specific statutes on abuse distinguish based on the victim, that is, abuse of a child and abuse of an adult or elderly decedent, as well as on the nature of the abuse, that is, physical abuse and financial exploitation. Some jurisdictions specifically bar inheritance if the presumptive heir has abused the child decedent, while some jurisdictions bar inheritance if the presumptive heir has abused the adult or elderly decedent.

The triggering conduct of abuse varies among these jurisdictions, some including financial exploitation as well as physical abuse. Like the slayer statutes, some abuse statutes require a conviction for the abuse, while others only require clear and convincing evidence of abuse. This echo of the slayer statute carries more than a passing reference. Oregon includes an abuser with the slayer statute and Pennsylvania proposes to do the same. This joining of slayer and abuser has a certain logic to it, perhaps similar to Louisiana's murder and attempted murder in its unworthy successor provision. Taking a closer look, however, the joining of slayer and abuser raises a concern.

Oregon defines an abuser not only in the obvious terms of physical abuse or neglect but also in terms of financial abuse. Moreover, Oregon requires a conviction for such abuse within five years of the decedent's death. Financial abuse of the elderly is estimated to affect millions of people annually. The hard consequence of this financial loss on a vulnerable

48. See CAL. PROB. CODE § 259 (West 2007); 755 ILL. COMP. STAT. ANN. § 5/2-6.2 (West 2007); MD. CODE ANN., CRIM. LAW § 8-801(e) (West 2007); EST. & TRUSTS § 3-111 (West 2007); OR. REV. STAT. ANN. §§ 112.455-112.465 (West 2007); 20 PA. CONS. STAT. ANN. § 2106(b) (West 2007).
49. See MD. CODE ANN., EST. & TRUSTS § 3-111 (West 2007); 20 PA. CONS. STAT. ANN. § 2106(b) (West 2007).
50. See CAL. PROB. CODE § 259 (West 2007); 755 ILL. COMP. STAT. ANN. § 5/2-6.2 (West 2007); MD. CODE ANN., CRIM. LAW § 8-801(e) (West 2007); OR. REV. STAT. ANN. §§ 112.455-112.465 (West 2007).
51. See, e.g., CAL. PROB. CODE § 259(a)(1) (West 2007); OR. REV. STAT. ANN. § 112.455(1) (West 2007).
52. Illinois, Pennsylvania, and Oregon require a conviction. See supra note 48.
53. See e.g., CAL. PROB. CODE § 259 (West 2007).
55. OR. REV. STAT. ANN. § 112.455(1) (West 2007).
56. OR. REV. STAT. ANN. § 112.457 (West 2007).
57. Financial abuse or exploitation of the elderly is significant, although "no one knows precisely how many older Americans are being abused, neglected, or exploited." See NATIONAL CENTER ON ELDER ABUSE, FACT SHEET: ELDER ABUSE PREVALENCE AND INCIDENCE (2005). Some studies estimate that only one in 25 cases of financial exploitation is reported, suggesting that there may be as many as 5 million victims a year. Id. For a downside application of technology, see Eric L. Carlson, Phishing for Elderly Victims: As Elderly Migrate to the Internet Fraudulent Schemes Targeting Them Follow, 14 ELDER L.J.
population is quite real. Nevertheless, equating intentional killing with financial abuse seems lopsided in theory if not in statutory efficiency. The clear message of the slayer statutes, even allowing for their variation, is a bright line of societal condemnation of the act, underscored by a denial of the slayer’s unjust enrichment. The Oregon statute loses that clarity with the addition of financial abuse and further reduces the singular focus on the reprehensibility of the offending act by allowing the mere passage of time to cure its consequences. Neither theory of decedent’s intent or public policy would seem to offer support.

III. HEIRS’ MISCONDUCT IN THE CONTEXT OF SUCCESSION LAW REFORM

These limited statutory iterations on heirs’ misconduct suggest that the legislative preference for non-intervention, observable over time, continues. There is a reactive feel to these legislative pronouncements, especially noticeable in the patchwork of misconduct required, the underlying theories, and approaches to consequences. Unlike the striking similarity of heirship tables over time and borders, these disinheritance statutes generally lack certainty and clarity of purpose and vision. Nevertheless, they offer, sotto voce, a conversation among the three actors—decedent, legislator, and judge—in determining who should receive the decedent’s property and who should decide. There are two threads to this conversation.

The first thread of the conversation concerns the misconduct, dividing easily between murder and the others. The near universality of some version of a slayer statute attests to its strong public policy underpinnings, which traditionally trump the individual decedent’s intent. Murder is an extreme and egregious act that threatens the safety and stability of all, and a murder that leads directly to a pecuniary gain, fixed by statute, for the murderer is destructive of legal order. It simply cannot be tolerated. A decedent’s particular intent is irrelevant. This is not a conversation, it is a monologue. Society’s interest drowns out the decedent’s particular voice.


58. Violent crime rates have been declining since 1994 with the lowest level reached in 2005. For a significant number of victims, there is a family link between the victim and the slayer and hence to the inheritance. From 1976 to 2004, about 11% of all murder victims were determined to have been killed by an intimate; for women victims the rate is 18%. In 2002, 43% of murder victims were related to or acquainted with their assailants. Two-thirds of murders of children under the age of five were committed by a parent or other family member. BUREAU OF JUSTICE, CRIME CHARACTERISTICS: SUMMARY FINDINGS (Apr. 2007), http://www.ojp.usdoj.gov/bjs/cvictc.htm.

59. Except for Louisiana and Wisconsin, see discussion supra at notes 24-30.
The other types of misconduct lack this strength and clarity. Their range is limited in scope (adultery, abandonment and abuse) and in legislative concern (less than a third of states). This misconduct is of a lesser stature. It is of general concern but is neither a direct threat to society nor the direct cause of the decedent’s death. Unlike the act of murder, these involve not an isolated act but generally a course of conduct over time. Theoretically this time allows the aggrieved party time to evaluate, perhaps even reconcile, and then set forth her own dispositive wishes. If those wishes include forgiveness, the forfeiture statutes, by their definitional requisites, are generally not triggered. For this lesser misconduct, there is a conversation. It is a dialogue between the decedent and the legislature, begun by the legislature by culling out this misconduct, but finished by the decedent. The judge is merely the go between.

The second thread of conversation concerns the roles of all three actors—decedent, legislator and judge—and registers in the context of succession law reform. The two broad areas of succession law reform focus on the demographics of changing families and the realities of modern property. The Uniform Probate Code moves beyond the historic paradigm of one-husband-one-wife-for-life and recognizes the modern reality of blended families. It provides, for example, an inheritance scheme based on whether the decedent and the surviving spouse have some, all, or no children in common. Similarly, the proliferation of property and its new forms of titling have revolutionized the passing of property at death, often by privatizing its passing, and thus, bypassing the probate process completely. Both of these major expressions of succession law reform fundamentally recognize that a one size fits all approach to inheritance no longer reflects the realities of modern life.


63. See Langbein, supra note 61, at 1108-15.
This recognition may similarly be audible in the newer disinheritance statutes. When a legislature moves from an objective rule to a grant of discretion, it essentially recognizes that a single rule no longer works. In this view, the legislative function becomes two tiered. First, the legislature must identify the particular misconduct it wishes to address. Second, it must locate that misconduct between the two poles of decedent’s intent and public policy. Virtually all legislatures have placed a decedent’s murder squarely within the realm of public policy buttressed by a legislatively presumed intent, to the exclusion of the decedent’s particular intent. On the other hand, the few jurisdictions that have statutory bars for adultery generally locate that bar within the realm of the decedent’s intent by defining the misconduct in terms of the subsequent intentional actions of the decedent and spouse. A legislative grant of discretion to a judge represents a legislative determination that the misconduct it has identified cannot be so easily located for inheritance purposes. The proper resolution of the legislative concern requires a particularized determination, and that determination cannot, as a practical matter, be made by the legislature, but in the judgment of the legislature it is not to be made wholly by the decedent, either. The judge, then, is asked to actively join the conversation in order to balance decedent’s intent and public policy under the circumstances.

From a centuries’ old tradition based on the certainty and stability of nondiscretionary objective rules, this legislative grant of subjective discretion over the disposition of a decedent’s property is extraordinary. One would expect, therefore, that the misconduct that causes the legislature first to override its long standing reluctance to create a statutory disinheritance, and then to take the additional and extraordinary step of granting discretion to a probate judge, must be very sensitive. It is not surprising, therefore, that child abandonment and mercy killings are two circumstances where the competing policies of decedent’s intent and public policy raise especially difficult issues.

Childhood from 0 to 18 encompasses the broadest range of human physical and intellectual growth and development. Yet legally for inheritance purposes, a child, whether of 17 months or 17 years, is deemed to lack testamentary capacity and hence unable to form testamentary intent. Similarly, a child’s statements or actions are legally irrelevant for the disposition of the child’s property. By allowing a judge to consider the

64. There may well be a multiplicity of concerns, but for purposes of this paper the primary perspective is the bilateral tension between the individual decedent’s particular intent and society's collective judgment in light of the misconduct. See Gary, Laws to Changing Families, supra note 5, at 6-13.
65. See discussion supra at notes 20-33.
66. See discussion supra at notes 13-19.
67. See discussion supra at notes 43-44.
abandonment in light of this particular child, the child’s intent may emerge and be honored. Whether or not a judge can discern a particular intent for the child, the judge must then balance that intent, particular or generic, against a matrix of public policies that include protecting a vulnerable population, the legal duty of a parent to support a child, privacy in family matters, respect for the rule of law, and institutional efficiency. The lifelong abandonment of a 13 year old child decedent differs greatly from the 13 month abandonment of an almost 18 year old child decedent. Now two legislatures statutorily recognize that reality and allow for a more nuanced approach by substituting the closer voice of the judge for its own remote pronouncement.

Mercy killing similarly presents a difficult issue today. It also offers a striking contrast to the assumed slayer statute paradigm of the murderous beneficiary. In the celebrated 19th-century case of Riggs versus Palmer, a grandson kills his grandfather in order to receive his inheritance. In the absence of a controlling New York statute, the court upholds the disinheritance based on the equitable principle that a wrongdoer shall not profit by his wrongful act. The near universal adoption of a slayer statute confirms the soundness of this judgment. On the other hand, consider the case of a husband married more than 60 years to his adored wife. Now suffering terribly from a terminal illness, she begs her husband to end her suffering. He reluctantly and sadly, but knowingly and intentionally, acquiesces. For some people, these two killers, the grandson and the husband, do not occupy the same moral position. By granting discretion to a judge, the legislature acknowledges the possibility that these two killings can, and perhaps should, be differentiated and have a different impact on the disposition of the decedent's property. For two jurisdictions, the conversation is allowed to continue past the mere fact of the act. The final word belongs to the judge, who now must balance society’s collective concerns against killing with the particular facts of the case.

These disinheritance statutes, originally limited to a single voice, now encompass a fuller range of sound.

IV. CONCLUSION

The changing landscape of modern families and property necessitates an ongoing reconsideration of intestate statutes for the devolution of property. Concerns about an heir’s misconduct have historically only been modestly

68. 22 N.E. 188 (N.Y. 1889).
69. For a similar, real-life scenario, see Sherman, supra note 23, at 804.
70. The Wisconsin statute goes even further by also providing that a decedent can opt out of the slayer statute, thereby removing both judge and legislator from the conversation. The sole voice belongs to the decedent. See discussion supra, at notes 27-28.
addressed within intestacy, and that remains true today. Nevertheless, recent disinheri-
tance statutes have moved beyond the tradition of an objective rule to granting a judge discretion in certain sensitive circumstances. This legislative grant of discretion is extraordinary. It may mark the beginning of a subjective approach in the disposition of intestate property, one that in balancing the intent of the decedent against society’s general public policy in very limited circumstances of heirs’ misconduct places a thumb on the scale in favor of the decedent’s particular intent. For a system premised on the importance of decedent’s intent, it is a step in the right direction and bears watching.