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It’s the 21st Century. . .Time for Probate Codes to Address Family Violence: A Proposal That Deals With the Realities of the Problem

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IT'S THE 21ST CENTURY. . .TIME FOR PROBATE CODES TO ADDRESS FAMILY VIOLENCE: A PROPOSAL THAT DEALS WITH THE REALITIES OF THE PROBLEM

I. INTRODUCTION

It is an understatement that family violence is one of our nation's most pressing problems. In general, the relationships within our families are the first ones we know and often remain the most personal. "It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[1] The hidden tragedy of family violence is not the physical bruises that may develop and eventually will go away, but rather it is the emotional beating that will continue for the rest of a victim's lifetime. Family violence destroys or disfigures these precious personal relationships and this everlasting effect, taken as a collective whole, often carries over into other aspects of our society.[2]

In the past thirty years, our society has begun to recognize the severity and ugliness of family violence.[3] The invisible walls created by the sanctity of

1. Moore v. East Cleveland, 431 U.S. 494, 503-04 (1977).

2. Marva Bledsoe, *Domestic Violence is a Serious Problem*, *in* DOMESTIC VIOLENCE 15-18 (Tamara J. Roleff ed., 2000). "The trauma goes beyond the pain of any one episode. Once begun in a relationship, a pattern of violence will escalate both in frequency and severity. Worse, abuse in the home today leaves its mark on the future. Family violence is cyclical in nature. . ." *Id*. at 17. Although batterers are not usually abusive in their work environments or in relationships with people outside the family, an abusive pattern is likely to exist in relationships with others. MICHELE HARAWAY & MARSALI HANSEN, SPOUSE ABUSE: ASSESSING & TREATING BATTERED WOMEN, BATTERERS & THEIR CHILDREN 27 (Patricia Hammond ed., 1994). Further, in 30-70% of spousal abuse cases there exists child physical or sexual abuse. *Id*. ". . .The consequences of domestic violence involve all family members, with children being the *unintended victims*. . ." Gayla Margolin, *Effects of Domestic Violence On Children*, *in* VIOLENCE AGAINST CHILDREN IN THE FAMILY AND COMMUNITY 57 (Penelope K. Trickett et al. eds., 1998). *See infra* notes 3, 30, 31, 32 and accompanying text.

3. *See infra* note 38. Social-Welfare expenditures by federal and state authorities rose from less than 12% of the gross national product to 20% from 1965 to 1975. Philip Jenkins, *The Seriousness of Domestic Violence is Exaggerated*, *in* DOMSTIC VIOLENCE, *supra* note 2, at 19, 20.

However, it has been argued that the increase in reports of family violence is not due to an increase in abusive behavior, but rather, it is the result of family members recognizing the increase in availability of protective services and an increase in a willingness to use these services. Thus, coupled with a very broad definition of abuse, a spiral effect was created. More services were created, therefore, more incidents were reported and so on. *Id*. at 19-24. Also

marriage have been corroded by time and constant pressure from the intolerance of a growing portion of our society.[4] Our legal system has lagged behind, but recently it has begun to peer through the cracks in those walls and punish those it finds guilty of family violence.[5] However, the legal assault on family violence has not been unified. Where states have increasingly adopted criminal statutes against this problem, legislatures in almost all of the fifty states and the drafters of the Uniform Probate Code (UPC) have either neglected or have refused to create family property laws which address family violence.[6] Specifically, only one state has adopted a probate code section that disqualifies an heir from his or her right to inherit through intestate succession,[7] elective share,[8] homestead allowance,[9] or any other statutory allowances[10] for a pattern of physical violence directed towards the decedent.[11]

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leading to an exaggerated number of instances of abuse may be laws which were passed to strengthen these protective services requiring doctors, teachers, etc. to report suspected instances of family violence. *Id*.

4. *See infra* notes 38, 56, 105 and accompanying text.

5. State legislatures have passed penal codes against deaths *resulting* from patterns of family violence. *See infra* note 105.

6. *See infra* notes 55, 56, and accompanying text.

7. Intestate refers to a person dying without a valid will. LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 12-13 (David L. Shapiro et al. eds., 2nd ed. 1997). Intestate succession is the distribution of the property of an estate in accordance with the appropriate intestate succession statutes. *Id.* at 13.

8. Elective share is a spouse's statutorily created right to take against an existing will of the deceased spouse. WAGGONER ET AL., *supra* note 7, at 526. An elective share may also be described as a "forced share," and all but one of the "separate property states" have decided that surviving spouses need protection from disinheritance. *Id*. Georgia is currently the only "separate property state" that does not recognize an elective share. *Id*. at 526 n.11. As opposed to "separate property states," "community property states" do not have an elective share. *Id*. at 520. These states allow the surviving spouse to own a half interest upon property that was in the "fruits of marriage." *Id*. Since, the surviving spouse has already been taken care of with this marital property, "community property states" allow complete denotative freedom to the deceased "over his or her separate or individual property and over his or her half of the community or marital property." *Id*. Only nine states are in effect community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. *Id*. at 519. Wisconsin's adoption of the Uniform Marital Property Act made it a community property state. *Id*. at n.4.

9. Homestead allowance laws give a decedent's dependant survivors a right to occupy certain real estate owned by the decedent. *Id*. at 577-578. These laws vary as to what rights are given. *Compare e.g.,* MINN. STAT. ANN. § 524.2-2803 (2000) (provides for no ceiling on property value at all) *with* ALA. CODE § 43-8-110 (2000) (provides a ceiling of property value of $30,000) *and* ALASKA STAT. § 13.12.402 (2000) (providing a homestead allowance of $27,000) *and* MO. REV. STAT. § 474.290 (1999) (provides for a ceiling of $15,000). The UPC is very different than traditional homestead allowances. It provides a money substitute, up to fifteen thousand dollars, to be given to the surviving spouse and/or issue. U.P.C. § 2-402 (1993).

10. In addition to the homestead allowance a surviving spouse (or surviving children of the decedent if there is no surviving spouse) has a statutory right to a specified amount of value from

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Although one goal of a probate code and its laws of intestate succession is to give effect to the probable intent of the deceased, it is common for the UPC and state legislatures to address public policy issues within their respective codes.[12] An alternative rationale "for adopting a particular distributive pattern

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the estate in household furniture, automobiles, furnishings, appliances and personal effects. *See*, *e.g*., U.P.C. § 2-403 (1993). Under the U.P.C. this amount may be as much as $10,000. *Id*. This allowance is referred to as exempt property.

In addition to a right to exempt property and homestead allowance, a decedent's surviving spouse and minor children under the decedent's support are entitled to an allowance in money out of the estate for their maintenance during the period of administration. *See e.g.,* U.P.C. § 2-404 (1993). This is entitlement is referred to as a family allowance.

These two statutorily created entitlements of the decedent's estate are not chargeable against any benefit or share passing to the recipient through a will, intestate succession, or elective share. *See, e.g.,* U.P.C. § 2-403; U.P.C. § 2-404.

Probate codes recognize that situations often change in the time a will is completed and when a testator dies. Commonly, surviving spouses, who were not included in a premarital will, and children, who were not born at the time the will was created, are regarded as pretermitted heirs. Code sections entitle these omitted heirs to receive an interest in the decedent's estate. *See, e.g.,* U.P.C. § 2-301 (1993) (allowing an omitted spouse an interest in the estate "no less than the value of the of the share of the estate he [or she] would have received if the testator had died intestate as to that portion of the estate"); U.P.C. § 2-302 (1993) (entitling an omitted child a share in the estate). These rights are conditioned upon several situations described within the statutes. Generally, these statutes will not grant these interests if the intent of the testator was to leave the heir out of the will and that intent can be shown. *See, e.g.,* U.P.C. § 2-301 (refusing a surviving spouse's entitlement if "(1) it appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse; (2) the will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or (3) the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence").

11. *See* CA. PROB. CODE ANN. § 259 (2000) (deeming any person, who is "liable for physical abuse, neglect or fiduciary abuse of the decedent, who was an elder or dependent adult" as predeceasing the decedent). This statute is discussed further below. *See infra* notes 130-135 and accompanying text.

12. Several states have statutes barring an heir from inheritance for specific acts of misconduct. *See infra* note 56. These statutes are based more upon the norms of society than upon the probable intent of the deceased. *Id.*

The existence of a parent-child relationship is another area where probate codes consider public policy concerns. The issue of inheritance by dead-beat parents and their families is often addressed. These statutes are intended to punish parents who do not fulfill their paternal duties as defined by society. *See, e.g.,* MO. REV. STAT. § 474.060 (2000) (adopting that even in situations where paternity has been established it is "ineffective to qualify the father or his kindred to inherit from or through the child, unless the father has openly treated the child as his, and has not refused to support the child"); U.P.C. § 2-114 (c) (1993) ("inheritance from or through a child by either natural parent or his [or her] kindred is precluded unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child"). Inheritance by or from an adopted child is also dealt with by many codes and jurisdictions differ upon the appropriate method of addressing the public policy issue. *Compare* FLA. STAT. ANN. § 732.108(1) (b) (West

in an intestacy statute is that it serves society's interests. . . If society's well being requires a distributive pattern different from the determined wishes of intestate decedents, the decedent's wishes should be subordinated."[13] State legislatures and the UPC, however, have remained eerily silent on the issue of family violence.[14]

Following the lead of Robin L. Preble's proposed statute against succession rights of abusive heirs,[15] which was the first to address many of the issues presented in this article, the proposal presented in this article addresses the issue of family violence and disqualifies abusive heirs from their property rights received after the death of the battered decedent. However, unlike Preble's earlier proposal, the family violence proposal follows the mold that the UPC and states have used for statutes regarding similar public policy issues

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2000) ("adoption of a child by a natural parent's spouse who married the natural parent after death of the other natural parent has no effect on the relationship between the child and the family of the deceased natural parent") *with* PA. CONS. STAT. ANN. § 2108 (West 2000) ("an adopted person shall not be considered as continuing to be the child or issue of his natural parents except in distributing the estate of a natural kin, other than the natural parent, who has maintained a family relationship with the adopted person").

Another example of probate codes applying public policy into intestate succession over the possible intent of the decedent is in the issue of "half bloods." Half bloods are descendents "from one of the decedent's ancestors, but not from a pair of them." WAGGONER ET AL., *supra* note 7, at 54 n. 35. Throughout the history of the idea of intestate succession, codes have adhered to the policy that property should stay within the family. *Id*. at 32. Therefore, family members who were not within the bloodline of the deceased are generally not considered heirs of the decedent, except of course the surviving spouse. *See*, *e.g.,* MO. REV. STAT. § 474.010 (2000) (provides the general rules of descent, but only allows relatives of non-blood to take property if the estate is going to escheat to the state); U.P.C. § 2-103 (1993) (allows the estate to escheat before non-bloods, other than the surviving spouse, can take property through intestation). In a minority of jurisdictions, this policy of keeping property within the decedent's bloodline is applied very literally to half bloods. *See* FLA. STAT. ANN. § 732.105 (2000) (adopting that when part of the collaterals are of the whole blood and part is of half blood, "those of half blood shall only inherit only half as much as those of the whole blood"); *see also* MO. REV. STAT. § 474.040 (2000); TEX. PROB. CODE ANN. § 41 (West 1999). *But see e.g.,* ALA. STAT. § 43-8-46 (2000) ("Relatives of the half blood inherit the same share they would inherit if they were of the whole blood"); ARIZ. REV. STAT. § 14-2107 (2000) (providing no descent differences between half bloods and whole bloods); *see also* DEL. CODE ANN. tit. 5 § 506 (2000); HAW. REV. STAT. § 532-8 (2000); IDAHO CODE § 15-2-107 (1999).

13. Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 324. "There are four identifiable community aims: (1) to protect the financially dependent family; (2) to avoid complicating property titles and excessive subdivision of property; (3) to promote and encourage the nuclear family; and (4) to encourage the accumulation of property by individuals." *Id*.

14. *See infra* notes 55, 56. *But see supra* notes 115-120 and accompanying text.

15. Robin L. Preble, *Family Violence and Family Property: A Proposal For Reform*, 13 LAW & INEQ 401 (1995).

and employs a clear and convincing evidentiary standard.[16] This standard guarantees fairness and justice to the accused batterer, but also recognizes the realities of family violence and the tendency for silence to reign over the family.

One of most troublesome side effects of family abuse is the family's reluctance to involve and notify outsiders of the abuser's actions.[17] This silence on its face seems unexplainable, but experts believe that the silence may be the result of social pressures,[18] fear for physical safety,[19] fear of losing their family,[20] and psychological effects resulting from the abusive situation.[21] Regardless of the cause for a victim's reluctance to ask for help, his or her silence cannot be ignored and must be incorporated into a statute against the attainment of family property rights by an abuser from a deceased victim.

The higher burden of proof upon the accuser protects the wrongfully accused,[22] but it allows a wide range of evidence to be admitted into court.[23] The scope of admissible evidence is not limited to existing civil or criminal records of the benefiting family members. Even though the existence of these things would weigh heavily with the court, the proposal is written with the understanding that many instances of family violence go unreported. If abuse goes undetected by traditional legal means, it does not change the fact that it existed and destroyed the lives of the victims. When attempting to confront family violence, a statute should not ignore acts because they go legally unreported.

Part two of this article will discuss the problem of family violence in our society more specifically. Included in this discussion will be the causes and effects of the shroud of silence that may exist. Also included in the second

16. *Id*. at 412-417. *See*, *e.g.,* U.P.C. § 2-503 (1993) (states that writings intended as wills must be established by clear and convincing evidence); U.P.C. § 2-104 (1993) (requires that an heir survive the decedent for 120 hours must be established by clear and convincing evidence); U.P.C. § 2-507 (c) and (d) (1993) (creates presumptions that the testator intended a subsequent will to replace a prior will or merely to supplement an already existing will are created if the subsequent will makes a complete disposition of the testator's estate or not, unless it is rebutted by clear and convincing evidence). *See*, *e.g.*, ALA. STAT. § 26-17-5 (2000) (allowing a presumption of paternity to only be rebutted by clear and convincing evidence); ALASKA STAT. § 13.12.104 (2000) (requiring clear and convincing evidence that an heir survives the decedent by 120 hours); MO. REV. STAT. § 474.060 (2) (2) (2000) (applying a clear and convincing evidentiary standard to establish paternity after the death of the father); GA. STAT § 53-3-6 (2000) (allowing a presumption of an intent to revoke a will rebutted only by clear and convincing evidence). *See* proposed statute section (A).

17. *See infra* notes 39, 40, 46, 49, 50, 100 and accompanying text.

18. *See infra* note 39, 40.

19. *See infra* note 46, 47 and accompanying text.

20. *See infra* note 41, 42, 44.

21. *See infra* note 49, 50.

22. *See infra* notes 91-93 and accompanying text.

23. *See infra* notes 97-101 and accompanying text.

section of this article will be an examination of the current systems regulating family property rights and their inadequacies. Part three will contain the proposed statute and the advantages it offers. Further, part three will compare the proposal to ones made in the past, and in particular it will explain and support the presence of a clear and convincing evidentiary standard. Part four of this article will provide examples of support for a change and discredit arguments against it. Part five concludes that not only a statute that addresses family violence is needed, but also it cannot ignore the reality that many acts of violence are legally unreported. The purpose of this article is not only to make a proposal that will address family violence in regards to family property rights, but also to do so in a way that is practical and addresses the entire problem. The statute recognizes it is important not to exclude the many families that have been torn apart by family violence, but have not yet taken legal action.

II. BACKGROUND

In order to understand why a statute barring inheritance rights for a pattern of family violence is needed it is necessary to examine the problem of family violence in the United States and to discuss the inadequacies of the current approaches employed by all fifty states.

A. The Realities of Family Violence

"The American family and the American home are perhaps as or more violent than any other single American institution or setting. . . Americans run the greatest risks of assault, physical injury, and even murder in their own homes by members of their own families."[24] A person is battered by his or her spouse or cohabitator every fifteen seconds in the United States and one in four murders involves family relationships.[25] Some studies report that 3.8 to 8.7 million couples experience violence and that family violence "is the single major cause of injuries to women, more than stranger rapes, muggings, and automobile accidents combined."[26]

Children and other family members are also affected by family violence. Children who grow up in violent homes create violent environments within their subsequent families, and children who are abused are more likely to be

24. MURRAY A. STRAUS, ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 4 (1st ed., 1980).

25. Bledsoe, *supra* note 2, at 16.

26. HARRAWAY ET AL., *supra* note 2, at 22-23 (recognizing that the number of incidents varies due to different definitions of battering and samples selected).

Not all family violence is perpetrated by the husband or father, males constitute five percent of the victims of spousal abuse. Bledsoe, *supra* note 2, at 16; *see infra* note 37.

violent towards their parents and other siblings.[27] These unfortunate effects are magnified by the fact that the number of children reported as abused or neglected in the United States grew by thirty-three percent during the 1990's and it is estimated that over 1,071,000 children were abused in 1999.[28] Sadly, abuse often occurs before the child is even born because acts of family violence do not cease when the battered women is pregnant.[29]

The walls of the home do not effectively contain the dangerous consequences of family violence, they can be observed in other areas of our society. Availability of emergency hospital care must be a concern when one-third of all visits are "domestic violence-related."[30] Ultimately, our economy is significantly affected by the three to five billion dollars of economic loss created by "abuse-related absenteeism" from work.[31] This high number does not include the one hundred million dollars spent on medical expenses resulting from domestic assaults per year.[32] We can no longer afford to view family violence as the family's private problem.

It is hard to point to one factor that has contributed the most in allowing family violence to become such a plague on our society. Certainly alcohol, drugs[33] and the male dominance in our society[34] have contributed to the

27. RICHARD J. GELLES, FAMILY VIOLENCE 21 (2nd ed., 1987). "Sixty-three percent of boys ages 11-20 who commit homicide kill the man who is beating their mother." Bledsoe, *supra* note 2, at 16. Male children within a family where their father abuses their mother are "700 times more likely to use violence in their own lives." Lenore Walker, *The Battered Women Syndrome Defense*, *in* BATTERED WOMEN 82, 86 (Louise Gerdes ed., 1999).

28. Prevent Child Abuse America, *Reports of Child Abuse & Neglect Grew 33 Percent in the 1990's* (March 13, 2001), *available at* http://www.preventchildabuse.org/media/03_13_01_3.html.

29. HARAWAY ET AL., *supra* note 2, at 25. Twenty-five percent of all battered women are abused during their pregnancy. Bledsoe, *supra* note 2, at 16. "Researchers describe the high incidence of battering during pregnancy as being the result of the batterer's frustration that someone other than himself (the growing fetus) has an impact on her." HARAWAY ET AL., *supra* note 2, at 25.

30. Bledsoe, *supra* note 2, at 17.

31. Bledsoe, *supra* note 2, at 16; It was estimated that in 1980, 175,500 workdays were lost due to acts of family violence. GELLES, *supra* note 27, at 13; Violence against women has several effects upon our nations economy. Johanna R. Shargel, *Federal Protection: The Violence Against Women Act, in* BATTERED WOMEN, *supra* note 27, at 75, 77 –78. These effects include: lost productivity in the work place, increased healthcare and security costs, higher turnover rates and depredation of employment opportunities caused by fear of abuse. *Id*.

32. Bledsoe, *supra* note 2, at 16.

33. Many batterers are alcoholics, but this cannot be used as an excuse for their violence. Researchers have found that after a batterer is treated for alcoholism he or she remains violent towards their spouse. HARAWAY ET AL., *supra* note 2, at 26. Research further indicates that abusers tend to do most of their battering while they are sober. *Id*. However, it may be argued that substance abuse is a cause of family violence. Jerry P. Flanzer, *Alcohol Abuse Causes Domestic Violence*, in DOMESTIC VIOLENCE, *supra* note 2, at 54. "The Violent perpetrator, stressed by AOD [alcohol or other drug], is less likely to be able to manage anxiety in the

problem, but our society's historic view on family violence definitely has been a significant factor.[35] For most of the twentieth century, courts and prosecutors "did not believe that formal prosecution was appropriate and that rehabilitation was the goal."[36] This belief was supported by the attitude of community members who were hesitant to enter into a "private matter of the family."[37] However, since the 1970's there has been considerable pressures to take a different approach and many states have adopted criminal statutes against family violence.[38]

A particular question that often arises is why doesn't the battered individual say or do something to prevent the abuse. The fact is that many victims attempt to leave, but several factors make it hard to do so successfully.[39] One reason victims of family violence stay with the abuser is a

external world and, supported by the external world's acceptance of violence, more likely to exacerbate his or her dysfunctional behavior. He or she will drink more *and* hit more." *Id*. at 62.

34. This feminist perspective is based upon the idea that men have held higher positions within society for centuries, and have kept them by subordinating women. Loretta J. Stalans & Arthur J. Lurigio, *Two Perspectives on Domestic Violence*, *in* BATTERED WOMEN, *supra* note 27, at 15, 18-19. In this Perspective, domestic violence is seen as another way of gaining and maintaining control over the less powerful women and children of the family. *Id*. Support for this perspective may be seen in study results that show that twenty percent of Americans believe that on appropriate occasions it is acceptable to hit a spouse. HARAWAY ET AL., *supra* note 2, at 27. In fact, the expression "the rule of thumb" is derived from English case law providing a husband the right to hit his wife with a rod no wider than the width of a thumb. Barbera J. Hart, *The Legal Road to Freedom, in* BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE, 13, 14 (Marsali Hansen & Michele Haraway eds., 1993).

35. Stalans et al., *supra* note 34, at 19-20. Husbands used the excuse of chastisement until the nineteenth century when laws were passed to punish offenders of spousal abuse. These laws were created on the notion that "the moral sense of the community revolts at the idea that the husband may inflict personal chastisement upon his wife, even for the most outrageous conduct." *Id*. at 19. These laws were rarely effective at dissuading acts of violence committed against one's spouse because they were rarely enforced. *Id*.

36. *Id*. Domestic violence was considered a matter to be kept out of public view. Statutes were created that did not allow police to arrest a suspected abuser unless the act of violence was witnessed by an uninterested third party. *Id*.

37. *Id*.

38. *Id*. at 19-20. The woman's movement of the seventies stressed that spousal abuse was a public concern and lawsuits were filed against police departments for failure to provide equal protection to abused women. *Id*.

39. HARAWAY ET AL., *supra* note 2 at 23-24. Statistics indicate that an average of seven attempts are made to leave the abuser before a victim is successful. *Id*. However, "when a battered women leaves her batterer and seeks help from another, inability to obtain emotional support is the most common reason for returning to the abusive situation." *Id*. Too frequently, victims attempting to leave reach out for friends and relatives only to be told that they should try harder to make the marriage work. Often helpers do not realize the physical danger that the abused is in. *Id*. "Some of the reasons women *do not* break off relationships with abusive husbands are that: (1) they do have negative self-concepts; (2) they believe their husbands will reform; (3) economic hardship; (4) they have children who need a father's economic support; (5)

lack of financial resources, which may make the individual dependent upon the batterer.[40]

Another reason for the silence is the fear of losing one's family to the batterer. Many abusers attempt to get custody of any children a couple may have as an attempt to remain in psychological control over the victim and courts often oblige.[41] Eighty-five percent of the time women receive custody, but this is due largely to the fact that fathers often do not contest them.[42] A 1989 Massachusetts state government report showed that in seventy percent of the cases where fathers did contest giving the mother full custody, judges granted sole custody to the father or joint custody.[43] Many states have passed laws that require judges to apply substantial weight to incidents of family violence in the determination of custody, but many judges frequently dismiss

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they doubt they can get along alone; (6) they believe divorcees are stigmatized; and (7) it is difficult for women with children to get work." GELLES, supra note 27, at 109 (summarizing the findings in E. Truninger *Marital Violence: The Legal Solutions*, 23 HASTINGS L.J. 259-276). Yet another factor that may keep victims of family violence silent is the private nature of the family. *Id*. at 17.

"The question is no longer "why don't they leave?". . . The questions now are 'Why aren't they safe when they leave?' and 'What can we do to help them stay gone?'" Stephanie Rodriguez, *Is Leaving Better?, in* BATTERED WOMEN, *supra* note 27, at 111, 113.

Sarah Buel, a victim of spousal abuse recalls her difficulties attempting to leave her abuser, "We go back because we think we'll figure out a way to stop the violence, the magic secret everybody else seems to know. We don't want to believe that out marriage or relationship failed because we weren't willing to try just a little harder. I felt deeply ashamed, that it must be my fault. I never heard anyone else talking about it. I assumed I was the only one it was happening to." Hara Estroff Marano, *From Battered Women to Advocate*, *in* BATTERED WOMEN, *supra* note 27, at 121, 125.

Of course men are victims of family violence too and they share many of the same reasons for not seeking help or leaving their spouse. Phillip W. Cook, *Female Violence Against Men is a Serious Problem*, *in* DOMESTIC VIOLENCE, *supra* note 2, at 25, 26-28. Abused men must deal with ridicule and isolation that is different than that witnessed to by women. *Id*. at 30-31. The police may arrive at the scene and laugh about the incident or a man's male friends or family members might believe the man did something to deserve the attack. *Id*. at 30. A man has fewer places he can turn to for guidance and help because there are "no victim's advocates, no crises lines, no support groups, no media recognition, no shelters, and a pervasive attitude that supports a macho 'I can handle it. . .I must be the strong and responsible one' kind of response." *Id*. All of these things prevent a man from "leaving an abusive relationship, or even acknowledging it." *Id*.

40. Rodriguez, *supra* note 39, at 112. "We trade our poverty for safety. We go back because we don't know what else to do." Marano, *supra* note 39, at 124.

41. *Id*.; Catherine Elton, *Why Courts Award Batterers Custody*, *in* BATTERED WOMEN, *supra* note 27, at 87. "It is in fact common for judges to grant fathers who abuse their wives—even fathers convicted of murdering their wives—custody of their children." *Id*. According to the American Psychological Association, husbands who batter their spouses are twice as likely to seek custody as non-abusive husbands. *Id*. at 88.

42. *Id*. at 87-88.

43. *Id*.; Marano, *supra* note 39 at 124.

them based upon the "remarkable belief" that there is no connection between violence directed towards a spouse and violence towards their children.[44] In actuality, this belief is in direct conflict with research that shows that forty to sixty percent of men who beat their wives also beat their children.[45]

Another powerful reason for victims to remain silent or to stay with their spouse is fear for their personal safety. Often, the danger of abuse does not cease after the spouse leaves. The number of violent acts and resulting murders actually increase when a spouse tries to leave.[46] Unlike incidents of violence from strangers, victims of family violence often cannot completely cut ties with the abuser.[47] Children play a major role in this continued contact, because courts often grant joint custody.[48]

Perhaps the strongest wall, which a battered family member must tear down before he or she may confront the abuser, is the psychological effect created by the abuse itself. Victims often become isolated from peers, family members, and the batterer becomes the emotional support for that person, achieving the control that they so desperately desired.[49] One theory suggests that women in marriages consumed by family violence have much less self-

44. Elton, *supra* note 41, at 88. A majority of states have passed legislation requiring judges to examine incidents of domestic violence in determining custody. *Id.* Several states legislation creates a presumption that it is not in the child's well being to be placed in the custody of an abuser. *Id.*

45. *Id.*

46. HARAWAY ET AL., *supra* note 2 at 30; Rodiguez, *supra* note 39, at 111. The chances of getting murdered increase seventy-five percent after an abused women leaves the battering husband. *Id.* The reason for this astonishing fact is that "Most men who batter are terrified at the thought of separation, and they continue to stalk and harass their victims even after the women leave." Walker, *supra* note 27, at 86. When victims of spousal abuse attempt to leave, abusers "desperately escalate tactics of control." Marano, *supra* note 39, at 125.

47. Stalens et al., *supra* note 34, at 16-17; *See* Beth Sipe, *A Deadly Confrontation*, *in* BATTERED WOMEN, *supra* note 27, at 114.

48. *Id.*; *see supra* notes 41, 42, 43, 44 and accompanying text.

49. HARAWAY ET AL., *supra* note 2, at 62-63; Susan Brewster, *Families and Friends Must Recognize the Danger*, *in* BATTERED WOMEN, *supra* note 27, at 63, 64-65.
One nightmarish example of a victim's loss of control is the story of Hedda Nussbaum. Tamara Jones, *The Women Who Cannot Stop Crying*, BATTERED WOMEN, *supra* note 27, at 102. Nussbaum was a victim of atrocious violence for 12 years, and her emotional scars have still not healed. *Id.* The physical beatings stopped after one last fit of violence and the unfortunate death of the couple's adopted child, but Nussbaum has had to deal with people's beliefs that she was to blame for not protecting her child. The prosecutor, however, felt that she could not be held accountable in the violent environment that had been created. *Id.* at 103. When Nussbaum was mentally examined, she was compared to that of "a hostage or prisoner of war, robbed of her free will and grasp of reality by a tormentor whose approval had come to mean everything to her." *Id.* at 104. Even while lying in the hospital with brain injuries the only thing that Nussbaum could think of was the fate of her attacker. *Id.*

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confidence than women who are in marriages free from violence.[50] The repeated beatings cause the abused spouse to feel as if they have lost control over what happens to them.[51]

Regardless of the exact reason why a particular abused member of a family does not seek help or successfully leaves the abuser, the law should not neglect the rights of these individuals and fail to provide some form of protection. The sheer magnitude of the problem of family violence demands that more needs to be done in all aspects of our society. There should be an increase in legal protections besides criminal statutes. State legislatures should no longer condone family violence, as they did for much of our nation's history,[52] by allowing the recognition of succession rights in the abused decedent's estate.

B. The Inadequacy of The Current Systems Employed

Although each state has its own system of property descent, when it comes to the disqualification of succession rights, they all can be put into two general categories: UPC states and non-UPC states.[53] These categories are divided on their approach to disqualifying spouses from property rights based upon particular patterns of misconduct.[54] The UPC and a majority of states do not disqualify heirs because of misconduct. Only "distinct legal acts" that dissolve

50. GELLES, *supra* note 27 at 122-24. The theory of "learned helplessness," developed by Lenore Walker, is derived from experiments involving laboratory animals subjected to electronic shocks, for which the animal is powerless to control or escape. Eventually, it is learned that they are helpless to avoid the attacks. *Id.* at 123. It is important, however, to note that victims of family violence are not to be confused with lab rats in experiments. These individuals are not as passive and many try to leave. *Id.* People are more complicated, many victims "stay, leave, and return." *Id.*

51. *Id.*

52. *See supra* note 35, 36, 37 and accompanying text.

53. WAGGONER ET AL., *supra* note 7, at 81-82. It is interesting to note that neither group disqualifies an heir for acts of misconduct other than the surviving spouse or dead-beat parent. *See supra* notes 55, 56. The exception is the rule of law followed by almost all jurisdictions that a murderer of the decedent cannot profit from their wrong. *See infra* notes 106, 108. "In some respects, homicide is just another in the list of reprehensible acts that result in forfeiture because denying an heir the right to take accords with the community's sense of justice and likely reflects the decedent's dispositive preference." WAGGONER ET AL., *supra* note 7, at 462. However, homicide is different from other wrongful conduct because of its nexus with the transfer of the property. Inheritance is based upon who dies first, this conduct directly affects this idea and therefore courts have barred an otherwise proper heir from taking property even without statutory authority. *Id.*

54. Generally these acts of misconduct do not include incidents of family violence. *See infra* note 56. *But* see CAL. PROB. CODE ANN. § 259 (West, WESTLAW through 1999-2000 Reg. Sess.) (barring succession rights based upon acts of violence upon an elder or dependent adult); s*ee infra* notes 130-135 and accompanying text.

the family, such as divorce and legal separation may disqualify an heir.[55] However, a handful of states recognize that an individual's conduct may disqualify them from their inheritance rights.[56] These states generally look at acts that constitute abandonment of the family or neglect to the decedent.[57] The rationale used to support these statutes is that these instances of misconduct in effect voluntarily dissolve the marriage and therefore the abandoning spouse does not deserve to inherit from or through the deserted

55. *See, e.g.,* UPC § 2-802 (1990) (comments state, "although some existing statutes bar the surviving spouse for desertion or adultery, the present section requires some definite legal act to bar the surviving spouse"); WAGGONER ET AL., *supra* note 7, at 81.

56. *See*, *e.g.,* KY. REV. STAT. § 392.090 (Banks-Baldwin 2000) (spouse barred if spouse "leaves the other and lives in adultery," unless the spouses "afterward become reconciled and liver together as husband and wife"); MO. REV. STAT. § 474.140 (2000) (spouse barred "if [husband] voluntarily leaves his spouse and goes away and continues to live with an adulterer or abandons his spouse without reasonable cause and continues to live separate and apart from his spouse for one whole year next proceeding death, or dwells with another in a state of adultery continuously, or if any wife after being ravished consents to her ravisher. . . unless such spouse is voluntarily reconciled to him and resumes cohabitation with him."); EST. POWERS & TRUSTS LAW § 5-1.2(a) (5) (6) (McKinney 2000) (spouse barred if spouse "abandoned the deceased spouse, and such abandonment continued until the time of death" or if the spouse "who, having the duty to support the other spouse, failed or refused to provide for such spouse though he or she had the means to do so, unless such marital duty was resumed and continued until the death of the surviving spouse having the need of support"; N.H. REV. STAT. ANN. § 560:19 (2000) (spouse barred "if at the time of the death of either the husband or wife, the decedent was justifiably living apart from the surviving husband or wife because such survivor was or had been guilty of conduct which constitutes cause for divorce"); N.C. GEN. STAT. § 31A-1(a) (3) (b) (2000) (spouse barred if "willfully and without just cause abandons and refuses to live with the other spouse and is not living with the other spouse at the time of such spouse's death"); 20 PA. CONS. STAT. § 2106 (a) (West 2000) (spouse barred if "for one year or upwards previous to the death of the other spouse, has willfully neglected or refused to perform the duty to support the other spouse, or who for one year or upwards has willfully and maliciously deserted the other spouse"); VA. CODE § 64.1-16.3 (A) (2000) (spouse barred if "willfully deserts or abandons his or her spouse and such desertion or abandonment continues until the death of the spouse").

The California legislature has adopted a probate code section that does examine acts of violence, but, as discussed below, it is not necessarily concerned with family abuse. The language of the statute limits its applicability to family abuse situations. *See infra* notes 130-135 and accompanying text.

Many jurisdictions will disqualify a parent for in effect neglecting and abandoning their child by refusing to support them and openly acknowledging the child as theirs. *See infra* note 141.

57. *See supra* note 56. *See generally* 13 A.L.R. 3rd 446-451 (1967) (discussing the forfeiture of rights of dower.).

spouse.[58] Yet, these statutes ignore the dividing effect violence has on the family.[59]

In light of the vast majority of state probate codes ignoring the issue of family violence,[60] our society relies upon two legal actions to disinherit an abusive family member: a divorce or a disinheriting will. However, these two means of dealing with abusive heirs are ineffective because often they are impractical.

The difficulties of speaking out or leaving an abusive family member were discussed above,[61] but under our current system that is exactly what our laws are requiring victims to do in order to bar succession rights of the abusive spouse.[62] Moreover, divorce only deals with part of the problem; it is ineffective when violence involves a child decedent. The divorced parent's ties to the children from the marriage still exist, and the parent or his kindred may still inherit from or through a deceased child. Also, divorce has absolutely no effect upon family members on the victim spouse's side and may actually reward the abusive family member.[63] Since, divorce is often not an option for a victim and does not affect the pattern of family violence from other members of the family besides a spouse, relying upon divorce to deal with family violence is not a wise decision.

One solution to the issue of succession rights and family violence is for the victim to create a will disinheriting the abuser. However, this solution fails because in too many cases it just does not occur.[64] Many people die without a

58. *See generally* 48 A.L.R. 4th 972 § 13(a) 1050-57 (1986) (examining various court decisions applying elective share forfeiture statutes.). *See also supra* note 56.

59. *See supra* notes 27-30. However, there is some evidence of courts examining family abuse to determine that "constructive abandonment" occurred. WAGGONER ET AL., *supra* note 7, at 82; *See infra* note 113.

60. *See supra* note 56.

61. *See supra* notes 39-51 and accompanying text.

62. *See supra* notes 55, 56.

63. The divorced spouse is no longer viewed as the surviving spouse. *See*, *e.g*., U.P.C. § 2-802 (1993) (an individual who is divorced from the decedent. . .is not a surviving spouse unless, by virtue of a subsequent marriage, he [or she] is married to the decedent at the time of death). S*ee also, e.g.,* COLO. REV. STAT. ANN. § 15-11-802 (West 2000); NEB. REV. STAT. § 30-2353 (2000); IDAHO CODE § 15-2-802 (1999).

An abusive member of the family may be awarded by a divorce between the victim and his or her spouse. *See, e.g.,* U.P.C. § 2-103 (1993) (allowing a decedent's parents to take under intestate succession if there is no surviving spouse and no descendents of the decedent); MO REV. STAT § 474.010 (2000) (providing descent to the decedent's father, mother, brothers, sisters or their descendents in equal parts if there is no surviving spouse and no descendents of the decedent); IND. CODE ANN. § 29-1-2-1 (Michie 2000) (providing the entire estate to pass to the surviving parents, brothers and sisters of the decedent if there is no surviving spouse or issue).

64. In almost all non-UPC states have made eighteen the minimum age requirement for the creation of a will. WAGGONER ET AL., *supra* note 7, at 220. Therefore, this "solution" to family abuse is not even available to children.

will and their property passes through intestacy.[65] One study reported that eighty-seven percent of individuals under the age of thirty and sixty-five percent of people under the age of forty-five do not have wills.[66] Estate size and family income play great roles in who creates a will. In estates smaller than $129,000, seventy-two percent did not have a will controlling their distribution.[67] This becomes a problem when one examines the possible effects of "pro-spouse" distribution jurisdictions.[68] For example, under jurisdictions that have adopted the UPC, in an estate valued under $200,000, an abusive spouse could easily receive the entire estate.[69] Many jurisdictions make sure that the spouse is taken care of first before any property is transferred to any other family members.[70] Normally, this idea of providing for the surviving spouse may be seen as a good social policy, but in the case of an abusive surviving spouse and a small estate this amicable goal is perverted into a policy that supports a behavior that destroys and terrorizes the family.

It is not easy to explain why victimized people do not make wills disinheriting an abusive heir. The best explanation probably lies in a combination of human nature and economics. It can be classified as human nature not to want to talk about one's own death, and that is exactly what one is doing when they are preparing a will. No one enjoys thinking about what is going to happen when his or her time comes to leave this world, and people

65. *Id.* at 29-32. Will substitutes, such as joint bank accounts, life insurance, revocable trusts and joint tenancies in property, may contribute to the number of individuals without wills. Will substitutes are designed to avoid probate and are out of the scope of the proposed family abuse statute.

66. *Id.*

67. *Id.*

68. Pro-spouse jurisdictions provide a large sum of money to the surviving spouse before anyone else is allowed a portion of the intestate estate. *See*, *e.g.,* ALASKA STAT. § 13.12.102 (Michie 2000) (depending upon which heirs survive the decedent, the surviving spouse can take the entire estate, the first $200,000 and three-fourths of any remaining balance, the first $150,000 and one-half of any balance, or the first $100,000 and one-half of any balance of the intestate estate); *But see* 755 ILL. COMP. STAT. ANN. 5/2-1 (West 2000) (allowing the surviving spouse the entire estate if there are no descendents of the decedent, but one-half of the intestate estate if there exists any descendents of the decedent); ARK. CODE ANN. § 28-9-214 (Michie 1999) (requiring property to pass first to the children of the intestate and second if the intestate is survived by no descendant, to the intestate's surviving spouse unless the intestate and such surviving spouse had been continuously married less than three (3) years next preceding the death of the intestate, in which event the surviving spouse will take merely fifty percent (50%) of the intestate's heritable estate").

69. *See* U.P.C. § 2-102 (1993) ("providing the surviving spouse "the first $200,000, plus three-fourths of any balance of the intestate estate, if no descendent of the decedent survives the decedent, but a parent of the decedent survives the decedent").

70. *Id.*; s*ee*, *e.g.,* MO REV. STAT.§ 474.010 (2000) ("the first twenty thousand dollars in value of the intestate estate, plus one-half of the balance of the intestate estate, if there are surviving issue all of whom are also issue of the surviving spouse"). *See also supra* note 68.

may rationalize procrastination by convincing themselves that there will be time to make a will later in life. Often, people die before they plan to, and as a result they do not possess a will.

A person's economic situation may play a big role in whether or not he or she creates a will. Perhaps they feel that they have nothing of value to leave their heirs and the little they do have will find its way to the ones they want to have it. Many people may not have the money to hire an attorney to draft a will. Valid wills must follow strict formalities to be given effect.[71] The formalities required may differ within each jurisdiction, but most follow a doctrine of "strict compliance."[72] These formalities may not be known by a layperson and therefore an attorney's expertise is required. Not all jurisdictions recognize holographic wills, which are handwritten by the testator, but even the jurisdictions that do have requirements that must be fulfilled before the will may be admitted to probate.[73] Without the aid of an attorney, one could imagine the horrible circumstance which could arise if a decedent attempted to draft their own will disinheriting an abusive heir, but the will is deemed invalid and therefore is not admitted to probate. Not only is the intention to disinherit the abusive heir clear, but the decedent tried to express that intent to the court. Under the current systems, this intent must be ignored and the invalid will cannot be used to disqualify the abusive heir of his

71. WAGGONER ET AL., *supra* note 7, at 170-199. Generally, there are three formalities that must be met. A will must be in writing, signed by the testator and attested by a specified number of witnesses. *Id*. These formalities may sound simple, but jurisdictions very upon what acts will satisfy each. *Id*. *Compare* Potter v. Richardson, 230 S.W.2d 672 (Mo. 1950) (holding that the location of the testator's name was evidence of intent to make a final act, but was not dispositive) *with* In re Winter's Will 98 N.Y.S2d 312 (1950), *aff'd* without opinion, 98 N.E.2d 477 (N.Y. 1951) (invalidating a will because it did not contain the testator's signature at the end of the document). *Compare* Bain v. Hill, 639 So.2d 178 (Fla. Dist. Ct. App. 1994) (holding that the exact order of signing is not critical if the testator and the witnesses sign as part of a "single transaction") *with In re* Hartung, 145 A.2d 798 (N.J. Super Ct. App. Div. 1958) (rejecting the single transaction idea).

The UPC and a minority of jurisdictions adhere to a doctrine of "substantial compliance." *See* U.P.C. § 2-503 (1993); HAW. REV. STAT. § 560: 2-503 (2000); MICH. COMP. LAWS ANN. § 700.2503 (West 2000); MONT. CODE ANN. § 72-2-523 (2000); S.D. CODIFIED LAWS § 29A-2-503 (Michie 2000); UTAH CODE ANN. § 75-2-503 (2000). Under "substantial compliance," if a will is invalid because of a failure of compliance with all the formalities, the document may be given effect if "the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will. . ." U.P.C. § 2-503 (1993). However, even under this code section a layperson must be careful. This section opens everything to the scrutiny of the court, not just the formality that was not met. The proponent must also meet the clear and convincing evidence standard to validate a will under this section. *Id*.

72. WAGGONER ET AL., *supra* note 7, at 182-89.

73. WAGGONER ET AL., *supra* note 7, at 171. Holographic wills do not need to be attested, but they must be in the handwriting of the testator, signed by the testator and some jurisdictions require that the writing be dated. *Id*.

succession rights. Under the proposed statute this invalid will could be introduced as evidence and the probate court could at least honor the decedent's desire to disinherit that particular heir.[74]

Even if an abused decedent manages to create a disinheriting will,[75] too often the testator's attempt is doomed to fail. Probate systems are designed to protect and support surviving spouses and issue of the testator. Most jurisdictions have statutory created rights and allowances, which enable these members of the testator's family to take against the will or reserve property from the estate to take care of them.[76] Any disinheriting will is trumped on the rationale that public policy requires the protection of a testator's surviving spouse or issue from receiving very little or nothing from the estate.[77] Once again, this protection is misguided in the situation of an abusive heir being allowed rights in the estate of the deceased that he or she abused.

Yet another problem with relying upon an abused individual to write a will disinheriting their attacker is that the option is not available to a minor child. They cannot fulfill the minimum age for the execution of a will.[78] Under our current system of property law, minors can accumulate wealth, but they cannot devise it through a will. Thereby, making it nearly impossible for a child to deviate from the default system of intestacy and barring an abuser from his or her rights of property descent.

The current systems of dealing with the problem of family violence are inadequate. Right now the general policy is to ignore it and allow victims to either divorce or disinherit the abuser. This approach, however, does not recognize the realties of family violence,[79] and is only an attempt to keep the state's head in the sand when it comes to the ugly issue of family abuse.

III. AUTHOR'S PROPOSAL AND ANALYSIS

The proposed statute against family violence is the following:

> (A) If any family member is found, by clear and convincing evidence, to have committed a pattern of family abuse against the decedent, the abuser is barred

74. The court would not be validating that portion of the improperly executed will; rather the court would use the document as evidence showing a pattern of abuse.

75. Not an easy task considering that many of the pressures against a victim leaving an abuser can be applied to a victim creating a disinheriting will. *See supra* notes 39-51.

76. *See supra* notes 8-10.

77. *See supra* notes 8-10.

78. *See supra* note 64.

79. This approach fails to recognize that family violence can be perpetrated by anyone in the family. Also, this approach does not consider the incredible forces against a victim speaking out and taking permanent action against the abuser. *See supra* notes 39-51. Furthermore, this approach does not even recognize that it many cases it is not effective against the abuser. The approach is relying upon the disinheriting will to be given effect in the current probate system. However, the probate system is designed to protect the abusive heir. *See supra* notes 8-10.

from his or her right of inheritance through intestacy, elective share, homestead allowance, exempt property, any omitted heir status that may exist and any statutory allowances from the estate of the abused decedent[80] so long as;

i. the violence occurred within five years of the decedent's death and the decedent was an adult at the time of the abuse; or

ii. the violence occurred within the lifetime of the decedent and the decedent was a minor at the time of the abuse.[81]

(B) The abuser shall be deemed to have predeceased the decedent for purposes of section (A).

(C) Definitions

1. "Family abuse" refers to acts of abuse perpetrated against a family or household member by a family or household member. Acts of family abuse are the following:

   a. physical harm, bodily injury, or assault;

   b. sexual assault [as defined by the jurisdiction's appropriate criminal sexual abuse statute];

   c. infliction of fear of imminent physical harm, bodily injury, or assault; and

   d. terrorizing threats [as defined by the jurisdiction's applicable statutes]

   Such acts do not have to be the subject of any legal action prior to the death of the victim:

2. "Family members" means:

   a. spouses and common law or punitive spouses;

   b. parents and children; and

   c. persons related by blood or through adoption.

80. It is important to note that this statute does not bar an heir from receiving property under a valid will drafted by the decedent. Testamentary freedom is highly regarded in our society. *See* Fellows et al., *supra* note 13. If a person wants to make a devise to an abusive heir, then that intent should be respected.

81. Subsection (A) (i) and (ii) is based largely upon the proposal found in Preble's article. However, that proposal contained evidentiary restrictions that are not included in this proposal and did not contain the clear and convincing evidentiary standard that is contained in section (A) of this present proposal. Preble, *supra* note 15, at 412-17; *see infra* notes 97-102 and accompanying text.

This statute will not only address family violence, but it will do so in a constitutional method, while protecting both the accused and the accusing party.

A. Possible Constitutional Challenges

First, this proposal passes constitutional muster because it is not void for vagueness or a forfeiture of estate upon criminal conviction. A law cannot be so vague that "[persons] of common intelligence must necessarily guess at its meaning and differ as to its application."[82] Vagueness in the conduct a law prescribes "may trap the innocent by not providing fair warning" and may delegate "basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[83] This statute defines the term "family abuse" and refers the reader to any appropriate criminal statute that also contains the definition thereby giving the reader adequate notice of what acts will trigger a disqualification of family property rights.[84] Furthermore, section (A) defines the property rights that are affected by this statute and subsection (C)(2) notifies the reader of the class of individuals that may fall under the provisions of this law.

A second constitutional challenge may derive from many jurisdictions having constitutional provisions that forbid a conviction from "corrupting the blood" of the guilty or causing a "forfeiture of estate."[85] However, slayer statutes had to hurdle these same constitutional provisions.[86] A handful of courts struck down the slayer statutes on the grounds of these constitutional provisions.[87] The purpose prohibiting the state from enacting laws that would take a criminals property rights was to protect innocent family members from the loss of family property and inheritance rights.[88] Unlike the laws that worried the state legislatures to the point of adopting these prohibitions, this proposed statute "would only require that the abuser forfeit certain inheritance interests in the decedent's estate."[89] All other property rights possessed by the abuser would go unaffected.

82. Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

83. Grayned v. Rockford, 408 U.S. 104, 108-109 (1972).

84. *See* proposed statute section (C)(1).

85. *See*, *e.g.,* AK. CONST. art. I, § 15; ARK. CONST. art. II, § 17; COLO. CONST. art. II, § 9; HAW. REV. STAT. ANN. § 831-3 (Michie 2000); IND. CONST. art. I, § 30; NEB. CONST.art. I, § 15; ME. CONST. art. I, § 11.

86. *See* Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 538-45 (1986).

87. *See*, *e.g.,* Hagen v. Cone, 94 S.E. 602 (Ga. App. 1917); Wall v. Pfanschmidt, 106 N.E. 785 (Ill. 1914); Wilson v. Randolf, 261 P. 654 (Nev. 1927).

88. Fellows, *supra* note 86, at 540.

89. Preble, *supra* note 15, at 421; s*ee* proposed statute section (A).

The realities associated with family violence suggest that this statute would not be deemed a forfeiture of estate. Section (B) of the proposed statute ensures that the property rights will pass to the heirs of the decedent, who are probably the heirs of the abuser. Thus, "by forfeiting the abuser's rights and distributing the property to the remaining family members of the decedent, the proposed reform would operate to divert additional property to the non-abusive heirs, rather than taking it from them."[90]

B. The Protections Offered by the Proposed Statute

The proposed statute protects the accused abuser by the clear and convincing evidentiary standard and the five-year statutory limit of admissible incidents of abuse while the decedent was an adult. A high burden of proof exists because the statute requires an accuser to prove clearly and convincing to the court the existence of a pattern of family violence.[91] This evidentiary standard makes sure that strong evidence of incidents of family violence is presented to the court and the word "pattern" included in the statute ensures that relatively minor and isolated incidents of abuse will not be enough to allow the court to bar an accused from his or her inheritance rights.[92] Furthermore, the five-year statutory period prevents remote acts of violence to haunt the accused after the decedent's death.[93] This provision recognizes that couples may go to therapy and work through their problems. This statute is not designed to prevent or to discourage the hard work and love it took to stop the pattern of family violence that had developed.

The accused is not allowed the five-year protection when the abuse occurred while the decedent was a minor.[94] The reasoning for this stricter rule is to "better protect the most vulnerable victims of family violence and to send a clear message to child abusers."[95] Acts of child abuse can have everlasting

90. Preble*, supra* note 15, at 421.

91. *See* proposed statute section (A).

92. *Id.*

93. *See* proposed statute section (A) (i).

94. *See* proposed statute section (A) (ii).

95. Preble, *supra* note 15, at 416-17. It was proposed that a pattern of family violence while the decedent was a minor had to be proven by court documents, which showed "(i) a conviction for family violence by the abuser against the decedent while the decedent was a minor; (ii) actions by governmental authorities to protect the decedent from the abuser; or (iii) a tort judgment against the abuser in favor of the decedent for family violence committed by the abuser against the decedent while the decedent was a minor." *Id*. The rationale of this evidentiary restriction was to ensure that "clear and highly probable evidence to effect forfeiture." *Id*. However, this purpose can be achieved without limiting forfeiture only to situations where legal or governmental action was taken. The clear and convincing evidentiary standard provides practically the same amount of protection to the accused, but also allows the court to examine more evidence of abuse.

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effects upon a child's development both socially and mentally.[96] The proposed family violence statute attempts to make an abuser accountable for their actions against children longer than five years.

The proposed family violence statute also provides protections for individuals making allegations of an existing pattern of abuse. Although the clear and convincing evidentiary standard places a higher burden of proof on parties accusing a family member of violence, the standard allows the statute to permit a wide range of admissible evidence. A past proposal limited admissible evidence to "existing civil or criminal records of the benefiting family members."[97] It was argued that this limitation upon admissible evidence was appropriate because the lesser culpability, compared to an abuser who's acts of violence directly lead to the death of the decedent,[98] required "a higher threshold for the loss of the property interest."[99] However, this limitation on evidence admissible to show a past pattern of family violence completely ignores the reality that many incidents of violence go unreported to the authorities[100] and many never lead to a conviction, arrest or an issuance of an order for protection on behalf of the decedent.[101] Limiting admissible evidence to only these instances excludes medical reports, events witnessed by friends and family, and any otherwise admissible evidence that was not involved in a legal action. With the clear and convincing evidentiary standard protecting the accused, the family members benefiting from this statute are allowed to introduce evidence that may be less reliable and persuasive than

It is important to note that the clear and convincing evidence rule is still applied to abuse involving minors because the accused still deserves protection from the possibility of false or unwarranted accusations. *See* proposed statute section (A).

96. *See supra* note 27.

97. Preble, *supra* note 15, at 414.

98. The proposed family violence statute does not apply to cases where the family violence was the direct cause of the decedent's death. *See* proposed statute section (A). That situation would be left for either the State's slayer statute or, if none exits, then to the State's common law.

99. Preble, *supra* note 15, at 415. "Where homicide is involved, there is a stronger justification for considering any and all evidence of family violence which possibly led to the killing." *Id.*

100. A victim of spousal abuse is likely to complain about everything else, but the violence. HARAWAY ET AL., *supra* note 2, at 36. "Estimates from [the] National Crime Victimization Survey data indicate that only 56 percent of battering incidents are reported to the police. Other research has estimated that as few as 7 percent to 14 percent of battering incidents are reported. Nat'l Research Council, *Criminal Justice Measures*, *in* BATTERED WOMEN, *supra* note 27, at 68, 70.

101. Stalens et al., *supra* note 34, at 18-22; Albert R. Roberts, *The Police Response, in* BATTERED WOMEN, *supra* note 27, at 32, 32-40; Nat'l Research Council, *supra* note 96, at 68-74; Johanna Shargel, *Federal Protection: The Violence Against Women Act, in* BATTERED WOMEN, *supra* note 27, at 75, 75-81.

existing civil or criminal records, but may be the only evidence available to prove a past pattern of family violence.[102]

Prohibiting the inheritance rights of an abusive heir can be done in a method that is both constitutional and realistic. Issues of practicality and privacy remain to be addressed, however, these arguments have already begun to fail in practice. Courts routinely peer behind the walls of privacy, which historically surrounded the family.[103]

IV. SUPPORT FOR REFORM AND GETTING BEYOND THE SANCTITY OF MARRIAGE

The proposed statute in this article is designed to address the realities of family violence. One reality that must be observed is the corrosion of the legal sanctity of marriage, which existed in the past to protect the family from state intrusion.[104] An abuser can no longer hide under a shield provided by the family that he or she is destroying. There are several areas where the law and the courts are refusing to be prevented from applying justice just because it requires looking into the private lives of a family.

As discussed above, slayer statutes now exist in many jurisdictions.[105] These statutes give no regard to the sanctity of marriage. They are designed to

102. *See supra* note 101.

103. *See infra* notes 105, 107, 111.

104. *See, e.g., Moore*, 431 U.S. at 503 ("our decisions establish that the Constitution the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition"); Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925) (recognizing there is a private realm of family life which the state cannot enter). *But see supra* note 56, 107, 111, 130-135, 141 and accompanying text.

105. *See e.g*., ALA. CODE § 43-8-253 (2000) (barring an heir or devisee "who feloniously and intentionally kills the decedent"); DEL. CODE ANN. tit. 12, § 2322 (2000) (viewing the slayer as predeceasing the decedent "as to property which would have passed from the estate of the decedent to the slayer under the statutes of descent and distribution or have been acquired by statutory right as surviving spouse"); LA. CIV. CODE ANN. art. 941 (West 2000) ("a successor shall be deemed unworthy if he is convicted of a crime involving the intentional killing, or attempted killing, of the decedent or is judicially determined to have participated in the intentional, unjustified killing, or attempted killing, of the decedent"); ME. REV. STAT. ANN. tit 18-A, § 2-803 (West 1999) ("estate of the decedent passes as if the killer had predeceased the decedent"); MINN. STAT. ANN. § 525.2-803 (West 2000) ("a surviving spouse, heir or devisee who feloniously and intentionally kills the decedent is not entitled to any benefits under the will or under this article, including an intestate share, an elective share, an omitted spouse's or child's share, homestead, exempt property and a family allowance, and the estate of the decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent"); NEB. REV. STAT. § 30-2354 (2000) ("a surviving spouse, heir or devisee who feloniously and intentionally kills or aids and abets the killing of the decedent is not entitled to any benefits under the will or this article, and the estate of the decedent passes as if such spouse, heir, or devisee had predeceased the decedent").

punish the murderer and prevent a wrongdoer from profiting from their wrongs.[106] This notion of justice was not created by the legislatures when they drafted their slayer statutes, but rather it was developed in the common law and many jurisdictions without the aid of statutory directives have denied succession rights to killer heirs.[107] There is a difference, however, between an heir intentionally killing the decedent and an heir committing a pattern of violence against the decedent. The killer heir intentionally caused the death of the decedent and therefore directly led to the existence of the killer's succession rights. This close relationship between a killer's misconduct and his property rights may create a stronger "moral imperative of preventing a killer from succeeding to the victim's property"[108] than in the case of abusive heir attempting to receive his inheritance, but it provides support for a statute that looks beyond misplaced notions of family sanctity and punishes irreprehensible conduct.

Some jurisdictions bar succession rights based on particular acts of misconduct.[109] These acts of misconduct do not include incidents of family violence, but they do require courts to determine if an individual has in effect abandoned or neglected his or her spouse and family.[110] Again, these determinations often require probate courts to hold trials examining extrinsic evidence regarding the family relationship.[111]

106. WAGGONER ET AL., *supra* note 7, at 462.

107. *See*, *e.g.,* Neiman v. Hurff, 93 A.2d 345, 347 (N.J. 1952) (treating the killer as a constructive trustee, even though no slayer statute existed in New Jersey at this time, because a "wrongdoer shall not enrich himself by his inequity at the expense of an innocent person."); Perry v. Strawbridge, 108 S.W. 641, 648 (Mo. 1908) ("this construction of the existing statute. . .prohibiting a murdered from inheriting from his victim, does not violate our constitutional provision. . .there is no forfeiture of an estate which he has, but is simply preventing him from acquiring property in an unauthorized and unlawful way, i.e., by murder."); In re Tyler, 250 P. 456, 457 (Wash. 1926) ("it is so offensive to good conscience, repugnant to justice, and revolting to the mind of every right thinking person that one should come into court with bloody hands and receive as it were a reward for his iniquity that we cannot conceive that the Legislature composed of persons of good sense and integrity should have intended. . .that such consummation could be accomplished.").

108. WAGGONER ET AL., *supra* note 7, at 462.

109. *See supra* note 56.

110. *Id.*

111. *See In re* Jelloch, 854 S.W.2d 828 (Mo. Ct. App. 1993) (examining the family environment closely to determine if the decedent could "reasonably have been expected to live with [her husband]); In re Cochran, 738 A.2d 1029 (Pa. Super Ct. 1999) (holding that a protection from abuse order may establish grounds for forfeiture of the husbands spousal share); In re Fulton, 619 A.2d 280 (Pa. Super. Ct. 1992) (examining the backgrounds and lifestyles of the married couple, the events leading to the marriage ceremony, facts regarding wife's desertion of her husband, and Mrs. Fulton's funeral to determine if there was adequate evidence to support the Orphans' Court judge's finding that the separation was consensual between Mr. Fulton and Mrs. Fulton.).

Although a minority of states bar inheritance based upon particular acts of misconduct, none of these states address the issue of family abuse explicitly.[112] However, a doctrine within these jurisdictions may be interpreting acts of abuse as "constructive abandonment."[113] The rationale is that because of the acts of abuse which existed, the "decedent could not have reasonably have been expected to live with [the abuser]."[114] Many of these statutes barring succession rights focus upon abandonment of the decedent spouse.[115] Since the abuser forced the decedent to leave the family, these acts constitute abandoning the decedent.[116] The state statutes barring property rights for acts of misconduct are worded in a way that is conducive to this interpretation.[117]

112. *See* WAGGONER ET AL., *supra* note 7, at 81-82; *see supra* note 54. California examines acts of physical violence as it relates to an elder or dependent adult but it does not allow for an inquiry into acts of abuse between other members of the family. *See* CAL. PROB. CODE ANN. § 259 (West 1999); *see also supra* notes 130-135 and accompanying text.

113. *See, e.g., Jellech*, 854 S.W.2d at 828; Gove v. Crosby, 102 A.2d 905 (N.H. 1954) (interpreting the statutory language "living apart" as describing "a condition of 'isolation as regards action, function or associations' which might exist between a husband and wife while occupying the same dwelling," but requiring a new trial to examine the marital relationship after the wife's return to her battering husband). *See also Cochran*, 738 A.2d at 1029. The court in *Cochran* did not use the term "constructive abandonment." *Id*. However, the court concluded "the nature of the deserting spouse's conduct, either before or after the separation, and the extent to which it is inconsistent with the marital relationship, is dispositive of whether the separation is a willful and malicious desertion within the meaning of the forfeiture statute." *Id*. at 1032. The court names the heir's absence from the marital home as a "de facto desertion." *Id*. at 1032-33. This case may not be seen as following the "constructive abandonment" doctrine, but it is very similar in analysis. The court is responding to the petitioner's argument that he never intended to abandon the marital relationship. *Id*. at 1031-32. The court gets around this argument by recognizing that husband's actions towards the decedent forced him out of the spousal relationship and that this forced absence will qualify under the statute barring spousal inheritance rights for abandonment. *Id*. at 1032-33.

114. *Jellech,* 854 S.W.2d at 831. It is important to note that in Jellech it was entered into evidence without objection that the husband was verbally abusive to the decedent, noncommunicative and unaffectionate. *Id*. at 829-31. No acts of physical abuse were recognized by the court.

115. *See supra* note 56.

116. In *Jellech*, the court examined thoroughly the marital lives of the decedent and her husband. *Jellech*, 854 S.W.2d at 828-29. The court recognized that since the decedent actually left the home, it was her actions and intentions that they were interpreting. *Id*. at 829. However, it was the husband's acts, which drove the decedent from the home and marriage. *Id*. at 831. "The evidence of his abusive conduct, in conjunction with the evidence of his other actions, was such that the trial court could conclude that decedent could not reasonably have been expected to live with the petitioner." *Id*.

117. *See, e.g.,* EST. POWERS & TRUSTS LAW § 5-1.2 (a)(5) (West 2000) (spouse barred if spouse "abandoned the deceased spouse, and such abandonment continued until the time of death"); N.H. REV. STAT. ANN. § 560:19 (2000) (spouse barred if "at the time of the death of either the husband or wife, the decedent was justifiably living apart from the surviving husband or wife because such survivor was or had been guilty of conduct which constitutes cause for

The "constructive abandonment" doctrine has yet to develop into the tool against family violence that the proposed statue would be, because the language of a misconduct statute, which was never designed to handle the problem of family violence, restricts the scope of the doctrine. First, since the statute applies only to spouses,[118] children and other family members outside the decedent's household are outside the scope of the doctrine. The proposed statute is specifically designed to address abuse from all members of the family.[119] Second, the proposed statute clearly defines the acts of abuse.[120] The "constructive abandonment" doctrine leaves this up to the complete discretion of the particular court. An effective approach against family violence must apply to wide variety of acts and situations. Although the proposed statute allows for courts to interpret the severity and frequency of abusive acts, the statute lists the type of acts that will be examined.[121]

The "constructive abandonment" doctrine, however, does provide considerable support for the proposed statute against family violence. Not only does it allow a court to punish patterns of abuse by looking at the abandoning effect it may have had upon the family,[122] it also does not appear to require an abused decedent to actually leave the abuser, under certain circumstances.[123] The "constructive abandonment" doctrine has its roots in family law and abandonment grounds for divorce.[124] Courts hearing a petition

divorce"); N.C. GEN. STAT. § 31A-1 (a)(3)(b) (2000) (spouse barred if "willfully and without just cause abandons and refuses to live with the other spouse and is not living with the other spouse at the time of such spouse's death"); s*ee supra* note 56.

118. *See supra* note 56.

119. *See* proposed statute section (C)(2).

120. *See* proposed statute section (C)(1).

121. *Id.* Courts are given flexibility by the term "pattern." See proposed statute section (A). Although the statute defines what specific acts that are to be examined, courts are allowed to examine the facts to determine if the statute should apply to that particular circumstance.

122. *See supra* notes 111, 116.

123. *Jellech* involved a spouse who did actually leave her abuser. *See Jellech*, 854 S.W.2d at 829. This is a case where constructive abandonment is easily applied. The abusive spouse's actions are the cause for the abandonment by the other spouse from the family home. *See supra* notes 114-116. However, in situations where the abused spouse does not leave the home and continued to remain with the abuser, the argument of constructive abandonment is tougher to make. Since the intent to cease the marital relationship is the essence of spousal abandonment, an argument must be made that the intent still existed after the couple continued to cohabitate. *See Gove*, 102 A.2d 905; *see also infra* notes 128, 129 and accompanying text.

124. *See* Diemer v. Diemer, 168 N.E.2d 654 (N.Y. App. Div. 1960) (finding that spouse constructively abandoned her husband by refusing sexual relations even though her actions were without malice and the couple still lived together in the same household); Bruner v. Bruner, 135 N.E. 578 (Ind. 1922) (granting divorce on the grounds that constructive abandonment does not require a spouse to physically leave the home where the couple remained cohabited). *See also* 47A NYJUR § 1925 (West, 2nd ed. 1995) ("the spouse remaining at home may be guilty of abandonment where his or her conduct justifies the other spouse in departing from the marital home or terminating the marital relationship; this is referred to as constructive abandonment").

for divorce rationalized finding the existence of spousal abandonment where the couple remained under one roof by finding "that appellant and appellee had not lived and cohabitated together as man and wife for several years prior to, at the time of, nor since the filing of her petition."[125] This rationale can be applied to the constructive abandonment doctrine if one views abandonment as requiring an intent of one spouse "to give up completely the relation of husband and wife with no intention to resume it."[126] The basis for constructive abandonment is that this requisite intent can be inferred from the spouse's conduct."[127] Through the abusive actions of a spouse, intent to abandon the other is inferred.

Although an examination of the home may turn up intent by the abusive spouse to abandon the spousal relationship, in the case of family violence and continued cohabitation more evidence of the intent may be needed. Statutes barring property descent for acts of spousal misconduct have exceptions for couples that voluntarily reconcile and resume cohabitation.[128] Under the "constructive abandonment" doctrine a victim may not be required to leave the household and the abuse, but there exists a high hurdle to clear in proving that the couple did not kiss and make up after the violence occurred.[129]

The "constructive abandonment" doctrine does provide strong support for the proposed statute against family violence. It is an example of courts getting around state legislature's unwillingness to address family violence, by looking at acts of violence under the existing scheme. However, the doctrine is too limited in its scope and practicability to be effective against the complex problem of family violence.

Another support for the proposed family violence statute is California's statute barring any person from taking property under the laws of intestacy, a will, or a trust, for acts of violence as well as other forms of misconduct.[130] An heir is disqualified if it can be proven by clear and convincing evidence that (1) he is liable for physical abuse upon a person who was an elder or a dependent adult; (2) he acted in bad faith and (3) was "reckless, oppressive, fraudulent, or

125. *Bruner*, 135 N.E. at 579. "It cannot be expected in all cases that the plaintiff upon bringing an action for a divorce will abandon her home, to which she has as much right as the defendant, and desert her children, to whom she has an equal right, and be compelled to maintain herself separate and apart from her husband pending the suit. She may have no other home and be entirely without means of supporting herself elsewhere." Denison v. Denison, 30 P. 1100, 1101 (Wash. 1892).

126. In re Clark, 213 S.W.2d 645, 650 (Mo. Ct. App. 1948).

127. *See Jellech*, 854 S.W.2d at 830.

128. *See supra* note 56.

129. In *Gove*, the court ordered a new trial to examine the marital relationship, which existed at the time of the decedent's death. *See Gove*, 102 A.2d at 907. It is important to note, however, that even though a further examination was needed, constructive abandonment was not precluded by the battered spouse's return to her violent husband. *Id.*

130. *See* CAL. PROB. CODE § 259 (West 2000).

malicious in the commission of these acts."[131] Furthermore, it must be proven by clear and convincing evidence that the decedent, "at the time the acts occurred and thereafter until the time of his or her death," to have been "substantially unable to manage his or her financial resources or to resist fraud or undue influence."[132] At first glance, this statute may seem like its objective was to address family violence, however, the statute is too limited to be effective in that area. It applies only to a small portion of the family[133] and even then it is limited to individuals who are very susceptible to fraud or undue influence regarding their financial well-being.[134]

The California statute, however, does provide a great amount of support for the proposed statute contained in this article. It uses a clear and convincing evidentiary standard like the one included in the proposal. Furthermore, an individual must only be found liable for physical abuse, neglect or fiduciary abuse. No prior convictions are needed to prove these acts.[135] This statute may not be very applicable to the issue of family violence, but it is a giant step forward in the disqualification of an heir's rights of succession.[136]

Another area where courts have examined the relationships within the family very intensively is the area of legitimizing children and determining inheritance rights arising from, through or to a child. Although the UPC takes the position that a child is legally the child of his or her natural parents regardless of their marital status,[137] many jurisdictions view the child as the child of only the mother in the absence of a valid marriage.[138] In these jurisdictions, however, paternity may be established by other means[139] and this requires a court to examine private matters inside the family.[140]

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131. *Id*.

132. *Id*. § (a)(4).

133. Statute only protects the elderly or dependant adults. *Id*. § (a) (1).

134. Only elderly or dependent adults who are "substantially" unable to manage their financial resources or to resist fraud or undue influence fall under the people protected by this statute. *See supra* note 115.

135. "Any person found liable under subdivision (a) [acts of fraud, physical abuse, neglect, etc.] or convicted under subdivision (b) [violation of section 236 of the California penal code] shall not receive any property, damages, or costs that are awarded to the decedent's estate in an action described in subdivision (a) or (b), whether that person's entitlement is under a will, a trust, or the laws of intestacy. § 259 (c).

136. The statute does not limit itself only to heirs of the decedent. *Id.* § (a) ("any person shall be deemed to have predeceased a decedent").

137. *See* U.P.C. § 2-114 (1993) (an individual is the child of his [or her] natural parents, regardless of their marital status. The parent and child relationship may be established under [the Uniform Parentage Act] [applicable state law] [insert appropriate statutory reference]).

138. *See*, *e.g.,* FLA. STAT. ANN. § 732.108 (West 2000); MO. REV. STAT. § 474.060 (2000).

139. *See*, *e.g.,* ALA. CODE § 43-8-48 (2000.) ("person born out of wedlock is a child of the mother. . .that person is also the child of the father, if; (a) the natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is

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Even if a parent-child relationship has been established, many jurisdictions will not allow a parent or their kindred to inherit from or through a child if the parent has not "openly treated the kid as his" and/or "refused to support the child."[141] This determination forces the court to examine the everyday lives of the parent and child. Particular instances must be examined to determine the true nature of the relationship. This examination is very similar to the one required by the proposed family abuse statute. Evidence of particular instances of violence will be presented to the probate court for its determination if a pattern of family violence did exist, which falls under the statute as requiring a bar on succession rights.

All of these areas of law require probate courts to examine the family environment in much the same way as the proposed family violence statute. At first glance a statute requiring a probate court to determine if a pattern of family abuse existed may seem impractical and too demanding upon the courts, but courts are already performing similar examinations in other contexts.

V. CONCLUSION

In the past, family violence was viewed as a "private matter," which was no place for the courts. That approach failed and today family violence is almost out of control. It is time state legislatures completely remove their heads from the nineteenth-century sand. Criminal statutes have been put in place, but its time to reinforce them with probate laws that bar succession rights of family abusers. The proposed statute is not requiring the probate

void; or (b) the paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof").

140. *See e.g.,* House v. Campbell, 628 So.2d 448 (Ala. Sup. Ct. 1993) (holding that although the father of decedent often failed to contribute to child's support, he did not "refuse" to do so such that a statutory determination of paternity would be ineffective); Patterson v. Patterson, 116 So. 734, 735 (Miss. 1928) (holding that because father did not treat the decedent as his own son, neither the father or the decedent's half brother could inherit from the boy).

141. *See e.g.,* ALA. CODE § 43-8-48 (2) (b) (2000) ("paternity established under this paragraph is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his, and has not refused to support the child"); MO. REV. STAT.§ 474.060 (2) (2) (2000) (requiring the father or his kindred to have "openly treated the child as his" and to have not refused support of the child); N.M. STAT. ANN. § 45-2-114 (C) (Michie 2000) (precluding inheritance from or through a child by either natural parent or his kindred "unless that natural parent has openly treated his child as his and has not refused to support the child"); TENN. CODE ANN. § 31-2-105 (2) (b) (2000) ("in no event shall a parent be permitted to inherit through intestate succession until all child support arrearages together with interest thereon at the legal rate of interest computed from the date each payment was due have been paid in full to the parent ordered to receive such support or to such parent's estate if deceased.").

courts to do anything different from what they are already doing in other contexts. The only thing stopping them is the implementation of the statutes.

The important thing to remember is that to successfully attack a problem, one must first understand it. The trait that makes family abuse such a tough adversary is that it uses a shroud of silence to protect itself. Any statute attacking family violence must somehow get passed this silence to hear the victim's stories. The proposed family violence statute's clear and convincing evidentiary standard does this, and it does it in a method that provides protections for all involved. Society has always demanded that victims seek help, but it never understood just how tough it was. It is the twenty-first century, and it is time for the legal system to lend a hand to those victims. Probate courts, by their nature, are limited in protections they can provide a victim of family violence, but the proposed family abuse statute punishes attackers and provides for the loving family members from the abused decedent's estate. Indeed, they are victims too from the attacker's abuse and can benefit from a probate court applying justice.

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