

Summer 2015

## Probable Intent vs. Certainty: The Missouri Probate Court and the Uniform Probate Code

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### Recommended Citation

Stephanie Pierce, *Probable Intent vs. Certainty: The Missouri Probate Court and the Uniform Probate Code*, 80 Mo. L. REV. (2015)

Available at: <https://scholarship.law.missouri.edu/mlr/vol80/iss3/10>

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## NOTE

# Probable Intent vs. Certainty: The Missouri Probate Court and the Uniform Probate Code

*In re Brockmire*, 424 S.W.3d 445 (Mo. 2014) (en banc).

STEPHANIE PIERCE\*

### I. INTRODUCTION

Intestate succession statutes are difficult to design – they must be definite enough to ensure judicial efficiency, yet also match the average decedent’s probable intent.<sup>1</sup> With the ever-changing family dynamic, it is difficult for these statutes to keep up, and it is likely impossible for them to stay ahead.

This Note seeks to address how increasingly complex family situations should impact intestacy statutes. In *In re Brockmire*, the Supreme Court of Missouri specifically addressed what occurs when a decedent predeceases his biological granddaughter and his biological daughter, who had been adopted as an adult by her stepfather.<sup>2</sup> Unfortunately, the court, bound by statute, was unable to even contemplate a remedy consistent with the probable intent of the decedent.<sup>3</sup>

In addressing this complex set of family circumstances, this Note will first take an in-depth look into Missouri intestacy law. Additionally, this Note will address and analyze the different approaches of other states, as well as the approach taken by the Uniform Probate Code, and will compare each of those methods to the applicable Missouri statutes. This Note argues that the current Missouri intestacy statutes are antiquated and need to be reformed to match the standards set forth by the Uniform Probate Code.

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1. Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 *FORDHAM L. REV.* 1031, 1034 & n.12 (2004).

2. 424 S.W.3d 445, 446 (Mo. 2014) (en banc).

3. *Id.* at 450.

## II. FACTS AND HOLDING

Lonnie Brockmire (“Decedent”) died intestate<sup>4</sup> on July 18, 2011.<sup>5</sup> Decedent was not survived by a spouse or a parent. Decedent was, however, survived by his brother, Ronald, his biological daughter, Sherri, and Sherri’s biological daughter, Decedent’s granddaughter, Bella.<sup>6</sup> Sherri brought this suit on behalf of Bella in hopes of receiving a portion of Decedent’s estate.<sup>7</sup> The Probate Division of the Circuit Court of Cape Girardeau County granted partial distribution of Decedent’s estate to Bella, a decision Ronald successfully appealed.<sup>8</sup>

Ronald’s appeal was based on his contention that Bella was not a legal heir of Decedent.<sup>9</sup> Ronald argued that because Sherri’s stepfather had adopted Sherri prior to Decedent’s death, the legal relationship between Decedent and Sherri had severed.<sup>10</sup>

Ronald’s argument was based on two Missouri probate statutes.<sup>11</sup> Ronald first cited Missouri Revised Statutes Section 474.010(2), which provides that a decedent’s intestate estate will be distributed to the decedent’s descendants *only if* the decedent’s child *predeceases*<sup>12</sup> his descendants.<sup>13</sup> Ronald stated that even if Bella’s legal relationship with Decedent had not dissolved, Bella would have only been able to inherit from Decedent if Sherri had predeceased Bella.<sup>14</sup> Additionally, Ronald cited to Missouri Revised Statutes Section 474.060(1), which states that adoptees may only inherit from their adoptive parents.<sup>15</sup> Ronald contended, and the court confirmed, that

4. Defined as: “Of, relating to, or involving a person who has died without a valid will.” *Intestate*, BLACK’S LAW DICTIONARY (10th ed. 2014).

5. *Brockmire*, 424 S.W.3d at 446.

6. *Id.*

7. *Id.* at 445.

8. Brief of Appellant Ronald W. Brockmire at 1, *Brockmire*, 424 S.W.3d 445 (No. ED 99103), 2013 WL 210165.

9. *Id.* at 4.

10. *Id.*

11. *Id.*; see MO. REV. STAT. §§ 474.010, .060 (2000).

12. Defined as: “To die before (another).” *Predecease*, BLACK’S LAW DICTIONARY (10th ed. 2014).

13. *Brockmire*, 424 S.W.3d at 446 (emphasis added) (citing § 474.010) (“The part not distributable to the surviving spouse, or the entire intestate property, if there is no surviving spouse, shall descend and be distributed as follows: (a) To the decedent’s children, or their descendants, in equal parts; (b) If there are no children, or their descendants, then to the decedent’s father, mother, brothers and sisters or their descendants in equal parts . . .”).

14. Brief of Appellant Ronald W. Brockmire, *supra* note 8, at 6.

15. *Id.* at 7 (citing § 474.060(1)). Additionally, Ronald argues that the purpose of Section 474.060 would be frustrated if Bella was allowed to inherit because she would stand to inherit from both her biological and adopted grandfathers. Brief of Appellant Ronald W. Brockmire, *supra* note 8, at 7; Respondent’s Brief at 8–9, *Brockmire*, 424 S.W.3d 445 (No. ED 99103), 2013 WL 802893.

once Sherri was adopted, Bella “lost her status as a descendant of [Decedent’s] child.”<sup>16</sup> This meant that neither Sherri nor Bella could receive any portion of Decedent’s estate.<sup>17</sup>

Sherri countered with several arguments to persuade the court that the Probate Division’s distribution of Decedent’s estate was proper.<sup>18</sup> Sherri first stated that the terms contained in Sections 474.010(1) and (2) were in conflict.<sup>19</sup> The term “issue” is used within the statute to limit the portion of the intestate estate distributed to a spouse and, subsequently, the phrase “children or their descendants” is used when discussing distribution of a decedent’s property when there is no surviving spouse.<sup>20</sup> Sherri argued that this created a conflict because an “issue,” which encompasses a larger group of individuals, was able to inherit when there was a surviving spouse, but only “children or their descendants” could inherit when there was no surviving spouse.<sup>21</sup> Because the term “issue” is broader than “children or their descendants” by definition, Sherri stated that Bella would have been able to inherit if “issue” had been used in Section 474.010(2) in lieu of “children or their descendants.”<sup>22</sup> Sherri additionally argued the legislature’s intent when invoking the phrase “children or their descendants” must have been to clarify that the first generation is required to inherit before any subsequent generations.<sup>23</sup>

Sherri also contended that Section 474.060 should not impact Bella.<sup>24</sup> Sherri noted that the statute referenced the elimination of a legal relationship between an adoptee and her biological parents, but made no mention of an adoption’s effect upon an adopted person’s pre-existing children.<sup>25</sup> Sherri further noted that had it been the legislature’s intent to eliminate the grandparent and grandchild’s legal relationship, they easily could have done so.<sup>26</sup>

Beyond statutory construction, Sherri argued that the court must look beyond the wording of intestacy statutes when determining the legislature’s intent.<sup>27</sup> Citing to Missouri adoption statutes, Sherri argued that the removal of Bella as a legal heir of Decedent frustrated the purposes of Missouri law.<sup>28</sup> Sherri cited Missouri Revised Statutes Section 452.402 in support of her proposition, which permits grandparents to be awarded visitation time to

16. Brief of Appellant Ronald W. Brockmire, *supra* note 8 at 7; *Brockmire*, 424 S.W.3d at 447–48.

17. *Brockmire*, 424 S.W.3d at 450.

18. *See generally* Respondent’s Brief, *supra* note 15.

19. *Id.* at 2–4.

20. MO. REV. STAT. §§ 474.010(1)–(2) (2000).

21. *In re Brockmire*, No. 99103, 2013 WL 2484534, at \*3 (Mo. Ct. App. June 11, 2013); *see* MO. REV. STAT. § 472.010 (2000).

22. *Brockmire*, 2013 WL 2484534, at \*3.

23. *Id.* at \*5.

24. *Id.* at \*2–3.

25. *Id.* at \*5.

26. *Id.*

27. *Id.*

28. Respondent’s Brief, *supra* note 15, at 7.

grandchildren; in the case of an adopted grandchild, a grandparent's visitation rights are not automatically or explicitly terminated upon adoption.<sup>29</sup>

Additionally, Sherri tried to combat Ronald's contention that Section 474.010 forbade Bella from receiving a distribution of Decedent's intestate estate, regardless of adoption, because Sherri had not predeceased Decedent.<sup>30</sup> Sherri attempted to persuade the court to treat her as though she had pre-deceased Decedent under the statute and find that Bella must be treated as an heir because the adoption did not eliminate Bella from Decedent's "biological line."<sup>31</sup>

Lastly, if the Probate Division's ruling was overturned, Sherri argued, it would violate Bella's due process rights.<sup>32</sup> Without citing any case law, Sherri concluded that all individuals have a vested right in their legal bloodline at birth.<sup>33</sup> Sherri stated that her adoption wrongly deprived Bella of her "vested right of a relation to . . . Decedent as a descendant of the child."<sup>34</sup>

The Missouri Court of Appeals for the Eastern District heard Ronald's appeal of the Probate Division's decision.<sup>35</sup> The court of appeals first looked to Section 474.060's definition of "child" for the purposes of intestate succession.<sup>36</sup> The statute declares that an adopted person ceases to be the legal child of the biological parent upon adoption,<sup>37</sup> meaning, once Sherri's stepfather adopted her, she was no longer Decedent's legal child or heir.<sup>38</sup> Because Sherri is not Decedent's legal child under the intestacy statute, Bella was likewise not the legal grandchild of Decedent.<sup>39</sup>

The court of appeals did not give credence to Sherri's argument that Missouri's intestacy statute was in conflict with itself.<sup>40</sup> Without providing a contrary interpretation, the court of appeals stated that Bella was not a lawful heir of Decedent, which made any conflict in the statute irrelevant.<sup>41</sup> The court of appeals also looked to Missouri adoption statutes, which take the

29. *Id.* at 8 (quoting MO. REV. STAT. § 452.402(6) (Cum. Supp. 2013)) ("[T]he right of a grandparent to maintain visitation rights pursuant to this section may terminate upon the adoption of the child."). The Missouri Court of Appeals for the Eastern District, however, stated "Section 452.402 does not . . . give rights of visitation to grandparents unless visitation is found to be in the child's best interest." *Aegerter v. Thompson*, 610 S.W.2d 308, 309–10 (Mo. Ct. App. 1980).

30. Respondent's Brief, *supra* note 15, at 7.

31. *Id.*

32. *Id.* at 12.

33. *Id.* at 13.

34. *Id.*

35. *In re Brockmire*, No. ED 99103, 2013 WL 2484534, at \*1 (Mo. Ct. App. June 11, 2013).

36. *Id.* at \*2.

37. *Id.*

38. *Id.*

39. *Id.* at \*3.

40. *Id.* at \*4.

41. *Id.*

“substitution approach,” meaning an adopted child “becomes the child of its adopting parents *for every purpose . . .*”<sup>42</sup> Additionally, the court of appeals dismissed Sherri’s argument that an outcome adverse to Bella would thwart the legislature’s intent.<sup>43</sup> The court of appeals stated that it “need not look at the ‘general purpose of intestacy statutes’” as Sherri requested because the plain language of both the intestacy and adoption statutes demonstrated that Bella was not a legal heir of Decedent.<sup>44</sup>

Lastly, the court of appeals rejected Sherri’s argument that Bella’s due process rights had been violated.<sup>45</sup> The court of appeals stated that this argument had no merit or support.<sup>46</sup> Further, there can be no “vested legal right” in a bloodline for the purposes of intestate succession, as Missouri statutes state that a bloodline can be substituted for legal purposes.<sup>47</sup> The court of appeals concluded by holding that, for the above reasons, the Probate Division’s determination was unsupported and made Ronald the sole legal heir of Decedent’s estate.<sup>48</sup>

Coming to the same ultimate conclusion as the court of appeals, the Supreme Court of Missouri held that Ronald was the sole legal heir of Decedent because distribution of Decedent’s intestate estate must be based on statutory construction alone.<sup>49</sup> The court similarly found no merit behind Sherri’s argument that Bella “had a vested legal right to her bloodline.”<sup>50</sup> The court enunciated that because expectant heirs have no vested interest until death, Bella had no right to lose.<sup>51</sup> The court stated that, under Missouri’s intestate statutes, once a descendant is adopted, the legal relationship between the descendant and her biological parent is destroyed – even when the descendant was adopted by their stepparent.<sup>52</sup> Subsequently, the severance of the legal relationship between a biological father and daughter destroys the legal relationship between the biological father and any of the daughter’s children or her descendants. The Supreme Court of Missouri stated that under Missouri probate law, adoption severs all legal ties between the parent and biological child, eliminating all intestate succession rights.<sup>53</sup>

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42. *Id.* (alteration in original). Missouri adoption statutes contemplate both the adoption of adults and minors. *See* *St. Louis Union Trust Co. v. Hill*, 76 S.W.2d 685, 686 (Mo. 1934).

43. *Brockmire*, 2013 WL 2484534, at \*5.

44. *Id.*

45. *Id.* at \*6.

46. *Id.*

47. *See, e.g., id.*

48. *Id.*

49. *In re Brockmire*, 424 S.W.3d 445, 446 (Mo. 2014) (en banc).

50. *Id.* at 449.

51. *Id.*

52. *Id.*

53. *Id.* at 450.

### III. LEGAL BACKGROUND

This Part will first look at the history of adoption in Missouri and address many important changes within both Missouri adoption and Missouri probate statutes that have occurred over the past century. Additionally, this Part will analyze the trend of acceptance, and even endorsement, of adoption in Missouri, and in particular how the adoption statutes have evolved to become more favorable toward adopted children and adoptive parents alike.

This Part will also look at the Uniform Probate Code's ("UPC") treatment of the effect of adoption on inheritance and the recent changes to it. Lastly, this Part will look at the Missouri statutes that currently dictate parent-child relationships for intestacy purposes and similar statutes enacted by other states, specifically analyzing the 1980 amendments to the Missouri Revised Statutes.

#### *A. Missouri Adoption History*

The history of adoption in Missouri has undertaken an extensive evolution throughout the last century, moving from a more or less contractual system to one involving much deeper considerations. This evolution has created many complex matters, including inheritance issues, which comprise the intestacy rules. This Part seeks to provide a narrative to this evolution as well as an analysis of resulting approaches.

#### 1. Origins

The laws surrounding intestate succession of adopted children have evolved for over a century, becoming much more favorable to adoptees. The first Missouri adoption statute was enacted in 1857.<sup>54</sup> Its enactment gave adopted children very basic human rights, such as "support and maintenance" and "proper and humane treatment."<sup>55</sup> However, other protections were

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54. *Goldberg v. Robertson*, 615 S.W.2d 59, 61 (Mo. 1981) (en banc). The 1857 statute stated in part:

[f]rom the time of filing the deed with the recorder, the child or children adopted shall have the same right against the person or persons executing the same, for support and maintenance and for proper and humane treatment, as a child has, by law, against lawful parents; and such adopted child shall have, in all respects, and enjoy such rights and privileges as against the person executing the deed of adoption. This provision *shall not extend to other parties*, but is wholly confined to parties executing the deed of adoption.

1857 Mo. Laws 59, § 3 (emphasis added).

55. Clifford S. Brown & Thomas E. Toney, Comment, *Eligibility of Adopted Children to Take by Intestate Descent and under Class Gifts in Missouri*, 34 MO. L. REV. 69, 69–70 n.7 (1969).

granted by the courts, such as forbidding an adoptive parent from inheriting through their adoptive children.<sup>56</sup> This determination may reflect the fear of predatory adoption in Missouri during that time, or perhaps a lack of legislative foresight.<sup>57</sup> A 1878 case, *Reinders v. Koppelman*, illustrates those protections. In *Reinders*, an adopted child predeceased her adoptive mother.<sup>58</sup> The Supreme Court of Missouri made it clear that the adoptive mother of a child who dies intestate cannot inherit from her adoptive child.<sup>59</sup>

Although the century-old laws provided minimal protections to adopted children, they were still very far from what today's statutes provide.<sup>60</sup> Even though adopted children could inherit from their adoptive parents, inheriting through them was an entirely different story.<sup>61</sup> The Supreme Court of Missouri, in *Hockaday v. Lynn*, a 1906 case regarding the distribution of a decedent's estate, demonstrates this point.<sup>62</sup> In *Hockaday*, a child was not permitted to inherit from her adoptive mother's brother.<sup>63</sup> The *Hockaday* court declared that the child would not be permitted to inherit through her father, as the adopted child was "an alien to his blood."<sup>64</sup>

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56. *See id.* at 71.

57. *See id.* ("Although . . . the courts were willing to allow the adopting parent to create an heir for himself, they refused to allow the adopting parent to make himself an heir, partly because the 1857 Act was unclear on this point, and partly because of a desire to prevent possible predatory adoption.").

58. *Reinders v. Koppelman*, 68 Mo. 482, 483 (1878).

59. *Id.* The court in *Koppelman* stated that this view is not in line with their sense of justice, but the court is *bound by statute*, citing the Statute of Descents which:

provides, that "when any person having title to any real estate . . . of inheritance shall die intestate as to such estate, it shall descend . . . if there be no children, or their descendants, of the person so dying intestate to his or her father, mother, brothers or sisters." *It does not say adopted father or mother.* Again: the Statute of Descents makes no distinction as to how the person so deceased acquired the property. If he or she have an estate of inheritance – no matter how acquired – and die intestate, such estate shall pass to the persons named above.

*Id.* at 485 (emphasis added).

60. *See* MO. REV. STAT. § 453 (2000).

61. *Hockaday v. Lynn*, 98 S.W. 585, 589 (Mo. 1906).

62. *See id.* at 585.

63. *Id.* at 589.

64. *Id.* at 588. This doctrine has also been titled as the "stranger to adoption" rule. Joanna L. Grossman, *The Potential Consequence of Adult Adoption for Inheritance: A Recent Virginia Supreme Court Ruling*, JUSTIA (October 20, 2011), <http://verdict.justia.com/2011/10/20/the-potential-consequences-of-adult-adoption-for-inheritance>.

In 1917, the statutory rules of inheritance for adopted children progressed from what Missouri law had previously permitted.<sup>65</sup> Adopted children were now able to inherit through their adoptive parents, and adoptive parents were now able to inherit through their children.<sup>66</sup> In *St. Louis Union Trust Co. v. Hill*, the Supreme Court of Missouri referenced this alteration as a “change [in] the blood stream of an adopted child,” and acknowledged that adopted children were the children of adoptive parents “for every purpose as fully as though born to the adopting parents.”<sup>67</sup> In *Hill*, the adoptees at issue were two adult stepchildren of the decedent, who the decedent adopted shortly before his death.<sup>68</sup> One caveat to this rule was given: inheritance rights were dictated by the statute in place at the time of the adoption.<sup>69</sup>

The amendment to the 1917 statute in 1947, however, demonstrated the legislature’s evolving view of adoption. This amendment eliminated the rule of law that dictated that an adopted child’s intestate succession rights correspond with the law at the time the adoption took place.<sup>70</sup> But a new question arose – whether an adopted child could still inherit from his natural parents – a question that *St. Louis Trust Co. v. Kaltenbach* answered in the affirmative.<sup>71</sup> The *Kaltenbach* court stated that the statute permitting adopted children to inherit from their parents did not preclude that child from also inheriting from their natural parents.<sup>72</sup> Another Supreme Court of Missouri holding

65. See *Brown & Toney*, *supra* note 55, at 72 (quoting MO. REV. STAT. § 1101 (1919)) (“When a child is adopted in accordance with the provisions of this article, all legal relationship, and all rights and duties, between such a child and its natural parents shall cease and determine. Said child shall there after be deemed and held to be for every purpose, the child of its parent or parents by adoption, as fully as though born to them in lawful wedlock. Said child . . . shall be capable of inheriting from, as the child of said parents as fully as though born to them in lawful wedlock.”).

66. *Id.* *Brown and Toney* interestingly stated that this Missouri advancement was not “innovative” as Massachusetts had enacted such legislation in 1851. *Id.* at 72 n.24.

67. *St. Louis Union Trust Co. v. Hill*, 76 S.W.2d 685, 689 (Mo. 1934).

68. *Id.* at 686.

69. Fred L. Kuhlman, *Intestate Succession by and From the Adopted Child*, 28 WASH. U. L.Q. 221, 244 (1943) (citing *McIntyre v. Hardesty*, 149 S.W.2d 334, 338 (Mo. 1941)) (“That Act, it seems to us, was intended to apply altogether prospectively and to persons adopted according to the provisions and requirements of the Act.”).

70. MO. REV. STAT. § 453.150 (1943). The amendment stated:

Any person adopted by deed of adoption or agreement of adoption in writing prior to 1917 and wherein said instrument was filed for record prior to July 1, 1917, shall hereafter be deemed and held to be for every purpose the child of its parent or parents by adoption as fully as though born to them in lawful wedlock, and such adoption shall have the same force and effect as an adoption under the provisions of this chapter, including all inheritance rights.

*Id.*

71. *St. Louis Union Trust Co. v. Kaltenbach*, 186 S.W.2d 578, 583 (Mo. 1945).

72. *Id.*

agreed with *Kaltenbach*, declaring that “the legislature has not said that one who has been adopted by another shall not inherit from his natural parents.”<sup>73</sup> This view has shifted through both case law and statute in Missouri.<sup>74</sup>

## 2. Shifting Views & Intestate Succession Statutes

Eight years after *Kaltenbach*, the Supreme Court of Missouri changed its view of the statutory interpretation of the 1917 adoption statute.<sup>75</sup> In *Wailes*, the court held that the Missouri statutes expressly precluded adopted children from inheriting through their natural parents; likewise, natural parents were precluded from inheriting from their children who have been adopted.<sup>76</sup> Emphasizing this point, the court stated:

The legislature in providing that *all* rights between the natural parent and the child should on adoption “cease and determine” did not intend to nor does it mistreat that class of children. After all, perhaps the legislature thought it best and intended to effect just what the statute says, that *all* rights, including the right to inherit, shall “cease and determine.”<sup>77</sup>

More recently, a Missouri appellate court enforced this point of view.<sup>78</sup> In *In re Tapp’s Estate*, the Missouri Court of Appeals held that John Oliver, the natural child of Ralph Tapp, was unable to inherit from his biological father because he had previously been adopted.<sup>79</sup> The court also noted the potential public policy concern of a double inheritance, as John Oliver had previously inherited from his adoptive father, although it is unclear what, if any, difference that made in the court’s conclusion.<sup>80</sup>

### B. Goals of Intestate Succession Statutes

Statutes stipulating the distribution of intestate estates are complex, and there are multiple factors that drafters must take into consideration. Because of the multitude of factors, drafters have taken many different approaches in an attempt to attain the decedent’s probable intent while maintaining judicial efficiency.<sup>81</sup> This complexity is in part caused by the fact that the American

73. *Miss. Valley Trust Co. v. Palms*, 229 S.W.2d 675, 680 (Mo. 1950).

74. *See* MO. REV. STAT. § 474.060 (2000).

75. *Wailes v. Curators of Cent. Coll.*, 254 S.W.2d 645, 649 (Mo. 1953) (en banc).

76. *Id.*; *see also* § 474.060(1).

77. *Wailes*, 254 S.W.2d at 649.

78. *In re Tapp’s Estate*, 569 S.W.2d 281 (Mo. 1978).

79. *Id.* at 285.

80. *See id.* at 285–86.

81. Hirsch, *supra* note 1, at 1034.

family has evolved rapidly in recent years, while the traditional nuclear family is becoming less common.<sup>82</sup>

Striving to meet many evolving factors, Section 1-102(b) of the UPC<sup>83</sup> lists the purposes of the Code.<sup>84</sup> Those purposes include: simplicity, clarity, and making “effective the intent of a decedent in distribution of his property [and] to promote a speedy and efficient system for liquidating the estate of the decedent . . . .”<sup>85</sup> Here, the common theme is the promotion of the decedent’s intent, coupled with efficiency.<sup>86</sup> As phrased by Ralph Brashier, an expert in probate law, “[T]he first goal of intestacy law is to effectuate the typical decedent’s intent, but like all laws, probate laws ultimately should promote and protect the state.”<sup>87</sup>

Applying these goals to the abundance of family combinations can be arduous, especially when coupled with the objectives of adoption. One goal of adoption is to “strengthen[] the new family unit [between the adopted child and adoptive parents],” which is met, in part, by severing ties with the biological parents.<sup>88</sup> But this goal may not be desirable in most adoptions, as over half of adoptions “involve children adopted by stepparents or relatives, where the adoption may be completed for legal rather than relationship purposes.”<sup>89</sup>

Adoption of stepchildren presents interesting complications as compared to an adoption by two non-biological parents because, “[I]n [that] situation, continued association between the child and the genetic parents is more likely to occur.”<sup>90</sup> Perhaps the conflict between meeting the goals of traditional adoption and stepparent adoption explains why states have taken different approaches on a child’s ability to inherit through either biological parent when adopted by a stepparent.<sup>91</sup> Eleven states currently permit children to maintain the ability to inherit from either biological parent after being adopt-

82. Natalie Angier, *The Changing American Family*, N.Y. TIMES, Nov. 27, 2013, [http://www.nytimes.com/2013/11/26/health/families.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/11/26/health/families.html?pagewanted=all&_r=0) (“This churning, this turnover in our intimate partnerships is creating complex families on a scale we have not seen before.”).

83. The Uniform Probate Code was drafted by the National Conference of Commissioners on Uniform State Laws and was approved and recommended for enactment in all states by the Commissioners. *See generally* UNIF. PROBATE CODE (amended 2010).

84. *Id.* at § 1-102(b).

85. *Id.*

86. *Id.*

87. Hirsch, *supra* note 1, at 1035 n.12 (quoting RALPH C. BRASHIER, *INHERITANCE LAW AND THE EVOLVING FAMILY* 7 (Temple Univ. Press 2004)).

88. WILLIAM MCGOVERN JR., SHELDON F. KURTZ & DAVID ENGLISH, *PRINCIPLES OF WILLS, TRUSTS & ESTATES* 115 (Thompson Reuters ed., 2d ed. 2011).

89. *Id.*

90. *Id.*

91. *Intestate Inheritance Rights for Adopted Persons*, CHILD WELFARE INFO. GATEWAY 2 (2012), <https://www.childwelfare.gov/pubPDFs/inherita-nce.pdf>.

ed by a stepparent.<sup>92</sup> Fourteen states allow children to inherit from or through either biological parent after adoption by a stepparent, depending on whether the adoption took place after the death of a biological parent.<sup>93</sup> Lastly, twenty-two states, including Missouri, provide for a full substitution approach.<sup>94</sup>

### C. Approaches

In Missouri, “The law of inheritance is a creature of statute.”<sup>95</sup> Additionally, “The status of adopted children under the statutes of descent and distribution will not vary.”<sup>96</sup> The Missouri statute takes a hard stance as compared to the UPC and other jurisdictions,<sup>97</sup> specifically declaring that adopted children may not inherit through their natural parents.<sup>98</sup> Section 474.060 proclaims, “[F]or purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person, an adopted person is the child of an adopting parent *and not of the natural parents.*”<sup>99</sup>

Missouri, however, did not always take the full substitution approach.<sup>100</sup> In 1980, Missouri enacted significant changes to its Probate Code, many of which were modeled after the UPC.<sup>101</sup> Prior to 1980, Section 474.060 only provided for the impact of intestate succession upon illegitimate children.<sup>102</sup> In 1980, Senate Bill No. 637 altered Section 474.060 to include adopted children and permitted adopted children to inherit from *either* biological parent when the adopting parent was “a spouse of a natural parent.”<sup>103</sup> The 1980

92. *Id.* (Alabama, Arizona, California, Colorado, Maine, Michigan, Montana, South Dakota, Utah, Vermont, and Virginia permit inheritance from either birth parent when adopted by a stepparent).

93. *Id.* (Alaska, Connecticut, Florida, Georgia, Idaho, Iowa, Massachusetts, Minnesota, New Jersey, North Dakota, Ohio, Oregon, Tennessee, and Wisconsin).

94. *Id.* at 5–38 (including: Arkansas, Delaware, Hawaii, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, Washington, West Virginia, Wyoming). The three remaining states – Illinois, Pennsylvania and Texas – provide a varying set of standards. *Id.* at 15, 30, 33.

95. *Robertson v. Cornett*, 225 S.W2d 780, 785 (Mo. 1949).

96. 5 MISSOURI PRACTICE SERIES, PROBATE LAW & PRACTICE § 359 (3d ed.).

97. *See*, 20 PA. CONS. STAT. § 2108 (1976); *see also* MO. REV. STAT. § 474.060 (2000).

98. *See* § 474.060.1. However, “adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and such natural parent.” *Id.*

99. *Id.* (emphasis added).

100. 1980 Mo. Laws 480.

101. 1980 *Legislation Affecting Trusts and Estates*, 16 REAL PROP. PROB. & TR. J. 48, 74–75 (1981).

102. *Id.*; *see also* MO. REV. STAT. § 474.060 (1955) (amended 1981).

103. 1980 Mo. Laws 480.

statute, therefore, produced the same result for children adopted by stepparents as Section 2-119 of the UPC.<sup>104</sup>

In 1981, Missouri again altered its stance through the enactment of Senate Bill No. 117.<sup>105</sup> The purpose of Senate Bill No. 117 was to “[a]mend various provisions of the Probate Code of Missouri that were affected by the major revision[s] [of the] 1980 legislation.”<sup>106</sup> Section 474.060 was revised to state, “[A]doption of a child by the spouse of a natural parent has no effect on the relationship between the child and *such* natural parent.”<sup>107</sup> This statute remains in effect today.<sup>108</sup> Although the exact reason for this alteration remains unclear, the Real Property, Probate and Trust Journal of 1982 stated that the amendment to Section 474.060 was “to make clear that adoption by a spouse of a natural parent does not affect the relationship between the child and the spouse who is the natural parent, *but such rule does not apply to the other natural parent.*”<sup>109</sup>

Unlike Missouri statutes, the UPC takes the likelihood of a continued relationship between a biological parent and their child who was adopted into consideration for determining distribution of the biological parent’s estate.<sup>110</sup> Specifically providing for this instance, UPC Section 2-119(b)(2) states, “A parent-child relationship exists between an individual who is adopted by the spouse of either genetic parent and *the other genetic parent*, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through the other genetic parent.”<sup>111</sup>

The UPC, however, did not originally take this stance.<sup>112</sup> In a 1968 UPC Special Committee questionnaire, Advisory Committee Members were asked various questions regarding the adequacy of proposed Section 2-109 (now Section 2-119).<sup>113</sup> One question, regarding a possible clarification of multiple adoptions, specifically cited a preliminary draft which stated, “[A]n adopted child shall be treated as the natural child of his adopted parents and shall cease to be treated as the child of his natural parents . . . .”<sup>114</sup> At that

104. *1980 Legislation Affecting Trusts and Estates*, *supra* note 101 at 74; *see also* UNIF. PROBATE CODE § 2-119 (2010).

105. *1981 Legislation Affecting Trusts and Estates*, 17 REAL PROP. PROB. & TR. J. 75, 95–96 (1981).

106. *Id.* at 95.

107. MO. REV. STAT. § 474.060(1) (1981).

108. *Id.*

109. *1981 Legislation Affecting Trusts and Estates*, *supra* note 105.

110. UNIF. PROBATE CODE § 2-119 (revised 2010).

111. *Id.* § 2-119(b)(2).

112. UNIF. PROBATE CODE § 2-109(1) (1969) (revised 2010).

113. ABA, Section of Real Prop., Probate and Trust Law Comm. on of Model Probate Code: Questionnaire for Members of Advisory Committee, C: 12/313 Box 10, FF6.

114. Cathy J. Jones, *Stepparent Adoption and Inheritance: A Suggested Revision of the Uniform Probate Code Section 2-109*, 8:53 W. NEW ENG. L. REV. 53, 59 n.19 (1986).

time, however, no committee member addressed any concern regarding intestacy rights of adopted children from their biological parents.<sup>115</sup> Although it is unclear at what point the committee discussed this issue, the provision found in today's Section 2-119 was included by 1975.<sup>116</sup>

Some states are even more liberal than the UPC.<sup>117</sup> Pennsylvania, for example, allows adopted children to inherit from their biological parents as long as the biological parent "has maintained a family relationship with the adopted person."<sup>118</sup> Other states, similar to the UPC, provide by statute that an "adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and either natural parent."<sup>119</sup> It is clear that there are varying approaches on intestate succession between adopted children and their biological parents, and it is difficult to state which approach would best achieve the desire of a legislature to accomplish both the intent of the decedent as well as promote state interests.

Each of the above issues is complicated, but taking adult adoption into account compounds these problems. In Missouri, adult adoption is not differentiated from minor adoption.<sup>120</sup> Two-thirds of states allow adult adoption without restriction, while one-third of states require the adoptee be younger than the adopter.<sup>121</sup> Although Missouri statutes do not distinguish between the adoption of an adult and the adoption of a minor, differentiation of outcomes could make the legislature's goal of honoring the decedent's intent through intestacy statutes even harder to achieve.<sup>122</sup>

The legislative history of Missouri probate law has undertaken a fascinating metamorphosis, resulting in a hardline approach to intestacy law. This stance, although decisive as compared to the varying approaches, left the court in *Brockmire* with no possible alternative holding.

#### IV. INSTANT DECISION

The Supreme Court of Missouri unanimously held that Ronald was the sole legal heir of Decedent.<sup>123</sup> The court first looked to Section 474.060 in

115. ABA, *supra* note 113.

116. UNIF. PROBATE CODE § 2-119 (2010).

117. 20 PA. CONS. STAT. § 2108 (1976).

118. *Id.*

119. ME. REV. STAT. tit. 18-A, § 2-109 (1997).

120. *In re Brockmire*, No. ED 99103, 2013 WL 2484534, at \*4 (Mo. Ct. App. 2013).

121. Joanna L. Grossman, *The Potential Consequences of Adult Adoption for Inheritance: A Recent Virginia Supreme Court Ruling*, JUSTIA (Oct. 20, 2011), <http://verdict.justia.com/2011/10/20/the-potential-consequences-of-adult-adoption-for-inheritance>. Other restrictions include adults to be adopted if they are between the ages of eighteen to twenty-one; disabled; or if there had been a "sustained parental relationship" for a specified time period. *Id.*

122. *Brockmire*, 2013 WL 2484534 at \*4.

123. *In re Brockmire*, 424 S.W.3d 445, 445–47 (Mo. 2014) (en banc).

reaching this conclusion.<sup>124</sup> The statute states, in part, that “an adopted person is the child of an adopting parent and not of the natural parents,” which would eliminate any possible argument that Sherri could bring under Missouri adoption statutes.<sup>125</sup>

Like the court of appeals, this court rejected Sherri’s argument that Section 474.010 contained a conflict by using the terms “issue” and “children, or their descendants” because it was irrelevant to the current circumstances.<sup>126</sup> Even if there was a conflict, the court stated that it would have been immaterial because Bella is not Decedent’s surviving issue or a descendent of his child.<sup>127</sup>

In making this determination, the court first looked to Section 474.010, which governs Missouri intestate succession.<sup>128</sup> Here, the court construed the statute to determine that the statement “children, or their descendants, in equal parts” illustrated that grandchildren of a decedent have no inheritance rights, with one exception:<sup>129</sup> grandchildren may inherit when “the grandchild is a descendant of a ‘child’ of the decedent;” additionally, the decedent’s child must have qualified to inherit “but for predeceasing the decedent.”<sup>130</sup> Because of Sherri’s adoption, Bella did not fit this description.<sup>131</sup>

The court further explained Sherri’s claim that the language used in Section 474.010 is in conflict with itself was invalid.<sup>132</sup> The term “issue” is utilized in Section 474.010(1) when delineating who may receive the remainder of the estate – the portion of the estate not set-aside for a surviving spouse.<sup>133</sup> Section 474.010(2) invokes the phrase “children, or their descendants” when describing distribution of an intestate estate where the decedent had no sur-

124. *Id.* at 446.

125. *Id.* at 448; MO. REV. STAT. § 474.060(1) (2000). Section 453.090, a Missouri adoption statute, states in part:

Such child shall be capable of inheriting from, and as the child of, his parent or parents by adoption as fully as though born to him or them in lawful wedlock and, if a minor, shall be entitled to proper support, nurture and care from his parent or parents by adoption.

MO. REV. STAT. § 453.090(2) (2000). The court addressed that the statute *does not eliminate* the argument that an adopted person can still inherit from or through their natural parents. *Brockmire*, 424 S.W.3d at 447–48.

126. *Brockmire*, 424 S.W.3d at 448.

127. *Id.* at 448–49. Additionally, the court noted that the word adopted issue within the definition of issue references a relationship between an adopted child and an adoptive parent. *Id.* at 449.

128. *Id.* at 446.

129. *Id.* at 447.

130. *Id.*

131. *Id.*

132. *Id.* at 448.

133. MO. REV. STAT. § 474.010 (2000).

viving spouse.<sup>134</sup> Here, the court rejected Sherri's argument that Bella would have qualified as a surviving issue and reasoned that it was useless to Sherri's position to include Bella within "children, or their descendants," as Bella met either description.<sup>135</sup>

The court added that Sherri's argument was flawed because the phrases "issue" and "children, or their descendants" are used for different purposes and, even more distinctly, because Bella would not qualify as a surviving issue of Decedent.<sup>136</sup> The court explained that Sherri's declaration that Bella should qualify as an "issue" was derived from a flawed reading of the definition.<sup>137</sup> "Issue" under Missouri law excludes "those who are the lineal descendants of living lineal descendants of the [decedent]."<sup>138</sup> Here, the court again enunciated that regardless of the adoption, Bella would not qualify for inheritance from Decedent unless Sherri had predeceased Decedent.<sup>139</sup> Additionally, the court pointed out that the definition of issue includes "adopted children," referencing a *decedent's children by adoption*, meaning that Bella is an issue of Sherri's adoptive parents, but not of Decedent's.<sup>140</sup>

Additionally, the court proclaimed that grandchildren do not have inheritance rights under Section 474.010 and rejected Sherri's request to treat her as though she predeceased Decedent, stating that "the statutes governing adoption and intestate succession [do] not support such conclusions, but they also plainly preclude them."<sup>141</sup>

After addressing the statutory construction of Sections 474.010 and 474.060, the court took note of Sherri's contention that she should be "treated as a 'child' of Decedent, despite her adoption and that she should have been deemed to have "died as a result of the adoption." The court reasoned that these arguments were invalid because applicable intestate succession statutes, as well as relevant adoption statutes, did not lead to that conclusion.<sup>142</sup> The court cited Missouri Revised Statute Section 453.090 in support of its holding, the pertinent part stating, "When a child . . . is adopted . . . all legal relationships and all rights . . . between such child and his natural parents . . . shall cease and determine."<sup>143</sup> Here, the court acknowledged that while this provision allowed Sherri to argue that she was still Decedent's descendant, Section 474.060 eliminated that argument, as it states, "[F]or purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person, an adopted person is the

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134. *Brockmire*, 424 S.W.3d at 448.

135. *Id.*

136. *Id.* at 448–49.

137. *Id.*

138. § 472.010.

139. *Brockmire*, 424 S.W.3d at 446.

140. *Id.* at 449. The Court points to other Missouri statutes that stipulate adopted children are children of the adoptive parents and not of the biological parents. *Id.*

141. *Id.* at 447.

142. *Id.*

143. *Id.*

child of an adopting parent and not of the natural parents.”<sup>144</sup> The court further explained this position, stating: “[E]ven if the Court assumes that Sherri should be treated as having ‘died’ as a result of her adoption,” Sherri would still not qualify as Decedent’s child, meaning Bella could not qualify as a descendant of Decedent.<sup>145</sup>

Next, the court rejected Sherri’s determination that Bella “had a vested right to her legal bloodline,” which was taken away from her without notice by Sherri’s adoption.<sup>146</sup> Here, the court quoted the longstanding principle that “no one is an heir to the living and that the living have no heirs in a legal sense.”<sup>147</sup> The court stated that Bella had no rights, so she could not lose any rights regardless of the fact that Sherri’s adoption affected how intestate succession applied to Bella under Missouri law.<sup>148</sup>

Here, the court determined that when Sherri was adopted by her stepfather, all legal ties between her and her biological father were severed under Section 474.060 and that when the legal ties between a parent and child are severed, the legal ties between the grandparent and grandchild are likewise severed.<sup>149</sup> The court looked beyond issues of adoption and stated that where the child of a decedent is still living, a grandchild of the decedent will be precluded from inheriting, rendering Bella unable to inherit from Decedent.<sup>150</sup> Lastly, the court addressed Sherri’s due process argument and stated that where an heir is expectant or apparent, they have no interest in a future decedent’s property, holding that Bella had no “legal bloodline” rights to lose.<sup>151</sup>

## V. COMMENT

The competing goals of intestacy law are difficult to reconcile with the increasing complexity of the family dynamic in our society. As the court in *Brockmire* stated, “[T]he General Assembly may enact whatever intestate succession statutes it sees fit – or none at all – this court is not authorized to second-guess the policy decision reflected in [the statutes].”<sup>152</sup> Because intestate succession is governed by statute, the courts are bound to follow black letter law without taking into account the extrinsic circumstances and evidence that may indicate that the decedent’s actual intent would depart from what the law provides.<sup>153</sup> To remedy the problematic outcomes of the current intestacy scheme, the Missouri legislature should amend Section 474.060 to

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144. *Id.*; see MO. REV. STAT. § 474.060(1) (2000).

145. *Brockmire*, 424 S.W.3d at 448.

146. *Id.* at 449.

147. *Id.*

148. *Id.*

149. *Id.* at 447–48.

150. *Id.* at 447.

151. *Id.* at 449.

152. *Id.* at 450.

153. *Id.*

permit a child adopted by a stepparent to inherit through both biological parents.

Traditional adoption, adult adoption, and stepparent adoption all increase the legislature's difficult task of constructing statutes that honor a decedent's presumed intent. But all of these complications can also arise when construing a testator's will.<sup>154</sup> Rules of construction allow for extrinsic evidence of the testator's intent to be taken into account when construing certain ambiguities within a will.<sup>155</sup> One Missouri court went so far as to say, "[A] court will enforce the intent of the testator, no matter what is expressed in the will."<sup>156</sup>

Intestacy statutes have been called "the will which the law makes."<sup>157</sup> With the ever-changing family dynamic, it is hard to imagine how intestacy statutes will be able to keep up, or rather, stay ahead of the evolution of the family – but does this mean that it is time for these statutes to include the subjective, to permit evidence of intent? The law of wills in Missouri, for example, allows extrinsic evidence to be introduced when a latent ambiguity exists within a will.<sup>158</sup> Attempting to determine the intent of all Missourians who have died intestate would surely be a drain upon the resources of the Missouri judiciary and the families of decedents. In *Brockmire*, for example, the entire estate in dispute was valued at a mere \$25,000.<sup>159</sup> After court costs and attorney's fees, it is hard to imagine that Ronald recovered any substantial amount of Decedent's estate. If intent was permitted to be an issue every time a decedent died intestate, many more lawful descendants would be at risk of a lawsuit. Further, if the Missouri probate courts were mandated to determine the intent of an intestate decedent each time a suit was brought by an aggrieved relative, it could cause a flurry of lengthy "he said, she said" cases. Although a determination of each intestate decedent's intent may be impossible to discern, Missouri statutes must endeavor to keep up with the average decedent's intent.

*Brockmire* presents a litany of complications.<sup>160</sup> First, Sherri was an adult at the time of her adoption. Secondly, her stepfather adopted her. Lastly, Sherri herself is not attempting to collect from her biological father's es-

154. See *Switzer v. Mercantile Bank of St. Louis*, 932 S.W.2d 893, 896 (Mo. Ct. App. 1996) (intent of including adopted children); *Davis v. Neilson*, 871 S.W.2d 35, 38 (Mo. Ct. App. 1993) (intent of including adopted adult).

155. MCGOVERN, KURTZ & ENGLISH, *supra* note 88, at 313.

156. *In re Just's Estate*, 618 S.W.2d 208, 211 (Mo. Ct. App. 1981).

157. Hirsch, *supra* note 1, at 1032–33 (quoting PETER LOVELASS, *THE WILL WHICH MAKES THE LAW*, (London, W. Strahan & M. Woodfall 1785) (in subsequent editions, retitled: *THE LAW'S DISPOSAL OF A PERSON'S ESTATE WHO DIES WITHOUT WILL OR TESTAMENT*)).

158. *Breckner v. Prestwood*, 600 S.W.2d 52, 56 (Mo. Ct. App. 1980) (extrinsic evidence permitted for latent and patent ambiguities).

159. *In re Brockmire*, No. ED 99103, 2013 WL 2484534, at \*1 (Mo. Ct. App. June 11, 2013).

160. *In re Brockmire*, 424 S.W.3d 445, 446 (Mo. 2014) (en banc).

tate, but rather Sherri is asking the court to permit her daughter, Bella, to inherit from Decedent's intestate estate.<sup>161</sup> The *Brockmire* court, by applying Missouri intestacy statutes, reached the conclusion that Sherri's legal relationship with Decedent severed upon her adoption, which consequently severed her child's legal relationship with Decedent as well.<sup>162</sup> There is no doubt that the court's application of these statutes reached the legally required conclusion, but it is impossible to know if the court's conclusion achieved Decedent's actual intent. Additionally, one might inquire whether these statutes have become antiquated and thus no longer represent the average decedent's probable intent.

It is hard to ignore the fact that the Missouri legislature has not made any effort to address the special circumstances of stepparent adoption, especially when the UPC addressed these concerns nearly forty years ago.<sup>163</sup> Additionally, multiple states have adjusted their intestacy statutes to account for this increasingly common occurrence.<sup>164</sup> It is even more perplexing that Missouri reverted to a more restricting version of Section 474.060, even after the UPC made revisions to become more accommodating to adopted stepchildren.<sup>165</sup> Today, it is difficult to imagine that the intent of the average biological grandparent would be to automatically disinherit their biological grandchild if that grandchild or their parent happens to have been adopted – particularly when the adoptive parent is the surviving spouse of the biological parent.

It is impossible to construct intestacy provisions that will cover every decedent's final wishes, but it is important for the legislature to keep up with the general intent of the public. Legislatures must also decide to what extent the average decedent would want an adopted child to inherit. Would they adopt the standard provided by the Pennsylvania statute, which takes into consideration maintained relationships,<sup>166</sup> or perhaps a bright-line rule similar to what the UPC provides,<sup>167</sup> or even a statute that provides inheritance rights to those who are adopted following the death of the biological parent/decedent?<sup>168</sup>

Although there are many options, the legislature's dual goals of efficiency and serving a decedent's intent are best met by enacting a statute similar to, or even identical to, the provision provided under the UPC. By creating a statute that does not take any subjective factors into account, it would seem unlikely that there would be an increase in litigation. A more subjective statute, like the Pennsylvania statute, would be less likely to meet that goal;

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161. *Id.* at 446.

162. *Id.* at 447–48.

163. UNIF. PROBATE CODE § 2-109 (1969).

164. *Brockmire*, 2013 WL 2484534, at \*5.

165. 1980 Mo. Laws 480; *see also*, Jones, *supra* note 114, at 63.

166. 20 PA. CONS. STAT. § 2514 (2014).

167. UNIF. PROBATE CODE § 2-119 (2010).

168. MINN. STAT. § 259.59 (2008).

although in fairness to the Pennsylvania statute, it does not appear that substantial litigation has ensued.<sup>169</sup>

Beyond conservation of judicial resources, a statute similar to the UPC would be more likely to meet a decedent's probable intent. An approach identical to the UPC approach could, like the current Missouri statute, also provide the unsatisfactory result that a decedent's actual intent would not be honored. But, an approach identical to the UPC would not punish a child adopted by a stepparent, or as in *Brockmire*, the descendant of an adopted stepchild.<sup>170</sup>

#### IV. CONCLUSION

*In re Brockmire* presents the kind of familial complexities that have become commonplace in today's society. Those complexities should be addressed by the Missouri legislature.

Similar to the evolution of adoption in Missouri, intestacy statutes should continue to evolve to conform to the probable intent of an average decedent. The best way to achieve the average decedent's intent is for Missouri to enact a statute similar or identical to UPC Section 2-119. Because intestate succession is governed completely by statute in Missouri, the courts will continue to be restrained by applying black letter law and will be unable to provide for any inheritance tie with the biological family until the statutes are modified to accommodate the changing family dynamic.

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169. PA. CONS. STAT. § 2514.

170. *In re Brockmire*, 424 S.W.3d 445 (Mo. 2014) (en banc).



