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Lines Drawn in Blood: A Comparative Perspective on the Accommodation of Blended Families in Succession Law

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Résumé de l'article

Les familles recomposées, issues de l'union d'individu.e.s dont les enfants ne sont pas commun.e.s aux deux conjoint.e.s, ne constituent pas un phénomène nouveau dans la société canadienne. Pourtant, les ordres juridiques canadiens peinent encore à trouver des moyens appropriés de prendre en compte leurs spécificités dans diverses sphères du droit. Cet article se concentre sur la manière dont le droit des successions affecte les familles recomposées : est-ce qu'un.e enfant peut hériter du beau-père intestat avec qui l'enfant a grandi si son acte de naissance ne liste pas le beau-père; l'enfant de l'un.e des conjoint.e.s reçoit-iel, comme prévu, la totalité de la succession de ce parent si le parent prédécède saon conjoint.e; la « demi-soeur » cadette d'un.e intestat reçoit-elle autant qu'un.e froeur aîné.e qui s'est détaché.e de la personne défunte depuis longtemps? Nous adoptons une approche comparative à ces questions en analysant de manière critique les lois du Canada, de la France, de l'Angleterre et de l'Écosse afin d'évaluer les forces et les faiblesses des différentes approches législatives en la matière.

Nos constats révèlent que même si les familles recomposées créent de nouvelles relations qui sont inexistantes au sein de la famille nucléaire, le modèle sur lequel se basent les lois successorales reste tout de même, à travers le monde, la famille nucléaire. Pourtant, même la simple relation parentale, lorsqu'elle est placée dans le cadre spécifique de la famille recomposée, opère différemment dans ce contexte et peut entraîner le détournement de l'héritage d'un.e défunt.e. Notre examen approfondi de l'interaction des familles recomposées avec le droit successoral contemporain, ainsi que des origines et objectifs de ce dernier, nous permet d'évaluer si les lois canadiennes atteignent leurs objectifs en ce qui concerne les familles recomposées. Notre constat est que notre droit des successions ne tient pas adéquatement compte de la spécificité des familles recomposées et nous suggérons de réformer la façon dont nous abordons le sujet afin de favoriser leur intégration.

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Lines Drawn in Blood: A Comparative Perspective on the Accommodation of Blended Families in Succession Law

*Laura Cárdenas**

Blended families, created by the coupling of individuals with children who are not common to both spouses, are not new to Canadian society. Yet, Canadian legal systems still struggle to find ways of accounting for their specificities in various legal regimes. This article focuses on the way laws on inheritance treat blended families: whether a stepchild can inherit, upon intestacy, from the father they grew up with if he is not listed on their birth certificate; whether, as intended, the child of one of the spouses really receives their parent's full estate if this parent predeceases their spouse; whether an intestate's younger "half-sister" receives as much as an estranged older sibling. I take a comparative approach to these questions, critically analyzing laws across Canada, France, England, and Scotland to discuss the strengths and shortcomings of various legislative approaches.

My findings indicate that while blended families create new relationships that are inexistent in the nuclear family, the template for succession laws across the world remains the nuclear family. Yet, even the simple parental relationship, when placed in the unique framework of a blended family, functions differently in this context and can lead to the rerouting of a deceased's inheritance. This in-depth look at the interplay of blended families and contemporary succession laws, their origins, and purposes allows me to evaluate whether Canadian laws are accomplishing their goals when it comes to blended families. I find that our laws on inheritance often fail to accommodate the specificity of blended families, and suggest a reframing of the way we approach inheritance so as to foster their inclusion.

Les familles recomposées, issues de l'union d'individu.e.s dont les enfants ne sont pas commun.e.s aux deux conjoint.e.s, ne constituent pas un phénomène nouveau dans la société canadienne. Pourtant, les ordres juridiques canadiens peinent encore à trouver des moyens appropriés de prendre en compte leurs spécificités dans diverses sphères du droit. Cet article se concentre sur la manière dont le droit des successions affecte les familles recomposées : est-ce qu'un.e enfant peut hériter du beau-père intestat avec qui l'enfant a grandi si son acte de naissance ne liste pas le beau-père; l'enfant de l'un.e des conjoint.e.s reçoit-iel, comme prévu, la totalité de la succession de ce parent si le parent prédécède saon conjoint.e; la « demi-sœur » cadette d'un.e intestat reçoit-elle autant qu'un.e frœur aîné.e qui s'est détaché.e de la personne défunte depuis longtemps? Nous adoptons une approche comparative à ces questions en analysant de manière critique les lois du Canada, de la France, de l'Angleterre et de l'Écosse afin d'évaluer les forces et les faiblesses des différentes approches législatives en la matière.

Nos constats révèlent que même si les familles recomposées créent de nouvelles relations qui sont inexistantes au sein de la famille nucléaire, le modèle sur lequel se basent les lois successorales reste tout de même, à travers le monde, la famille nucléaire. Pourtant, même la simple relation parentale, lorsqu'elle est placée dans le cadre spécifique de la famille recomposée, opère différemment dans ce contexte et peut entraîner le détournement de l'héritage d'un.e défunt.e. Notre examen approfondi de l'interaction des familles recomposées avec le droit successoral contemporain, ainsi que des origines et objectifs de ce dernier, nous permet d'évaluer si les lois canadiennes atteignent leurs objectifs en ce qui concerne les familles recomposées. Notre constat est que notre droit des successions ne tient pas adéquatement compte de la spécificité des familles recomposées et nous suggérons de réformer la façon dont nous abordons le sujet afin de favoriser leur intégration.

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Introduction

Fifty years ago, the Canadian government enacted the *Divorce Act*,[1] opening the door to a family structure that today comprises about 8 per cent of the Canadian population: blended families, formed when individuals with children marry or cohabitate, joining their families together. Today, our legal system still struggles to integrate these families into our various regimes, and reports from many law commissions across the country have issued diverging recommendations in this regard. This article contributes to that discussion by providing a comparative analysis and critique of various jurisdictions' laws on inheritance and how they treat blended families. The article takes a comparative approach, engaging with legislation and cases across Canada as well as France, England, and Scotland. The origins and purposes of each country's laws will be analyzed to evaluate whether the latter serve the objectives intended by the legislatures.

The rest of this introduction defines blended families and briefly discusses statistical data to gauge the potential impact of the laws at issue. Part I then provides a high overview of the succession laws of the jurisdictions analyzed, and dissects the justifications that structure these systems in each jurisdiction. Parts II to IV focus on three familial relationships in the unique context of blended families to evaluate whether their specificity is factored into succession legislation, and if so, in what ways: the stepparental relationship (Part II); the parent-child relationship (Part III); and sibling relationships (Part IV).

A. A Picture of Blended Families in Canada

Blended families, or stepfamilies, are families composed of a couple with one or multiple children who have a link of filiation with only one member of the couple.[2] Additionally, the couple may also have children in common. Blended families are commonly classified into three types. *Simple* blended families are those where there are no children common to both spouses, and one of the spouses has at least one child whose birth or adoption precedes the current relationship. In *complex* blended families there are no children common to both spouses, but both of the spouses have at least one child whose birth or adoption precedes the current relationship. Finally, in *fertile* blended families the couple has at least one common child,

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1 SC 1967–68, c 24.

2 See Statistics Canada, *Portrait of Families and Living Arrangements in Canada: Families, Households and Marital Status, 2011 Census of Population*, Catalogue No 98-312-X2011001 (Ottawa: Statistics Canada, 2012) at 10 [*2011 Census*].

and one or both spouses have at least one child whose birth or adoption precedes the current relationship.[3]

Blended families are most often compared to "nuclear families"[4] (also called "intact,"[5] "biological,"[6] or "traditional"[7] families), which are families composed of a couple and only children possessing a link of filiation with both parents. According to Statistics Canada, nuclear families composed approximately 87.4 per cent of couple families with children under twenty-four years of age in 2011, whereas simple blended families composed approximately 7.4 per cent, complex families approximately 1 per cent, and fertile families approximately 4.3 per cent of this total.[8] The overall percentage of blended families in the Canadian population has remained relatively stable over the last two decades, increasing only slightly.[9] Within this group, the percentage of simple blended families has shrunk, and the number of complex and fertile blended families has been increasing.[10] In 2011, about half of couples in a blended family were married, with the percentage being somewhat higher for couples in a complex or fertile blended family rather than a simple one.[11]

As this brief picture has shown, blended families are not a homogeneous group: they can be structured in many different ways depending on

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3 See Hélène Belleau, Carmen Lavallée & Annabelle Seery, *Unions et désunions conjugales au Québec : rapport de recherche – Première partie : le couple, l'argent et le droit* (Montreal: Institut national de la recherche scientifique, 2017) at 19, online: <espace.inrs.ca> [perma.cc/DG9L-AQ9C]. See also *2011 Census*, *supra* note 2 at Table 4.

4 Lawrence H Ganong & Marilyn Coleman, "How Society Views Stepfamilies" (1997) 26:1/2 Marriage & Family Rev 85 at 86ff.

5 *2011 Census*, *supra* note 2 at 10; Statistics Canada, *2011 General Social Survey: Overview of Families in Canada—Being a Parent in a Stepfamily: A Profile*, by Mireille Vézina, Catalogue No 89-650-X-No.002 (Ottawa: Statistics Canada, 2012) at 7.

6 Graham Allan, Sheila Hawker & Graham Crow, "Kinship in Stepfamilies" in Jan Pryor, ed, *The International Handbook of Stepfamilies: Policy and Practice in Legal, Research, and Clinical Environments* (Hoboken, NJ: John Wiley & Sons, 2008) 323 at 326.

7 Ralph C Brashier, *Inheritance Law and The Evolving Family* (Philadelphia: Temple University Press, 2004) at 3ff.

8 See *2011 Census*, *supra* note 2 at Table 4.

9 The percentage of couple families with children up to age twenty-four that are blended families has been increasing slightly over this period of time, composing 9% of this total in 1995, 10.8% in 2001, 11.1% in 2006, 10.7% in 2011 (see Vézina, *supra* note 5 at 9, Table 1), and 12.4% in 2016 (see "Data Tables, 2016 Census" (last modified 17 June 2019), online: *Statistics Canada* <www12.statcan.gc.ca> [perma.cc/X2H4-X4JK] ["2016 Census Data"]).

10 See Vézina, *supra* note 5 at 9, Chart 1.

11 See *ibid* at 12, Table 2.

how many children integrate the family and what links of filiation they have with each member of the couple.[12]

Irrespective of these differences, blended families are always and by definition the site of relationships that do not exist in nuclear families. In a simple blended family, a bond is created between a stepchild and a step-parent that is distinct from the parental one. A complex blended family implies not only two such bonds, but also the creation of a relationship between stepsiblings. A fertile blended family will add to or replace this bond with one between half-siblings. These families also involve other new step-relationships with members of the step-parent's or stepchild's larger family, and possibly a "constellation"[13] of such relationships.[14] These new relationships carry not only emotional and social implications, but often also financial and legal ones.[15]

The relationships created in blended families are themselves also immensely variable depending on the circumstances and the individuals involved. Relationships between individuals brought together by the new couple can thus range from a strong familial bond to a relationship resembling that between strangers.[16] A series of variables can influence the nature of these relationships, including whether the members of the blended family live in the same household; the length of time they share a household; the age of the children when the new couple formed; and the presence

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12 See *ibid* at 11–12, 14–15, 19. See also Marie-Christine Saint-Jacques, Sylvie Drapeau & Claudine Parent, "Conséquences, facteurs de risque et de protection pour les familles recomposées : synthèse de la documentation" (18 December 2009) at iii, 17, 37–38, online (pdf): *Université Laval* <www.jefar.ulaval.ca> [perma.cc/7JRF-FFL5]; Belleau, Lavallée & Seery, *supra* note 3 at 19; Jan Trost, "Step-Family Variations" (1997) 26:1/2 Marriage & Family Rev 71.

13 Irène Théry, "Les constellations familiales recomposées et le rapport au temps : une question de culture et de société" in Marie-Thérèse Meulders-Klein & Irène Théry, eds, *Quels repères pour les familles recomposées? Une approche pluridisciplinaire internationale* (Paris: Librairie générale de droit et de jurisprudence, 1995) 13; Irène Théry, "Introduction générale" in Marie-Thérèse Meulders-Klein & Irène Théry, eds, *Les recompositions familiales aujourd'hui* (Paris: Nathan, 1993) at 13–14 [Meulders-Klein & Théry, *Recompositions familiales*].

14 For studies regarding step-grandparents and the variations in these relationships, for instance, see e.g. Allan, Hawker & Crow, *supra* note 6 at 335ff; Lawrence Ganong, "Intergenerational Relationships in Stepfamilies" in Pryor, *supra* note 6, 323.

15 See Vézina, *supra* note 5 at 6. See also Saint-Jacques, Drapeau & Parent, *supra* note 12 at 10 (arguing that the lack of legal recognition of step-parents can have a direct impact on their daily lives, and providing the example of step-parents' inability to integrate some school activities or participate in interventions with the Director of Youth Protection as a result); Ganong & Coleman, *supra* note 4 at 88–89 (discussing the barriers raised against step-parents by social and health organizations the stepchildren are involved in).

16 See Saint-Jacques, Drapeau & Parent, *supra* note 12 at 13–14 (presenting four different models of integration of the stepchild–step-parent bond within a blended family).

of common siblings.[17] In particular, when members of a blended family live in the same household for a lengthy period of time starting when the children brought into the couple are very young, relationships between them usually grow stronger.[18] In contrast, if the blended family forms once these children are adults, familial bonds are not often found.[19] Moreover, the closeness that can grow between a stepchild and a step-parent who live together, or stepsiblings who grow up together for a substantial amount of time, are rarely found in those same relationships when the individuals do not live together.[20]

In two-thirds of Canadian blended families, the children live in the blended family's home full-time. In the case of the other third, some of the children live with the blended family part-time.[21] The ages of and age differences between children living in Canadian complex or fertile blended families range across a wide spectrum, but in a substantial number of these families, there is a significant age difference between children.[22] This picture of blended families in Canada suggests that just as there is not one type of blended family only, there cannot be only one way of addressing blended families' needs and realities in succession law. We might therefore expect that a legal system that accounts for diversity and provides flexibility would be best able to accommodate the above-mentioned realities.

B. Blended Families in Law

While blended families were historically the result of the death of a spouse and remarriage of their widow or widower, they nowadays result most often from the divorce or separation and subsequent re-coupling of

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17 See Allan, Hawker & Crow, *supra* note 6 at 340–41; Saint-Jacques, Drapeau & Parent, *supra* note 12 at 37 (raising the age of the child, the compatibility of personalities, the relationship maintained with each "biological" parent, and the time spent with a step-parent as the major factors in determining the quality of the stepchild–step-parent relationship); Anne C Bernstein, "Stepfamilies from Siblings' Perspectives" (1997) 26:1/2 Marriage & Family Rev 153 at 155.

18 See Allan, Hawker & Crow, *supra* note 6 at 340–41. See also Saint-Jacques, Drapeau & Parent, *supra* note 12 at 37.

19 See Allan, Hawker & Crow, *supra* note 6 at 335.

20 See *ibid* at 334, 341, 343.

21 See Vézina, *supra* note 5 at 11.

22 See "2016 Census Data", *supra* note 9.

individuals.[23] Despite this historical change, attitudes toward blended families have remained negative.[24] In early and modern Europe, blended families were perceived as troublesome; the relationships created within them were viewed as doomed to failure and constitutive of tensions leading to violence.[25] Perhaps these negative attitudes toward blended families are part of the reason that they have been kept at bay from the legal institutions that regulate families' lives. Yet, given the increasing proportion of blended families in society, it is past time to revisit and revise this exclusion.

Also resulting from this historical change is the reality that members of blended families now navigate more relationships with multiple parental figures, since the divorce or separation of a couple does not necessarily entail the disappearance of one parent from their children's lives.[26] Blended families no longer mirror the structure of nuclear families as closely as they did historically—a change that ought to be relevant to our legal systems. Yet, succession law, like much of family law, has always been centred around the model of the nuclear family. As a result, there are multiple specificities to the reality of blended families that are completely ignored by legislation on inheritance, being at times addressed by the courts instead.

I. The Purpose of Succession Law

Most succession regimes are constructed around two main notions: the intention of the deceased and moral duty. These notions serve to justify not only the structure of the regimes, but also the legislation and common law rules that modify them on a case-by-case basis. In this last task, other concerns (sometimes qualified as welfarist) supplement these two notions. Understanding what these justifications entail and the way they affect the structure of succession regimes will be key to analyzing and evaluating the way different regimes address blended families.

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[23] See Valerie Martin, *Stepfamilies in Canada: Numbers, Characteristics, Stability and Childbearing* (PhD Dissertation, McGill University, 2008) at 27–28 [unpublished]; Vézina, *supra* note 5 at 6; Roderick Phillips, "Stepfamilies from a Historical Perspective" (1997) 26:1/2 Marriage & Family Rev 5 at 6–7. See also Lisa Wilson, *A History of Stepfamilies in Early America* (Chapel Hill: University of North Carolina Press, 2014) at 2; Irène Théry & Marie-Josèphe Dhavernas, "La parenté aux frontières de l'amitié : statut et role du beau-parent dans les familles recomposées" in Meulders-Klein & Théry, *Recompositions familiales*, *supra* note 13, 159 at 167–68.

[24] See Phillips, *supra* note 23 at 11–12; Saint-Jacques, Drapeau & Parent, *supra* note 12 at iv, 10, 18; Ganong & Coleman, *supra* note 4 at 85–86, 92–99; Martin, *supra* note 23 at 29–30.

[25] See Phillips, *supra* note 23 at 11–13.

[26] See Martin, *supra* note 23 at 28.

Part I-A will analyze the following justifications and how they influence the way a jurisdiction addresses testation, intestate regimes, and the variation of the distribution of an estate: (1) intention of the deceased; (2) moral duty; and (3) need and dependency. Part I-B will analyze how these justifications are currently evidenced and used in Canadian jurisdictions to redraw the boundaries of the family in succession law.

A. Common Justifications for Succession Law Regimes and Their Variation

1. Intention of the Deceased

In Canada and the common law world, succession law is often said to hinge on the intention of the deceased, whether in the case of testation, where freedom of testation embodies this principle (a), or in the case of intestacy, the rules of which are said to represent the presumed intention of the deceased (b).

a. Testamentary Freedom

Testamentary freedom entails that the testator can make whatever legacies they wish, unconstrained by limitations inherent to succession law (such as forced heirship provisions).[27] It generally signifies that the testator can make legacies to whomever they desire, and they can give away all of their estate by will, without a share being due to a specific individual or class. This justification is, in particular, enshrined in the common law and jurisprudence from common law jurisdictions, such as England and Wales, Canada, and the United States.[28]

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27 See *Spence v BMO Trust Company*, 2016 ONCA 196 at paras 30, 32 [*Spence*]; Roger Kerridge, "Family Provision in England and Wales" in Kenneth GC Reid, Marius J de Waal & Reinhard Zimmerman, eds, *Comparative Succession Law, Volume III: Mandatory Family Protection* (Oxford: Oxford University Press, 2020) 384 at 384 [Kerridge, "Family Provision"] [Reid, de Waal & Zimmerman, *Volume III*]; Daniel B Kelly, "Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications" (2013) 82:3 Fordham L Rev 1125 at 1133.

28 See *Blathwayt v Cawley*, [1975] 3 All ER 625 at 636, [1976] AC 397 (HL); *Canada Trust Co v Ontario (Human Rights Commission)* (1990), 74 OR (2d) 481 at 495, 69 DLR (4th) 321 [*Canada Trust Co*] ("[t]he freedom of an owner of property to dispose of [their] property as [that person] chooses is an important social interest that has long been recognized in our society and is firmly rooted in our law"), cited in *Spence*, *supra* note 27 at para 30; *Tataryn v Tataryn Estate*, [1994] 2 SCR 807 at 824, 116 DLR (4th) 193 [*Tataryn*]. See also, in the United States, *Restatement (Third) of the Law of Property* § 10.1 comment (a) (2001); Kelly, *supra* note 27 at 1133ff.

Both civil and common law scholars have justified freedom of testation on the basis that it is an incident of property rights[29] and a natural right (a justification attributed in particular to John Locke in the seventeenth century).[30] Economic justifications have also been provided for testamentary freedom, arguing, for instance, that freedom of testation maximizes donor satisfaction, promotes capital accumulation, and strengthens family relationships, and that testators possess an informational advantage allowing them to select the highest-value donees for their estate.[31]

In the twentieth century, testamentary freedom has often been termed "the cornerstone of the common law,"[32] where it is deemed to have shaped succession law and to remain its core structuring principle today. Yet, contrary to what is advanced by its reputation, testamentary freedom has not been the norm in most jurisdictions over long periods of time. In England, unlimited freedom of testation was allowed for both personalty and realty only from approximately 1891 to 1939.[33] Similarly, in Canada, where "[a]t the dawn of the twentieth century, an unbridled freedom of testation prevailed,"[34] testamentary freedom was gradually limited by legislation restricting testation in favour of widows in the 1910s[35] and in favour of widows, widowers, and children in the 1920s.[36] By the mid-1970s, all Canadian

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29 See Kate Green, "The Englishwoman's Castle: Inheritance and Private Property Today" (1988) 51:2 Mod L Rev 187 at 187. See also Miloš Vukotić, "Influence of Objective Elements on the Interpretation of Wills" (2017) 33:1 Pravani Vjesnik 9 ("[f]reedom of testation has deep roots in the right to property and dignity—it is an expression of personal freedom" at 10).

30 See Gordon Bale, "Limitation on Testamentary Disposition in Canada" (1964) 42:3 Can Bar Rev 367 at 368. This last view has detractors amongst natural law scholars as well (see Kelly, *supra* note 27 at 1135, n 48). See also G Boissonade, "De la liberté de tester" (1872) 2 R législation ancienne & moderne, française & étrangère 612 at 612–13, 645, 647.

31 See Kelly, *supra* note 27 at 1135–38.

32 Green, *supra* note 29 at 190.

33 See Kerridge, "Family Provision", *supra* note 27 at 384; Green, *supra* note 29 at 191ff. See also Bale, *supra* note 30 at 368ff.

34 Alexandra Popovici & Lionel Smith, "Freedom of Testation and Family Claims in Canada" in Reid, de Waal & Zimmerman, *Volume III*, *supra* note 27, 507 at 507. See also *Re Tyhurst, Deceased*, [1932] SCR 713 at 716, 4 DLR 173; *Re Browne*, [1934] SCR 324 at 330, 2 DLR 588, where the Supreme Court of Canada refers to the importance of remaining true to the testator's intention as, respectively, the court's "duty" and "the golden rule, the fundamental principle" of succession law. See also Angela Campbell, "I Do, I Will" (2014) 47:2 UBC L Rev 367 at 371–72.

35 See, in Alberta, the *Married Women's Relief Act*, SA 1910 (2nd Sess), c 18; in Saskatchewan, *An Act to Amend the Devolution of Estates Act*, SS 1910–11, c 13; in Manitoba, *The Dower Act*, SM 1919, c 26.

36 See, in British Columbia, *Testator's Family Maintenance Act*, SBC 1920, c 94; in Ontario, *The Dependants' Relief Act*, SO 1929, c 47.

provinces and territories had enacted statutes restricting testamentary freedom.[37]

Some mixed jurisdictions, such as Quebec and Scotland, have also based their succession law on the principle of testamentary freedom.[38] Freedom of testation made its way into Quebec in the *Quebec Act* of 1774. The principle initially encountered a warm reception, with scholars in Quebec defending it on the same grounds put forward by common law jurists. Until the 1930s, freedom of testation was seen as a logical consequence of the right to property or a principle stemming from natural law.[39] A shift in public opinion occurred in the 1930s, however, turning Quebec scholars against the testamentary freedom that was enshrined in the *Civil Code of Lower Canada*. This criticism was based on the importance of morality in family legislation, on the goal of protecting family members such as the deceased's spouse and children, and on the shared nature of property accumulated by the deceased with their spouse.[40] Freedom of testation nonetheless remained the basis of succession law in Quebec and was unconstrained by family legislation until the 1980s.[41]

The history of testamentary freedom thus shows that although it serves as the basis for many succession regimes, it has long been limited by legislation meant to protect the deceased's family and dependants in all the jurisdictions studied.[42] It is also limited—in a practical sense—by rules that prevent the courts from taking into account evidence of the deceased's intention under some circumstances.[43]

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37 See *Testators' Family Maintenance Act*, SNS 1956, c 8; *Testators Family Maintenance Act*, SNB 1959, c 14; *The Family Relief Act, 1962*, SN 1962, c 56; *Dependant's Relief Ordinance*, RSY 1962 (1st Sess), c 9; *Dependants' Relief Ordinance*, SNWT 1971 (1st Sess), c 5; *Dependants of a Deceased Person Relief Act*, SPEI 1974, c 47 D-6. See also Bale, *supra* note 30 at 371ff; Popovici & Smith, *supra* note 34 at 511. While Nunavut did not enact its own legislation, it inherited that of the Northwest Territories upon its creation in 1999.

38 In Scotland, see Kenneth GC Reid, "Legal Rights in Scotland" in Reid, de Waal & Zimmerman, *Volume III*, *supra* note 27, 417, citing Viscount Stair ("'[t]he first rule of succession,' says Stair, is 'the express will of the owner'" at 441).

39 See Christine Morin, "La liberté de tester : évolution et révolution dans les représentations de la doctrine québécoise" (2008) 38:2 RDUS 339 at 370–83. See also Popovici & Smith, *supra* note 34 at 513.

40 See Morin, *supra* note 39 at 345–69.

41 See Popovici & Smith, *supra* note 34 at 512.

42 See Campbell, *supra* note 34 at 371–72, 394, 397.

43 See Vukotić, *supra* note 29 at 21ff. See also Campbell, *supra* note 34 at 387.

b. Presumed Intention of the Deceased in Intestacy

If testacy has been perceived in the common law as the realm of the intention of the testator, intestacy arguably corresponds to what the deceased *would have wanted*, had they made a will.[44] The presumed wishes of the deceased are the basis for intestacy regimes in common law jurisdictions such as England and Wales,[45] common law Canada,[46] and the United States,[47] and even played a role in some civil law jurisdictions such as France,[48] or mixed jurisdictions like Quebec.[49]

The rules on intestacy, in all jurisdictions, rank members of the deceased's family in the order in which they are scheduled to receive a share of the estate, subject to the rights of the family members ranked higher. The wishes of the deceased are assumed to correspond to their presumed affections, which are based on how close the deceased is taken to have been to people who had a certain familial (and generally formalized) relationship with them. Thus, in all Canadian jurisdictions—as in most jurisdictions across the world—the deceased's spouse and issue share the first place, followed by the deceased's parents, their siblings, and their grandparents and niblings.

The deceased's affections are presumed equal to all those individuals who held the same relationship to them.[50] This equality is reflected in the equal shares distributed to members of a same class, and used to be embodied in the hotchpot rule on the presumption of advancement. This rule, stemming from the equitable maxim that "equality is equity,"[51] subtracted from the inheritance of a child of the deceased gifts they had received from

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44 See Fiona Burns, "Surviving Spouses, Surviving Children and the Reform of Total Intestacy Law in England and Scotland: Past, Present and Future" (2013) 33:1 LS 85 at 96; Kenneth GC Reid, Marius J de Waal & Reinhard Zimmerman, "Intestate Succession in Historical and Comparative Perspective" in Kenneth GC Reid, Marius J de Waal & Reinhard Zimmerman, eds, *Comparative Succession Law, Volume II: Intestate Succession* (Oxford: Oxford University Press, 2015) 442 at 445–46 [Reid, de Waal & Zimmerman, "Intestate Succession"] [Reid, de Waal & Zimmerman, *Volume II*].

45 See Roger Kerridge, "Intestate Succession in England and Wales" in Reid, de Waal & Zimmerman, *Volume II*, *supra* note 44, 323 at 327–28 [Kerridge, "Intestate Succession"]; Burns, *supra* note 44 at 96.

46 See e.g. Alberta Law Reform Institute, *Reform of the Intestate Succession Act*, Report 78 (Edmonton: ALRI, June 1999) at 1.

47 See Reid, de Waal & Zimmerman, "Intestate Succession", *supra* note 44 at 446, n 24.

48 See Cécile Pérès, "Intestate Succession in France" in Reid, de Waal & Zimmerman, *Volume II*, *supra* note 44, 33 at 37.

49 See Quebec, Ministère de la justice, *Commentaires du ministre de la justice : le Code civil du Québec*, vol 1 (Québec: Publications du Québec, 1993) at 390.

50 See Reid, de Waal & Zimmerman, "Intestate Succession", *supra* note 44 at 446–48.

51 Kerridge, "Intestate Succession", *supra* note 45 at 330.

their parent during their lifetime "by way of advancement or on the marriage of [the] child."[52] The hotchpot rule was repealed in England in 1995[53] and in a number of Canadian provinces in the late twentieth century.[54] In Canada, the rule was found not to represent the wishes of most testators, as "the function of intestacy [is] to distribute what was left of the intestate's property at death, and not to redress inequalities existing in the intestate's lifetime."[55]

The presumed intention of the deceased is the corollary of testamentary freedom in intestacy. This equivalency's shortcomings are clear: the rules on intestacy are meant to represent the presumed affections of the deceased, but these presumptions are unlikely to correspond to all or most cases. When they do not, evidence of the deceased's actual intentions is, on its own, insufficient to vary the distribution.[56] Furthermore, the relationships taken into account by the regime and their value respective to one another are subject to change within society at a pace that might not correspond to that of the legal reforms that determine them.

2. Moral Duty

Moral duty stands in stark contrast to testamentary freedom as a structuring principle of succession law. The moral duties of the deceased have been used to justify the variation of wills and intestacies (a), the structure of intestacy regimes (b), and the provisions that reserve a part of a deceased's estate to a specific person or class (c).

The *moral duty*, *moral obligation*, or *family duty* of the deceased are all expressions used to refer to the obligations that the deceased is considered

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52 *Administration of Estates Act 1925* (UK), 15 & 16 Geo V, c 23, s 47(1)(iii). See also Roger Kerridge, *Parry & Kerridge: The Law of Succession*, 12th ed (London, UK: Sweet & Maxwell, 2009) at paras 2–52.

53 See *Law Reform (Succession) Act 1995* (UK), c 41, s 1(2)(a). See also Kerridge, "Intestate Succession", *supra* note 45 at 331. The hotchpot rule on presumptions of advancement was also applied in testacy (see John G Ross Martyn et al, eds, *Theobald on Wills*, 17th ed (London, UK: Sweet & Maxwell, 2010) at paras 36ff; Manitoba Law Reform Commission, *Wills and Succession Legislation*, Report 108 (Winnipeg: MLRC, March 2003) at 47), and was abrogated in many Canadian provinces as well (see e.g. *Wills and Succession Act*, SA 2010, c W-12.2, ss 110(1)–(2) [*Succession Act* Alta]; *Wills, Estates and Succession Act*, SBC 2009, c 13, ss 53(1)–(2) [*Succession Act* BC]).

54 See e.g. *Succession Act* Alta, *supra* note 53, ss 110(1)–(2); *The Intestate Succession and Consequential Amendments Act*, SM 1989–90, c 43, s 8(5), cited in Manitoba Law Reform Commission, *supra* note 53 at 47, n 139.

55 British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework*, Report 45 (Vancouver: BCLI, 2006) at 18.

56 See Reid, de Waal & Zimmerman, "Intestate Succession", *supra* note 44 at 446; Vukotić, *supra* note 29 at 21ff.

to owe others, even after death. They are sometimes construed as the continuation of the duties owed by the testator to their family members during their lifetime,[57] or understood against the standards of societal expectations. In Canada, the last articulation of moral obligations provided by the Supreme Court stems from *Tataryn v. Tataryn*, where they were defined by reference to "contemporary community standards."[58] Moral obligations can also include obligations that follow from the creation of expectations on the part of the deceased (such as promises of support).[59] Depending on the definition chosen, on the jurisdiction, or on the facts of the case, these obligations may be extended only to the members of the nuclear family, or to family more broadly, or to third parties.

a. Variation of Wills and Intestacies

The clearest arena where moral duty and testamentary freedom are opposed is in the variation of wills or intestacies on the grounds of moral duty. A will or intestacy is varied when an individual appeals to dependants' relief legislation to be provided with a part of the estate they were not granted in the deceased's will or by the intestacy regime applicable.[60] Dependants' relief statutes function by introducing a range of relationships that they will consider as giving rise to a potential claim; the range varies depending on the jurisdiction, as does the discretion allowed courts to determine whether an individual "fits" a listed relationship. Once it has been determined that an individual belongs to one of the listed relationships, the statutes also provide a list of criteria to consider in determining the amount of relief, if any, that they can obtain.[61] The Quebec equivalent to dependants' relief legislation is the obligation of support described at article 585 of the *Civil Code of Québec*. There are only two relationships that can give rise to such an obligation: marriage (or civil union) and the parent-child relationship.[62]

Variation of wills or intestacies is, depending on the jurisdiction, granted on the grounds of need, moral duty, or a combination of the two. Many statutes providing dependants' relief on the basis of moral duty were originally justified on the grounds that such a duty was owed by a deceased (generally a husband) to their family (generally their wife and children),

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57 See e.g. arts 585, 684 CCQ. See also Popovici & Smith, *supra* note 34 at 527–28; *Tataryn*, *supra* note 28 at 821; Peter Bowal, "How Do You Spell Relief? Re-Writing Wills in Canada" (2000) 25 LawNow 26 at 28; Bale, *supra* note 30 at 367–68.

58 *Tataryn*, *supra* note 28 at 821.

59 See Green, *supra* note 29 at 202–03.

60 Note that in British Columbia and Nova Scotia, dependants' relief legislation does not apply to intestacies (see Popovici & Smith, *supra* note 34 at 530, n 120).

61 See *ibid* at 525, 527.

62 See arts 585ff CCQ.

continued from the obligations that were owed to the latter during the deceased's lifetime. Such justifications have been provided for legislation in Quebec, common law Canada, and England.

In Quebec, obligations of support that were owed by the deceased to family members before their death continue post-mortem and, in order to be satisfied from the estate, may vary the deceased's will or intestacy.[63] In common law Canada, the obligation claimed can also be the continuation of one which was recognized—or would have been recognized—during the deceased's lifetime.[64] Most Canadian dependants' relief statutes hold that once a claimant fulfilling the criteria of the required relationship is found not to have received "adequate provision for [their] proper maintenance and support,"[65] the court will determine the quantum of relief to be granted. Manitoba, in contrast, allows only claimants in financial need to obtain relief.[66]

The criteria listed to evaluate this quantum are indicative of the importance that could be granted to moral considerations in a court's decision. Newfoundland and Labrador, for instance, invites the court to take into account not only need-related criteria (such as the financial circumstances of the dependant[67] and the claims from other dependants[68]) but also criteria that require the court to form a judgment about the relationship between the claimant and the deceased. These criteria include any "character or conduct of the dependant" that could disentitle them; the relationship between dependant and deceased; services rendered by the dependant to the deceased; and the deceased's reasons for not making adequate provision for the dependant.[69]

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63 See e.g. arts 585, 684 CCQ; Popovici & Smith, *supra* note 34 at 519. Although these scholars view these post-mortem obligations as strictly legal in origin (see *ibid* at 525), the moral obligation that grounds the original obligation of support between family members during the deceased's lifetime places it in the category of moral obligations varying the testator's intent for our purposes.

64 See *Tataryn*, *supra* note 28 at 820.

65 *Family Relief Act*, RSNL 1990, c F-3, s 3(1) [*Family Relief Act* NL]. For other jurisdictions, see e.g. *Succession Act* Alta, *supra* note 53, s 88(1); *Succession Act* BC, *supra* note 53, s 60; *Dependants Relief Act*, RSNWT 1988, c D-4, s 2(1) [*Dependants Relief Act* NWT]. See also Popovici & Smith, *supra* note 34.

66 See e.g. *The Dependants Relief Act*, SM 1989–90, c 42, CCSM c D37, s 2(1) [*Dependants Relief Act* Man]. Interestingly, Manitoba's approach used to be one aligned with moral duty—"fair share morality"—but was changed with the 1989 reform to a need-based approach: see Darrell A Kreel, *The Judicial Reconstruction of Wills in Manitoba* (LLM Thesis, University of Manitoba, 1999) at 100 [unpublished].

67 See *Family Relief Act* NL, *supra* note 65, s 5(1)(d).

68 See *ibid*, s 5(1)(e).

69 See *ibid*, ss 5(1)(a), 5(1)(c), 5(1)(g), 5(3).

Another group of statutes allows a wide discretion to the courts,[70] which has generally been interpreted in favour of a moral approach. The British Columbia Law Institute has stated, for example, that although British Columbia's first dependants' relief legislation, the *Testator's Family Maintenance Act*,[71] was created as social welfare legislation to remedy issues of dependants left in economic need, "since *Walker v. McDermott*[72] in 1931, [dependants' relief legislation] has been interpreted in a much more expansive fashion, acting, in effect, as a means of preventing disinheritance."[73] Such an evolution is grounded in the introduction of moral dimensions into the courts' interpretations of the statute. Another example of this approach is visible in jurisdictions that award relief to children above the age of majority, whether or not dependent.[74] The importance of moral obligations in the courts' deliberative process was enshrined in Justice McLachlin's judgment in *Tataryn*, where she interpreted and applied British Columbia's *Wills Variation Act*,[75] clarifying the duty of a testator to make proper provision on the basis of a moral obligation: "[Moral obligations] are found in society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards."[76] With Justice McLachlin's statement being specific to British Columbia's *Wills Variation Act*, its applicability to other jurisdictions is uncertain. For instance, the Ontario Court of Appeal has in turn declared that Justice McLachlin's interpretation of moral obligations in *Tataryn* represented Ontarian law in 2004,[77] before declaring the opposite in 2014.[78] Meanwhile,

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70 See e.g. *Succession Act* BC, *supra* note 53, s 60; *Provision for Dependants Act*, SNB 2012, c 111, s 2; *Dependants Relief Act* NWT, *supra* note 65, s 2(1) (listing no criteria to be taken into account by the courts in determining the quantum of relief to be awarded to a dependant).

71 *Supra* note 36.

72 [1931] SCR 94, 1 DLR 662.

73 British Columbia Law Institute, *supra* note 55 at 56. See also Donovan Waters & Leela A Hemmings, "Succession and Forced Heirship" (2009) 15:9 Trusts & Trustees 739 at 743 (comparing the British Columbian trend with "the thinking behind fixed shares in the civil law jurisdictions of the world").

74 See Albert H Oosterhoff, *Oosterhoff on Wills and Succession: Text, Commentary and Materials*, 7th ed (Toronto: Carswell, 2011) at 861. See also Bowal, *supra* note 57 at 27–28.

75 RSBC 1979, c 435.

76 *Tataryn*, *supra* note 28 at 821.

77 See *Cummings v Cummings* (2004), 235 DLR (4th) 474 at paras 40–47, 69 OR (3d) 398 (CA). See also *Quinn v Carrigan*, 2014 ONSC 5682 at para 78.

78 See *Verch Estate v Weckwerth*, 2014 ONCA 338 at para 5. See also Popovici & Smith, *supra* note 34 at 529–30.

Tataryn has also been applied in Alberta,[79] Saskatchewan,[80] New Brunswick,[81] Nova Scotia,[82] Prince Edward Island,[83] the Northwest Territories,[84] and Yukon.[85]

Similarly, in England and Wales, legislation awarding relief to dependants and family members originated in "an appreciation of the fact that, in the field of succession, social interests, other than testamentary freedom, warranted consideration. There was a growing concern about the needs of dependants and a recognition of the *moral responsibility owed by testators to their dependants*."[86] While the *Inheritance (Family Provision) Act*[87] introduced in 1938 did not expressly refer to the moral duty of the deceased, English jurisprudence explicitly recognized this dimension of the statute for the first time in *Re Andrews*.[88] This moral dimension was reiterated in the parliamentary debates surrounding the introduction of the *Inheritance (Provision for Family and Dependants) Act 1975*.[89] Today, this recognition takes the form of an understanding that the variation of a will requires either special circumstances or a moral obligation toward the dependant.[90] As confirmed recently by the United Kingdom's Supreme Court in *Ilott v.*

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79 See e.g. *Koma v Tomich Estate*, 2011 ABCA 186; *Lafleur v Lafleur*, 2016 ABCA 7; *Boje v Boje (Estate of)*, 2005 ABCA 73.

80 See e.g. *Scott v Seier Estate*, 2016 SKCA 76; *Ostrander v Kimble Estate* (1996), 146 Sask R 64, 13 ETR (2d) 231 (QB); *Thronberg v Thronberg Estate*, 2003 SKQB 114.

81 See e.g. *Currie v Currie Estate* (1995), 166 NBR (2d) 144, 425 APR 144 (CA); *Johnson v Johnson Estate*, 2009 NBQB 208; *Lawrence v Johnston Estate* (2000), 32 ETR (2d) 86, 2000 CarswellNB92 (QB).

82 See e.g. *Welsh v McKee-Daly*, 2014 NSSC 356; *David v Beals Estate*, 2015 NSSC 288.

83 See e.g. *Re MacDonald Estate*, 2014 PESC 7.

84 See e.g. *Re Camsell Estate*, 2016 NWTSC 62.

85 See e.g. *Gonder v Velder Estate*, 2000 YTSC 505.

86 Bale, *supra* note 30 at 370 [emphasis added]. See e.g. Elizabeth Travis High, "The Tension between Testamentary Freedom and Parental Support Obligations: A Comparison Between the United States and Great Britain" (1984) 17 Cornell Intl LJ 321 at 323–24, n 12, citing UK, HL Deb (16 May 1928), 5th series, vol 71, col 42 (Lord Astor praised the legislation—inspired from that of New Zealand—for its ability to provide "support as it was the moral duty of the testator to provide").

87 (UK), 1 & 2 Geo VI, c 45.

88 [1955] 3 All ER 248 at 249, [1955] 1 WLR 1105 (ChD). See also *Re Fullard*, [1981] 2 All ER 796 at 800, [1982] Fam 42 (CA Civ) (where Ormond LJ acknowledged the moral dimension required by the decision process demanded by the legislation); Green, *supra* note 29 at 199–200.

89 (UK) [*Inheritance Act* 1975]. See UK, HC Deb (16 July 1975), vol 895, col 1686–87 (Peter Archer); Green, *supra* note 29 at 194–95.

90 See Kerridge, "Intestate Succession", *supra* note 45 at 20–28; *Inheritance Act* 1975, *supra* note 89, ss 3(1)(a)–(g).

The Blue Cross, "[c]learly, the presence or absence of a moral claim will often be at the centre of the decision under the 1975 Act."[91] *Ilott* suggests that moral obligations are to be inferred from the presence of need and the relevant relationship. While the decision leaves a wide discretion with trial judges,[92] it is also possible that the precedent set by the case will lead judges to find moral obligations wherever relevant relationships and need are present—thus resulting in a jurisprudential development similar to that which took place in British Columbia and common law Canada.

b. Intestacy Regimes

While in most cases intestacy regimes are said to be based on the presumed wishes of the deceased, it has also been suggested that these wishes might accord with the deceased's moral duty.[93] Most often, however, in Quebec and in France intestacy regimes are said to be founded on a combination of the presumed affections and the moral duty—or "family duty"—of the deceased.[94] This combination suggests that the deceased's wishes might have differed from their moral duty, or that they may indeed have been contrary to one another—in which case intestacy regimes operate a balance between the two realities: "In deciding how an estate is to be distributed, therefore, the law pays regard not merely to what the deceased is supposed to have wanted, but also to what [they] ought to have wanted."[95] The moral duties that are present in the Quebec and French intestacy regimes can be seen in their purest form in the French forced heirship—*la réserve héréditaire*.

c. Forced Heirship

Succession regimes that function through "forced heirship" or "forced shares" dictate that a certain share of a deceased's estate (whether they die testate or intestate) be devolved to specific individuals or members of a specific class. As such, testators will only be able to make legacies out of the available portion of their estate; intestacy rules will also apply only to the

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91 [2017] UKSC 17 at para 20 [*Ilott*].

92 See *ibid* at para 58, Hale B; Kerridge, "Intestate Succession", *supra* note 45 at 28.

93 See e.g. John EC Brierley & Roderick A Macdonald, eds, *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993), s 336.

94 See Jacques Auger, "Les principes de désignation des héritiers légaux : unité – proximité – égalité" in Brigitte Lefebvre, ed, *Mélanges Roger Comtois* (Montréal: Thémis, 2007) 73 at 79–80, 95–97; Reid, de Waal & Zimmerman, "Intestate Succession", *supra* note 44 at 446–48.

95 Reid, de Waal & Zimmerman, "Intestate Succession", *supra* note 44 at 446–48.

available portion of a deceased's estate. Forced heirship schemes are generally associated with civil law jurisdictions.[96]

Family duty is the foundation of forced shares.[97] This duty is seen as the continuation of the moral duty family members owe each other during their lifetime—generally crystallized in the duty from a parent to their children. The French *réserve héréditaire*,[98] for instance, has been qualified as a way to extend the obligation a parent has toward their children past their lifetime and onto their estate.[99] Under the *Civil Code of Lower Canada*, this duty ended with the death of the parent; the absence of a post-mortem equivalent in Quebec's civil law has been criticized by a scholar in Quebec as a "formidable illogicality."[100] Forced heirship provisions also guarantee an equal treatment among the children of the deceased, as far as the reserved portion is concerned;[101] in this sense, they reflect the principle embodied in the common law hotchpot rule on advancement. In Scotland, legal rights that grant the deceased's spouse and children a portion of the moveable estate[102] upon their death—whether testate or intestate—are said to translate a moral obligation founded in natural affection, which was made a legal obligation to "remove the temptation of non-compliance."[103] This language places the moral obligations in stark contrast with the intentions of the deceased: while it is acknowledged that both should match, the moral obligations are given primacy in cases where they do not, because they represent the intentions the deceased *ought* to have had.

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96 See *ibid*.

97 See Michel Grimaldi, *Droit civil des successions*, 6th ed (Paris: Litec, 2001), s 283; Louis Baudouin, *Le droit civil de la Province de Québec : modèle vivant de Droit comparé* (Montreal: Wilson & Lafleur, 1953) at 1130–31; Reid, *supra* note 38 at 442–43.

98 See art 912 C civ.

99 See Grimaldi, *supra* note 97, s 284. It has also been argued that the *réserve* was a mechanism used to maintain property within the family bloodline (see Reid, de Waal & Zimmerman, "Intestate Succession", *supra* note 44 at 447).

100 Louis-Philippe Pigeon, "Nécessité de restreindre la liberté de tester" in Association Henri Capitant pour la culture juridique française, *Travaux de l'association Henri Capitant pour la culture juridique française*, t 12 (Montréal: Eugène Doucet, 1961) at 669, cited in Morin, *supra* note 39 at 353 [translated by author].

101 See Grimaldi, *supra* note 97, s 289; Edmond Bonnal, *La liberté de tester et la divisibilité de la propriété* (Paris: Librairie de Guillaumin, 1866) at 118, 162; Reid, *supra* note 38 at 443.

102 The spouse's portion corresponds to one third of the moveable estate if the deceased left any issue, or one half if they left none; the issue's portion corresponds to one third of the moveable estate if the deceased left a spouse, or one half if they did not.

103 Reid, *supra* note 38 at 442.

3. Need in Dependants' Relief Recourses

Need and dependency have not served as justifications for the structure of the distribution schemes of succession regimes, but they are used in multiple Canadian jurisdictions as a justification to vary wills, and sometimes intestacies. Manitoba's current statute best exemplifies this approach. Its focus on need is clearly laid out in the threshold it imposes for the court to grant relief in subsection 2(1) of the *Dependants Relief Act*—"financial need" being the only criterion taken into account by the courts at that stage—and in the criteria considered to determine the quantum of this relief.[104] The only criterion that opens the door to a moral judgment on the part of the court is found in paragraph 8(2)(c), which considers the deceased's reasons for not making adequate provision for the claimant. The Manitoban example aside, most provinces and territories include need as a consideration *among others* to vary wills and intestacies, and sometimes disregard that aspect entirely, relying instead on moral duty.[105]

In Quebec, the foundation for a claim upon the estate is the same as that for a claim *inter vivos*, where the court considers both the resources of the debtor and the needs of the creditor. While the claim's success depends on the presence of a recognized relationship grounding the moral duty, need is a necessary element to found this claim.[106]

It has been suggested that using need and dependency as criteria to award relief is a way for the state to alleviate its purse from the expenses incurred by dependents who draw benefits from it. This argument has been used to justify future growth in the entitlement given to spouses of intestates[107] and in awards on dependants' relief legislation to able-bodied, adult children.[108] This justification, when taken into account by the courts, can also yield results contrary to the wishes (presumed or expressed) of the deceased.

B. Critical Analysis of the Predominant Justifications in Canada

Respecting the intention of the deceased is the founding principle for both testate and intestate regimes in Canada. This principle is manifested as testamentary freedom in testacy, and presumed intention in intestacy. In testacy, testamentary freedom can be defeated by the variation of the deceased's will on the grounds of a moral obligation due to a dependant (in all provinces but Manitoba), or on the basis of need of a dependant (in all

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[104] See e.g. *Dependants Relief Act* Man, *supra* note 66, ss 8(1)(b) (financial circumstances of the claimant), 8(1)(h) (claims of other dependants), 8(1)(a) (nature and size of the estate).

[105] See e.g. British Columbia Law Institute, *supra* note 55 at 56.

[106] See art 686 CCQ; Popovici & Smith, *supra* note 34 at 526.

[107] See Burns, *supra* note 44 at 117–18.

[108] See Kerridge, "Intestate Succession", *supra* note 45 at 24–25. See also Bowal, *supra* note 57 at 28.

provinces). In intestacy, presumed intention is the sole basis for the distributive rules in common law provinces and territories, whereas the moral duties of the deceased have also played a role in establishing these rules in Quebec (as they did in the French rules that inspired them). In all provinces and territories but British Columbia and Nova Scotia, intestacies are varied on the same grounds as wills: moral duty and the need of dependants.

While the same statutes serve to justify the variation of wills and intestacies, we might expect that, on the one hand, the morality that serves to justify the variation of a will is the kind which aims to strike down only disinheritances or legacies grounded in discriminatory reasoning.[109] On the other hand, the distribution of intestates' estates ought already to be free of discrimination, and any "unfairness" in its distribution would stem, rather, from the mismatch between the default devolutionary template and the specific situation of a given family (whose shape and needs can be taken into account and adjusted to match the intention of the deceased only by courts applying dependants' relief legislation). This expectation is closer to the truth when it comes to intestacy rather than testacy. Indeed, when looking at jurisprudence on the variation of wills, I have found that the courts contravene testators' intentions less often on the grounds of discrimination or public policy than they do on the basis that estrangement and lack of affection toward a family member are insufficient motives for disinheritance.[110] When the courts take the latter approach to the variation of a testator's will, they are effectively replacing the testator's judgment with their own, and redrawing the boundaries of the testator's family in accordance with "society's reasonable expectations" of who should be considered to belong to their family and to what extent the testator should care for their needs, given all aspects of their relationship and the dependant's needs.

In the intestate's case, the disturbance of the expected distribution is less shocking, as the intentions of the deceased were but presumed and it

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[109] See e.g. *Murley Estate v Murley* (1995), 130 Nfld & PEIR 271, 405 APR 271 (Nfld SC (TD)) (conditional legacy requiring a beneficiary to remain in one of the named "main stream Christian churches" in order to receive his inheritance found to be contrary to public policy); *Fox v Fox Estate*, 1996 CarswellOnt 317 at para 18, 28 OR (3d) 496 (CA) (trustee's use of discretion to disinherit the residual beneficiary for marrying outside the religious faith of his mother found contrary to public policy; the court also found that disinheritance on the base of religion or race is contrary to public policy); *Grams v Grams Estate*, 2015 SKQB 374 at para 110 (issue of disinheritance on the basis of sexual orientation can serve to ground a public policy challenge to set aside a will in trial court). See also *Canada Trust Co*, *supra* note 28 (charitable trust created in will found to be contrary to public policy due to provisions discriminatory on the grounds of race).

[110] See e.g. *Tataryn*, *supra* note 28; *McBride v Voth*, 2010 BCSC 443 at para 132. But see *Spence v BMO Trust Company*, 2015 ONSC 615, where the trial judge ruled that the exclusion of the testator's first daughter and grandchild was racially motivated and set aside the will in its entirety. The Ontario Court of Appeal reversed this judgment, as the will was not discriminatory on its face and estrangement was sufficient grounds for excluding the daughter and grandchild (see *Spence*, *supra* note 27).

is expected that such presumptions might not encapsulate the reality of every intestate individual. Yet, the variation of the distributions is also informative in telling us who the courts are willing to view as members of the deceased's family (following the guidance of the legislature or in accordance with the predominant view in society, as the case may be).

Through intestacy, the state is setting up a default blueprint for the family: this blueprint matches that of a nuclear family and therefore does not reflect the modern Canadian societal composition outlined in the introduction. Instead, in Canada, this blueprint is grounded on whom a deceased is supposed to have felt affectionate toward, and in some jurisdictions, whom they ought to be leaving part of their estate to in satisfaction of a moral duty.

Through testacy, the testator has expressed a (hopefully) clear intention: they have prioritized the members of their family that they wish to receive the largest shares of their estate, or excluded them (or some of them) entirely. As such, they have set the boundaries of their own family. Yet, the courts' variation of the testator's will or intestacy effectively redraws the boundaries of this family. The precedents such variations set can also potentially serve to shift the boundaries of family templates in the longer term.

In Parts II–IV, I will examine intestacy regimes in Canadian jurisdictions to determine whether the family blueprint created by the legislature is inclusive or exclusive of blended families. I will also analyze both dependants' relief legislation and jurisprudence on the variation of wills and intestacies—and more specifically who counts as a dependant and how their relationship to the deceased is evaluated—to determine how courts have redrawn the boundaries of deceased's families in determining whether the claimants were members of a (blended) family or not.

Part II thus considers the relationship between step-parents and step-children, and the extent to which it has been integrated into succession regimes in the jurisdictions studied. Part III analyzes and evaluates the different treatment of children as heirs when a step-parent has entered the picture and is competing with the children for the deceased's estate. Part IV focuses on the relationships between full, half-, and stepsiblings and compares the extent to which they are recognized by succession regimes. All three parts compare the current approach of the regimes to their stated objectives and prevalent approaches, as studied in Part I. Each part reaches some conclusions about the most inclusive approach to blended families for the regimes discussed.

II. The Step-Parental Relationship in a Blended Family

Blended families of all types—whether simple, complex, or fertile—involve the creation of a new relationship between the partner and the child of the spouse: a step-parental relationship. Depending on the circumstances, this relationship may be a close one, or it may be basically inexistent. The child and step-parent may indeed live together, with the step-parent taking an active interest and parenting role in the child's life—to the point of growing closer to the child than the parent who no longer lives with them[111]—or, on the opposite end of the spectrum, they may not even live with the child and perhaps may have met them only on a few occasions, if at all.[112] Canadian statistics show that about one in ten children aged fourteen or under lives in a blended household, and about 63 per cent of them are stepchildren.[113] This suggests that a significant percentage of youths lives with a step-parent at a formative age—likely forming a bond that is similar to that between birth or adoptive parents and their children. Sociological studies in Quebec and France, for instance, have found that some step-parents wish to cement this relationship through legacies upon their death; yet, another significant portion makes no legacies to their stepchildren.[114]

While in reality the strength of the bond between child and step-parent can range along a spectrum, it is simply inexistent in law: there are no legal status, rights, or obligations between step-parent and stepchild that are automatically derived from the introduction of a step-parent into a family.[115] In this respect, Canadian family law is similar to other jurisdictions, such as France, Scotland, and England and Wales. Because the relationship is not assumed to grant the same rights or obligations as that between a parent and child, it has no place in intestate succession law, although it can be given weight by the step-parent or stepchild writing a will. Moreover, three Canadian provinces have created space for the step-parental relationship that fulfills certain conditions in their dependants' relief legislation, and Quebec extends the obligation of support to individuals who have

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111 See Alberta Law Reform Institute, *supra* note 46 at 137. See e.g. *Mihaescu v Zodian Estate*, [2009] OJ No 2169 (QL), 49 ETR (3d) 8 (Ont Sup Ct) [*Mihaescu* cited to OJ].

112 See Saint-Jacques, Drapeau & Parent, *supra* note 12 at 13–14.

113 See *2011 Census*, *supra* note 2 at 14.

114 See Agnès Martial & Thuy Nam Trân Tran, "Solidarités conjugales et transmissions intergénérationnelles : l'héritage dans les familles recomposées québécoises" in Hélène Belleau & Agnès Martial, *Aimer et compter?* (Québec: Presses de l'Université du Québec, 2011) 225 at 239–40. See also Belleau, Lavallée & Seery, *supra* note 3 at 57–58; *Rivard c Rivard*, 2006 QCCQ 1785 [*Rivard*] (for an example of a step-parent including their stepchild in their will). Similar will studies are missing in the common law jurisdictions examined.

115 See e.g. Dominique Goubau, "Le statut du tiers 'significatif' dans les familles recomposées" in Service de la formation continue, Barreau du Québec, *Développements récents en droit familial*, vol 340 (Cowansville, QC: Yvon Blais, 2011) 1.

behaved as a parent (*in loco parentis*) to the deceased's children. I will analyze the implications of this recognition in intestacy (Part II-A) and in the recourses available in testacy and intestacy (Part II-B).

A. Step-Parental Relationships in Intestacy

1. Common Law Jurisdictions

None of the common law regimes for intestate succession surveyed for this article take the step-parental relationship into account in their basic rules for devolution.[116] Some of them, however, have debated (to different extents) the value of bringing this relationship into the fold in legislative reports.[117] The reports from the Scottish Law Commission[118] and Law Reform Commission of Saskatchewan being the most detailed in their analysis, I will engage with their main arguments for rejecting a stepchild's automatic claim to the estate below. The Scottish Commission acknowledged the "considerable public support" for stepchildren having rights to their step-parent's estate,[119] while Saskatchewan's report recognized "[t]he potential unjustness that may arise from not recognizing step children for the purposes of intestate succession."[120] Similarly, England and Wales's Law Commission, which made no recommendation or comment regarding stepchildren's right to inherit from their step-parent,[121] did state that it was "not persuaded" by "the proposition that step-parents will generally feel less obligation towards their step-children than their biological children."[122]

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116 See e.g. *Peters v Peters Estate*, 2015 ABCA 301 at paras 10–16 (in Canada); CH Sherrin & RC Bonehill, *The Law and Practice of Intestate Succession*, 3rd ed (London, UK: Sweet & Maxwell, 2004) at 10-018 (in England); Michael C Meston, *The Succession (Scotland) Act 1964*, 5th ed (Edinburgh: W Green, 2002) at 17 (in Scotland).

117 See e.g. UK, Law Commission, *Intestacy and Family Provision Claims on Death* (Consultation Paper No 191) (London, UK: Law Commission, October 2009) at paras 6.48–6.53 [English Law Commission, *Consultation Paper*]; UK, Scottish Law Commission, *Report on Succession* (Report No 215) (Edinburgh: Scottish Law Commission, April 2009) at para 1.10; British Columbia Law Institute, *supra* note 55 at 59–60; Law Reform Commission of Saskatchewan, *Reform of The Intestate Succession Act, 1996,* Final Report (Saskatoon: Law Reform Commission of Saskatchewan, March 2017) at 19–22; Alberta Law Reform Institute, *supra* note 46 at 137.

118 Although Scotland is a mixed jurisdiction, the Scottish Law Commission's approach to this issue reflects the same opening and arguments to incorporating stepchildren into intestacy regimes as are found in common law jurisdictions. For brevity and ease of discussion, Scotland's approach will therefore be discussed in the context of common law jurisdictions.

119 Scottish Law Commission, *supra* note 117 at para 2.31.

120 Law Reform Commission of Saskatchewan, *supra* note 117 at 19.

121 See Burns, *supra* note 44 at 102.

122 English Law Commission, *Consultation Paper*, *supra* note 117 at para 3.106.

The Scottish Commission's first argument to reject an automatic claim to the estate focused on the uncertainty such a claim would create. For the Commission, limiting potential claimants upon an intestacy to individuals related by "blood relationships or their legal equivalents" provides a measure of certainty to the law that should be maintained.[123] By "blood relationships," the Commission's comment certainly envisages the parentage that is recognized between birth or biological parents and their children; when referring to "legal equivalents," the Commission provides the example of adoption. This argument is essentially stating that the lack of legally recognized parentage between stepchild and step-parent is what distinguishes their relationship from those recognized in intestacy. At the same time, and putting aside the issue of uncertainty, it is also suggesting that only if the step-parent had "accepted the stepchild to a sufficient degree" could the relationship be considered one acceptable to intestacy law.[124] We can infer that the Commission would like this acceptance to be formalized through adoption. What these comments also suggest is that choice is a paramount precondition to accepting a relationship that contains no blood, but it needs to be formalized legally in order to be sufficient to justify a claim upon an estate. This logic is also reflected in the example of marriage.

Yet, accepting the premise that choice coupled with certainty should be sufficient to enlarge the category of potential beneficiaries upon intestacy should not necessarily lead to the rejection of non-formalized relationships (i.e., step-parenthood outside of adoption). Indeed, there are, in Scottish law as in every other jurisdiction, multiple provisions that help to establish parentage without proving the existence of a biological link between parent and child (e.g., heterosexual marriage leading to the presumption that a child born from a cisgender woman is genetically related to her cisgender male spouse). The existence of such presumptions—when they are clearly stated—serves to simplify the application of the law and endows the law of parentage with more certainty, not less. Certainty, therefore, may militate against a case-by-case recognition of parentage or benefits upon intestacy, but it need not justify the complete rejection of all options to fold step-parental relationships into the intestacy scheme. Presumptions that are adapted to the situations of step-parenthood could allow a non-formalized form of parenthood to be reflected in intestacy schemes, in the same way as de facto spouses' right to inherit upon an intestacy are recognized when certain criteria are met.

The argument over certainty can often be related to that of complexity. Saskatchewan's Commission justified its rejection of stepchildren's claims upon an intestacy due to a fear of "complicat[ing] what is currently quite a

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[123] See Scottish Law Commission, *supra* note 117 at para 2.32. See also Burns, *supra* note 44 at 105.

[124] Scottish Law Commission, *supra* note 117 at para 2.32.

clear piece of legislation."[125] The alternative to an absolute inclusion of stepchildren into the intestacy regime (i.e., the redefinition of "issue") entertained by Saskatchewan was "to allow a court to assess whether stepchildren in a particular case should be able to inherit from an intestate."[126] This option was rejected due to the fear of incurring delays and rendering the law too complicated, but revived—to some extent—through the recommendation for stepchildren to be allowed to bring claims as dependants under the province's *Dependants Relief Act*.[127] The importance attached to intention by the Commission suggests that it should also consider enacting presumptions to recognize stepchildren as heirs when their situation fulfills certain criteria, especially as the Commission is also suggesting that cohabitants be treated as spouses in intestacy law[128]—an acknowledgement of the importance of choice and an example of the introduction of presumptions about de facto situations into intestacy law.

A second argument brought forward by the Scottish Commission is its disapproval of what could be termed "double dipping": the Commission expresses the fear that "if a step-child (or an accepted child) were able to acquire an interest from the estate, [they] would be able to inherit from two sources: members of the step-parent's family and [their] own biological family."[129] This argument assumes that it is unfair for some children to inherit from more sources than others. The argument overlooks the fact that children do not all start off from an equal footing in the first place: their parents' estates may vary largely in size from the next child's; one child may be disinherited; one child may have only one parent—in other jurisdictions, one may have three or more.[130] Viewed in this light, what equality is it that the Commission is trying to preserve? The argument's point of departure is obviously the presumption of a nuclear family, but the question of stepchildren's rights demands that we shift out of this paradigm and consider the direction in which today's families are evolving before gauging what alternatives are the most fair.

The third argument made by the Commission touches on formality: if the step-parent desired to leave their stepchild an interest in the estate, "the acceptor could make provision for the child by the simple expedient of making a will."[131] In a vein similar to that of the first argument, it expresses

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125 Law Reform Commission of Saskatchewan, *supra* note 117 at 20.

126 *Ibid* at 19.

127 See *ibid* at 20.

128 See *ibid* at 4, 11–12.

129 Burns, *supra* note 44 at 105. See also Scottish Law Commission, *supra* note 117 at para 2.32.

130 See e.g. Catherine Rolfsen, "Della Wolf is B.C.'s 1st Child with 3 Parents on Birth Certificate", *CBC* (6 February 2014), online: <www.cbc.ca/news> [perma.cc/3PGK-ZEH9].

131 Scottish Law Commission, *supra* note 117 at para 2.33.

the idea that a formality—a clear declaration of intent—could have made the legacy happen. This argument is therefore also placing choice as the paramount factor to allow a deviation from the nuclear family model. It also suggests that the only acceptable form this gesture can take is that of a legacy. Yet, requiring step-parents to make a will to give weight to intentions that the Commission has recognized as widespread is antithetical to the Commission's own understanding of the intestacy regime as representative of the presumed intention of the deceased. In fact, any transfer that is made as a result of intestacy could also be expressed as a legacy in a will—yet this is no reason to forego considering what the presumed intention of a testator might be in creating or reforming an intestacy scheme. Therefore, this argument, whether on its own or in combination with the others, is not particularly convincing.

The arguments provided by these jurisdictions do not suggest that seeking to integrate stepchildren into intestacy schemes is unreasonable as far as the purposes of the regimes are concerned—only that it contributes to the complexity of the systems. A society growing in complexity, however, may justify a more complex default regime. All intestacy distribution schemes in Canada are justified in reference to the deceased's presumed intention. Where surveys find that step-parents' wishes are generally to fully include stepchildren into their families, intestacy regimes should find a way to acknowledge such a relationship in order to be more inclusive of blended families. Law commissions could consider developing a series of criteria, or presumptions, that would serve to determine when a stepchild and step-parent relationship has the tenor sufficient to be placed on the same level as that between adopter and adoptee or biological parent and child. This makes all the more sense in jurisdictions that recognize other de facto relationships in their intestacy schemes. Surveys such as those undertaken by the National Centre for Social Research[132] or by Hélène Belleau, Carmen Lavallée, and Annabelle Seery,[133] as well as the resources cited in the introduction, could prove useful in determining these criteria. Responses to the National Centre for Social Research's survey, for instance, emphasized the factors in the bilateral relationship between the stepchild and step-parent that could justify an equal treatment to the deceased's children, including living with the deceased for a substantial period of time and financial dependence.[134]

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[132] See National Centre for Social Research, *Inheritance and the Family: Attitudes to Will-Making and Intestacy*, by Alun Humphrey et al (London, UK: NatCen, August 2010). The survey was drawn upon by England and Wales's Law Commission in its report: see UK, Law Commission, *Intestacy and Family Provision Claims on Death* (Law Com No 331) (London, UK: The Stationary Office, 2011) at paras 1.33–34 [English Law Commission, *Final Report*].

[133] See Belleau, Lavallée & Seery, *supra* note 3.

[134] See National Centre for Social Research, *supra* note 132 at 59.

2. Civil Law Jurisdictions

Quebec's succession regime[135] stands in contrast to its neighbouring common law provinces because of its population's disinterest in allowing the stepchild's claim.[136] It too has never allowed for stepchildren to inherit from their step-parents. The distinction between parent and step-parent has been justified by the civil law's focus on parentage—rather than relationships based on affinity—as the foundation of succession rights. The only exception to this tendency has been marriage.[137] Author Jacques Auger has tied this distinction to the notion of proximity: only the proximity between spouses is sufficient to justify including the latter in Quebec's succession regime. Yet, when Auger applies the concept of proximity to de facto spouses' relationships, proximity entails emotional closeness, affection, and *communauté de vie*.[138] Since such criteria may be just as present in the relationships between step-parents and stepchildren, and those between half- or even stepsiblings, this rationale is insufficient on its own to set aside the possibility of stepchildren meriting a claim upon their step-parent's intestacy. Rather, it seems that the step-relationship is given no weight because Quebec's succession regime remains too anchored in the notion of parentage—or bloodlines—to allow any relationship outside of the formalized bonds of marriage or adoption. This propensity to value bloodlines above all other relationships will also be encountered in Part IV.

As far as the stepchild's ability to inherit is concerned, this preference for bloodline relationships does not yet seem to be out of step with Quebec's society. Sociological studies of Quebec's population have indeed concluded that most of the time step-parents want property to remain within their own "kinship":

> Bien des personnes semblent plutôt préoccupées de ce que leurs biens reviennent ensuite au sein de leur propre famille et *ne bénéficient pas à des beaux-enfants qu'elles considèrent comme étrangers au groupe de leurs apparentés*. La plus grande liberté qui préside à la transmission des biens au Québec et l'existence de solidarités conjugales dans les secondes ou troisièmes unions n'induisent donc que rarement la reconnaissance de relations beaux-parentales dans la succession.[139]

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[135] Quebec's approach to this issue is emblematic of civil law jurisdictions and will therefore be discussed in this context.

[136] See Belleau, Lavallée & Seery, *supra* note 3 at 57–58 (while some of the testators surveyed included stepchildren in their wills, these were "far behind their own children" [translated by author]).

[137] See Auger, *supra* note 94 at 79–82.

[138] See *ibid* at 81–82.

[139] Martial & Trân Tran, *supra* note 114 at 239 [emphasis added].

Since step-parents in Quebec today, for the most part, do not wish their stepchildren to inherit from their estate, the Quebec regime's focus on presumed intention supports the exclusion of this relationship from the default regime.

The importance granted to moral duty by Quebec's intestacy regime also militates for the exclusion of stepchildren, if moral duty is understood as the continuation of financial dependence. Indeed, a recent study of Quebec blended families found that in three-quarters of simple blended families, step-parents do not share in the costs relating to their stepchild's rearing.[140]

The approach to stepchildren's claims taken by French law offers an interesting point of comparison with Quebec's situation. The strong attachment of Quebec's succession regime to the bloodline conception originated with the French regime. Yet, the latter has evolved to accommodate the realities of blended families in a different and innovative way, by giving an institution dating from 1804, *l'adoption simple*, a new and unexpected use in the past four decades.[141] This mechanism permits the adoption of stepchildren without breaking the filiation between the stepchild and their parents. It also allows the stepchild to share in the *réserve héréditaire* left by their step-parent, alongside any biological or other adoptive children of the step-parent.[142] In the French context, where mandatory heirship provisions and the high rate of taxes charged on legacies limit what a legatee might receive from a testator, the possibility of *adoption simple* is one of the rare ways that a stepchild could receive an inheritance.[143]

This mechanism evidently demands that a testator have clearly expressed their intention to integrate the stepchild into their family through formalities before it allows them to override the default heirship provisions, and it is as demanding procedurally—or indeed, more so—as including a stepchild in one's will in any other jurisdiction. For these reasons, France's *adoption simple* may not be the best method to accommodate the reality of most blended families or serve as the template for default devolution schemes. Yet, going through the process of *adoption simple* provides additional measures of inclusion for the child, in areas outside of succession law, without demanding that the stepchild break ties with either of their

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140 See Belleau, Lavallée & Seery, *supra* note 3 at 36–38. See also Statistics Canada, "Census Family Structure Including Stepfamily Status" (2016), online: <www12.statcan.gc.ca> [perma.cc/8FZK-ZUG3] (simple blended families compose the majority of blended families in Quebec).

141 See Jean-François Mignot, "L'adoption simple en France : le renouveau d'une institution ancienne (1804–2007)" (2015) 56:3 R française sociologie 525; arts 363ff C civ.

142 See Cécile Pérès, "Compulsory Portion in France" in Reid, de Waal & Zimmerman, *Volume III*, *supra* note 27, 78 at 89.

143 See Martial & Trân Tran, *supra* note 114 at 228, n 4. Without simple adoption, the taxes levied on the legacy that a step-parent might want to leave to their stepchild would be prohibitive; and that's if they leave a legacy at all—not in intestacy.

birth parents. It may therefore deserve consideration from other jurisdictions as a mechanism to be made available to blended families, as it places at their disposal a tool tailored to the needs of step-parental relationships. Indeed, of all the mechanisms studied, *adoption simple* is the only one that truly allows the blended family to formalize step-parental relationships for what they are—additional relationships that are added to older ones, rather than necessarily replacing them. *Adoption simple* may not be as useful a tool in jurisdictions that do not function on the premise of forced heirship, but it exemplifies the type of custom-made frameworks that other jurisdictions should consider putting in place for the growing number of blended families we see in our societies. In an age where we are recognizing multiple parents to newborns in Canada, it is arguably time to start inquiring into other forms that multiple parentage or its equivalent could take for Canadian blended families.

B. Recognition of the Step-Parental Relationship in Intestacy and Testacy Recourses

1. Common Law Jurisdictions

By contrast to the rigid default devolution schemes, dependants' relief legislation has created some space for the step-parental relationship. In the Canadian common law, Ontario and Manitoba allow claims from the child in a relationship akin to a parental relationship, which could most easily accommodate the relationship between a step-parent and a stepchild.[144] The Northwest Territories specifically make room for stepchildren in their definition of "child."[145] In Manitoba and the Northwest Territories, the parent in such a relationship cannot bring a claim,[146] but it appears that they can in Ontario.[147] In Manitoba and the Northwest Territories, claims are based on a relationship of dependence—a requirement that is integrated in the definition of the relationships themselves in both provinces' *Dependants Relief Act*. In assessing the claim by the child in this situation, the Manitoban courts will consider the obligation of their other parents,[148] and

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144 See *Succession Law Reform Act*, RSO 1990, c S-26, s 57(1) *sub verbis* "child", "dependant" (c) [*Succession Law Reform Act* Ontario]; *Dependants Relief Act* Man, *supra* note 66, s 1 *sub verbo* "child". *Contra Succession Act* Alta, *supra* note 53, ss 72, 90 (no relationship akin to parental one).

145 *Dependants Relief Act* NWT, *supra* note 65, s 1 *sub verbis* "child", "dependant".

146 There is no definition of "parent" in the *Dependants Relief Act* Man, *supra* note 66, s 1 (Definitions).

147 See *Succession Law Reform Act* Ontario, *supra* note 144, s 57(1) *sub verbis* "parent", "dependant" (b).

148 See *Dependants Relief Act* Man, *supra* note 66, s 8(1)(k).

will be focusing on the child's needs, only granting the claims of children who comply with the age, capacity, and health parameters.[149]

In the Northwest Territories, the guidelines provided by the *Dependants Relief Act* are much broader, but also revolve around the notion of need,[150] without listing potential considerations.[151] This discretion has granted the courts leeway to consider elements associated with a moral duty approach and the intention of the deceased, rather than limiting themselves to concerns tied solely to need. In *Butt v. Chittock Estate*, for instance, the court takes into account the intentions of the deceased, who passed away intestate.[152] Judge de Weerdt establishes the quantum of relief that the claimants ought to be granted on the basis of an analysis of the deceased's intentions, as expressed by the individuals close to him prior to his death—an analysis grounded more in moral duty than in need. Indeed, the judge admits to "consider[ing] more than the provision of a minimum level of mere subsistence as being necessary if 'adequate provision' is to be made pursuant to s. 2(1)(b) [of the *Dependants Relief Act*]."[153] Instead, the judge distributes the estate by granting equal shares to the deceased's biological son and his stepson, in accordance with the deceased's presumed intention.[154]

In Ontario, the determination of the quantum of dependants' relief is grounded on a series of factors which are largely based on calculations of need and assets but also include "the proximity and duration of the dependant's relationship with the deceased", past contributions from the dependant to the deceased, and agreements between the two, inter alia.[155] These criteria suggest that the interest is in the quality of the relationship, not only the expectations that were created from a relationship of financial dependence.

These elements are represented in *Mihaescu v. Zodian Estate*, where the court—in determining whether to vary the will of the deceased—con-

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149 The definition sets these out: see *ibid*, s 1 *sub verbo* "dependant" (d).

150 See *Dependants Relief Act* NWT, *supra* note 65, s 2(1) ("[w]here a person ... dies intestate as to all or part of [their] estate and the share under the *Intestate Succession Act* of [their] dependants or any of them in the estate is *inadequate for their proper maintenance and support*" [emphasis added]).

151 See *ibid*, s 2(1) ("a judge ... may ... order that the provision that *the judge considers adequate* be made out of the estate of the deceased for the proper maintenance and support of the dependants or any of them" [emphasis added]). See also *ibid*, s 5(1) ("[i]n an order providing for maintenance and support of a dependant, a judge *may impose the conditions and restrictions that the judge considers fit*" [emphasis added]).

152 See *Butt v Chittock Estate*, [1995] NWTJ No 49 (QL) at paras 3, 18, 22, [1996] NWTR 104 (SC).

153 *Ibid* at para 25.

154 See *ibid* at para 24.

155 See *Succession Law Reform Act* Ontario, *supra* note 144, ss 62(1)(g), (h), (m).

sidered not only the financial aspects of the latter's step-parental relationship with his stepchild, but also evidence of their emotional connection (most notably, through the reproduction of a poem about the stepfather written by the child[156]). The intention of the stepfather was reinterpreted, his will rewritten: the court substituted his intention to leave his stepchild out of his will with the intention expressed in a prior contract, where he promised to care for the child after a potential separation with his spouse (the stepchild's birth mother).[157] The deceased's "settled intention to treat as his a child of his family" seems to have been the most important intention of all, as it led to the conclusion of a moral duty attaching to the step-parental relationship.[158] The quantum granted by the claim, however, was derived solely from a needs-based analysis.[159] This can be contrasted to the Northwest Territories court's approach in *Butt*, where the quantum was determined by reference to the equal moral duty owed to children and step-children. This contrast is further reinforced by looking at *Richer v. Richer*, an older case where the Ontario County Court weighed the entitlements of a testator's biological family against those owed to his most recent stepfamily, finding that the moral duty owed to the latter was greater and justified their being granted the lion's share of the estate.[160]

This emphasis on the details of the relationship at the stage of evaluating whether the stepchild should be granted relief, and the focus on the child's needs to consider the quantum of relief to be granted, appear in keeping with the legislation's dual focus on moral duty and dependency. The approach taken by these courts' interpretation of dependants' relief legislation seems inclusive of the step-parental relationship inherent in blended families, but the demanding nature of these statutes as a recourse (the financial expense, delays, and demands upon all parties' time, in addition to the potential tensions such a recourse might create within a family) is one of the major disadvantages of forcing step-parental claims to be addressed in this manner.

Recent developments in the common law have seen an increasing desire to include stepchildren into other provinces' dependants' relief legislation. The British Columbia Law Institute's 2006 report recommended the inclusion of dependant stepchildren (if minor at the moment of death) into the

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156 See *Mihaescu*, *supra* note 111 at para 26.

157 See *ibid* at paras 4, 6.

158 See *ibid* at paras 34, 40–41 (quotation at para 34).

159 See *ibid* at paras 27–32, 48–49.

160 See *Richer v Richer* (1984), 40 RFL (2d) 217 at 223, 17 ETR 102 (Ont County Ct).

Wills Variation Act.[161] This recommendation has not been followed.[162] Saskatchewan's Law Reform Commission made the same recommendation in 2017,[163] but only time and legal reforms will tell if it will be followed. The remaining Canadian provinces and territories do not, to date, recognize stepchildren's claims to the deceased's estate.[164]

Other common law jurisdictions such as England and Wales also allow dependants' relief claims from stepchildren. In that jurisdiction, a stepchild can claim that the distribution of the estate did not make a "reasonable financial provision" for them,[165] although the courts will take into consideration not only need and financial resources but also the "obligations and responsibilities which the deceased had towards any applicant" and "the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant."[166]

2. Civil Law Jurisdictions

Quebec civil law has had a more ambivalent relationship with the stepchild's claim for relief against a step-parent's estate. The *Civil Code of Québec* does not impose obligations of support upon individuals acting *in loco parentis* to children, nor does it recognize any such obligations post-mortem.[167] In *Rivard c. Rivard*, for instance, the intention of a step-parent to benefit their stepchild was clearly expressed in a will, but following the revocation of a universal legacy, the estate fell wholly into intestacy. Upon intestacy, the stepchild who was a legatee under the will was no longer able to receive a share in the estate. The court recognized that this outcome may run counter to the deceased's stated intention but granted the stepchild no remedy.[168]

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161 RSBC 1996, c 490. See British Columbia Law Institute, *supra* note 55 at xvi.

162 See *Succession Act* BC, *supra* note 53, s 1(1) *sub verbo* "descendant" ("all lineal descendants through all generations").

163 See Law Reform Commission of Saskatchewan, *supra* note 117 at 4, 22.

164 See e.g. *MacDonald v MacKenzie Estate* (1989), 64 DLR (4th) 476, 36 ETR 176 (PEI SC); *Re Buchanan* (1975), 16 NSR (2d) 262, 24 RFL 255 (SC); *David v Beals Estate*, 2015 NSSC 288; *Peri v McCutcheon*, 2011 BCCA 401; *Hope v Raeder Estate* (1994), 2 BCLR (3d) 58, 52 BCAC 112; *Naples v Martin Estate*, [1987] 1 WWR 52, 7 BCLR (2d) 134 (SC).

165 *Inheritance Act* 1975, *supra* note 89, s 1(1)(d) as amended by *Inheritance and Trustees' Powers Act 2014* (UK), Schedule 2, s 2(2).

166 *Inheritance Act* 1975, *supra* note 89, s 3(1). See e.g. *Re Callaghan* (1984), [1985] Fam 1, [1984] 3 WLR 1076 (Eng FamD); *Re Leach (Deceased)* (1985), [1986] Ch 226, [1985] 3 WLR 413 (Eng CA). See also Green, *supra* note 29 at 203ff; English Law Commission, *Consultation Paper*, *supra* note 117 at paras 2.31ff.

167 See art 585 CCQ, which creates such obligations only between spouses and "relatives in the direct line in the first degree".

168 See *Rivard*, *supra* note 114 at paras 45–46.

Both *Butt*, discussed above, and *Rivard* demonstrate that the deceased may want to give a share of the estate to their stepchildren and that there are ways to ascertain this intention upon an intestacy. The mechanism in Quebec shows, however, that there is no room to consider this intention, whereas the judicial discretion granted by the dependants' relief statute's consideration of moral duty criteria in the Northwest Territories can serve to give effect to these affections. In this sense, a moral duty analysis can open the door to acknowledging the deceased's intention, and can further the inclusion of blended families into legislative schemes that do not include or recognize them by name. The discrepancy between these outcomes is all the more interesting because Quebec is the only Canadian jurisdiction where commentators acknowledge the role of moral duty in framing the default devolution scheme.[169] These illustrations show that the "moral duty" of Quebec is not that of the common law: in Quebec, moral duty is built upon blood relationships, while in the common law, it has evolved to now translate the notion of affection.

Unlike the *Civil Code of Québec*, subsection 2(2) of the federal *Divorce Act*[170] does impose obligations of support upon individuals acting *in loco parentis* to children. As a result, a step-parent may—upon divorce—become a creditor of support to their stepchild if their relationship fulfilled certain criteria.[171] As the obligation stems not from Quebec civil law but from federal law, it applies only upon divorce and does not extend to the relationship between an individual and their de facto spouse's child. Because of its origin, some have argued that the obligation of support in an *in loco parentis* relationship cannot survive the step-parent's death (if it had been created upon a divorce) or be recognized post-mortem (if the step-parent died while married to the stepchild's parent), as article 684 CCQ would only intend for obligations of support created by article 585 CCQ to survive.[172] That being said, Quebec courts have, in the past, used the criteria and definition of "child of the marriage" found in the *Divorce Act* to establish whether an obligation of support created upon divorce between a parent and their biological child ought to be maintained past the testator's death, without reference to article 585 CCQ.[173] Although there has never been a case debating the survival of the obligation of support for a stepchild in Quebec, I see no reason why the courts would apply a different logic to obligations stemming from *in loco parentis* relationships, as their analysis

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169 See Part I, *above*.

170 RSC 1985, c 3 (2nd Supp).

171 See *Chartier v Chartier*, [1999] 1 SCR 242, 168 DLR (4th) 540.

172 See Michel Tétrault, *Droit de la famille : l'obligation alimentaire*, vol 2 (Cowansville, QC: Yvon Blais, 2011) at para 12.3.1.

173 See e.g. *Droit de la famille – 3569*, [2000] RDF 347, AZ-00021345 (SOQUIJ) (CS); *Droit de la famille – 2588* (1996), [1997] RDF 121, AZ-97024009 (SOQUIJ) (CS).

implies that article 684 CCQ applies to obligations of support arising under the *Divorce Act*.

Despite this potential avenue created by federal legislation, the Quebec regime's rejection of a claim by a stepchild under civil law sends a clear message of preference for blood relatives and the rejection of any step-relationship from the realm of succession law. Even if the stepchild's claim were recognized in a future case by a Quebec court, the fact that the estate's obligation in the stepchild's favour stems from an unintended consequence of the interaction of federal and provincial law does not do away with article 684 CCQ's focus on moral duty within bloodlines.

III. The Parent-Child Relationship in a Blended Family

Intestate succession regimes in both the common and civil law will usually divide an intestate's inheritance among their spouse and their children. This tendency is the result of societal and legislative changes recognizing the important role of spouses—especially wives—in the traditional family context. Throughout the twentieth century, this was reflected in the realm of succession law through a shift from attributing the lion's share of a succession from the child to the spouse. At the same time, however, Canadian society has seen the share of nuclear families decrease to the benefit of blended families. Part III considers the division of the estate between a deceased's spouse and children in light of the increasingly common scenario where the deceased's spouse and their children are not related—that is, where the spouse is a step-parent to at least some of the deceased's children. My aim is to evaluate whether the lack of parentage between spouse and children has an impact upon the share of the estate received by the children—in the short and long term—and whether this trend lines up with the principles that underpin the succession regimes studied. This part will start with a brief historical overview of various Canadian intestacy regimes' division of property between spouse and children (Part III-A), followed by an analysis of the status quo in multiple jurisdictions' intestacy regimes (Part III-B), and an analysis of the recourses open to children upon intestacy and testacy (Part III-C).

A. Historical Developments of the Division of the Estate Between Spouse and Children

Historically, succession regimes across jurisdictions aimed at keeping property within bloodlines.[174] Following calls for reforms and the change in legal status of women starting in the mid-nineteenth century, the second

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[174] See generally Laura Cárdenas, "Married Couple, Single Recipient: Understanding the Exclusion of Gifts and Inheritances from Default Matrimonial Regimes" (2018) 31:2 Can J Fam L 1.

half of the nineteenth century then saw the regimes reformed to protect spouses,[175] and the twentieth witnessed further shifts to favour them.[176] Two types of changes contributed to this trend: the abolition of some restrictions that served to maintain property within bloodlines across both civil and common law regimes, and the creation or extension of provisions allowing the spouse to secure a larger or a specific share of the deceased's estate.

In Canadian civil law, the most obvious example of spousal protection is Quebec's family patrimony, which is of public order and thus cannot be derogated from through testacy. The family patrimony applies upon the breakdown of a couple, be it in the context of divorce or following the death of one of the spouses.[177]

In Canadian common law, the provisions protecting primarily wives' interests traditionally included coverture, dower, and curtesy. Dower, in particular, was progressively replaced by a statutory legacy in favour of the spouse.[178] This first set of doctrines aimed at providing relief to the widow as a dependant and was of a temporary nature, as it did not transfer patrilineal property to the wife's descendants. The statutory legacy offered a more permanent solution. The statutory legacy was first introduced in the United Kingdom in 1890[179] and in Ontario in 1895.[180] The statutes' original purpose was to provide for widows without children.[181] The origins of the statutory legacy are to be found in a desire to respond to the need of spouses. The purpose of the legacy was, more specifically, to grant the surviving spouse the opportunity to purchase the deceased spouse's share of the matrimonial home.[182] This rationale was quickly confronted by critics' beliefs that only a wife having accomplished her moral duties to her husband (i.e., having borne him children) should receive such a legacy—or at least, such a wife should not be excluded from the scheme. The debate that took place on the pages of *The Globe* and the *Canadian Law Journal* provide a vivid picture of the commentators' discontent: "Wherein is the sense

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175 See generally Constance B Backhouse, "Married Women's Property Law in Nineteenth-Century Canada" (1988) 6:2 L & Hist Rev 211.

176 See e.g. Mireille D Castelli, "L'évolution du droit successoral en France et au Québec" (1973) 14:3 C de D 411 at 413–17; Morin, *supra* note 39 at 355–56.

177 See art 416 CCQ.

178 See The Honourable Bora Laskin, *Cases and Notes on Land Law* (Toronto: University of Toronto Press, 1964) at 70ff. On the dower that applied in the civil law, see also Castelli, *supra* note 176 at 445–52.

179 See *Intestate Estates Act, 1890* (UK), 53 & 54 Vict, c 29.

180 See *An Act making better Provisions for Widows of Intestates in Certain Cases*, 58 Vict, c 21, s 3.

181 See Louise M Mimnagh, "A History of Preferential Share in Ontario: Intestacy Legislation and Conceptions of the Deserving or Undeserving Widow" (2014) 23:1 Dal J Leg Stud 1 at 10.

182 See English Law Commission, *Consultation Paper*, *supra* note 117 at para 3.9.

of justice of this latest creature of the Solons of the Local Legislature? If a wife does her duty, or raises children, she gets nothing special; if she provides no issue, she gets $1,000 clear. Does one farrow cow get all the pasture?"[183]

In spite of this negative reception, the following iteration of these provisions did not respond to these priorities, and the repealing of the *Act making better Provisions for Widows of Intestates in Certain Cases* and subsequent enactment of equivalent provisions incorporated into *The Devolution of Estates Act*[184] maintained the distinction between widows with issue and those without. It was not until the 1977 *Succession Law Reform Act* that this distinction was repealed in Ontario[185] and until 1990 that two different amounts ceased to be granted to spouses with and without issue.[186]

Preferential shares for the spouse are found in many common law jurisdictions, including Australia, the United States, and Northern Ireland.[187] Practically speaking, in many of these jurisdictions a spouse electing to take their share has yielded the same result as a spouse-takes-all scheme. According to some commentators, this has always been the aim and the effect of the statutory legacy.[188] What has changed in the past century, however, is the incidence of blended families, which affects the planned trajectory upon intestacy of the estate after the spouse's death.

As a result of these reforms, all of the regimes studied currently divide an intestate estate between the deceased's spouse and children, and all of them have provisions in place ensuring that the spouse is not left without a share of the estate even if they were left out of the deceased's will. While these mechanisms tend to arise from legislation focusing on matrimonial property and divorce rather than successions, the spouse also has access to the tools of succession law outlined previously (dependants' relief legislation in common law Canada and the obligation of support in Quebec) if the share granted proves insufficient.

Moreover, the past few decades have seen a gradual increase in the spouse's share and a corresponding decrease in that of the children. This is

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183 See "Editorial Items" (1895) 31:17 Can LJ 555 at 556–57, cited in Mimnagh, *supra* note 181 at 10.

184 RSO 1897, c 127, ss 12(1)–(3). See also *Schedule A (Acts and parts of Acts Repealed)*, RSO 1897 at 3657; Mimnagh, *supra* note 181 at 11.

185 *Succession Law Reform Act*, SO 1977, c 40, ss 45, 46(1)–(2).

186 See *Succession Law Reform Act* Ontario, *supra* note 144. See also, in England and Wales, English Law Commission, *Consultation Paper*, *supra* note 117 at para 3.7.

187 See Kathryn O'Sullivan, "Distribution of Intestate Estates in Non-Traditional Families: A Way Forward?" (2017) 46:1 Comm L World Rev 21 at 23.

188 See English Law Commission, *Consultation Paper*, *supra* note 117 at para 3.66: "Those promoting the [1925] legislation in Parliament stated that 98% of estates were valued at less than [the sum of the statutory legacy]. In the overwhelming majority of cases, therefore, a surviving spouse would inherit the entire estate." See also *ibid* at para 3.13.

often considered to stem from the fact that life expectancy has increased, and spouses will often live longer after the deceased, thereby needing more funds. The inheritance going to the spouse lessens the impact of this growing life expectancy on the public purse.[189] It has often been argued that the decrease of the children's share is unproblematic because of the presumption that the spouse—who receives an enlarged share of the deceased's estate—will leave this share to the children (either through intestacy or by will). This presumption is titled the *conduit theory* in the United States, because the spouse acts as a conduit for the parent's estate to reach the children.

The conduit theory is based on the model of the nuclear family and the assumption that both spouses in a couple will want their children to inherit the bulk of their estate upon their deaths. The theory stands for the idea that once one of the spouses dies, their estate may be largely inherited by the remaining spouse rather than the children, but it will devolve to the children nonetheless upon the second spouse's death. The second spouse thus acted as a conduit for the property to reach the descendants. While the theory functions when the family is a nuclear one and both spouses die intestate or will their property to their spouse or—residually—their children, it fails to take into account less conventional family models (or intentions).[190] The consequences of this presumption will be examined below.

B. The Child's Situation upon an Intestacy

For our purposes, succession regimes can broadly be divided into two groups, depending on whether they separate the estate directly into shares for each member of the deceased's family, or whether they first grant a lump sum to specific family members (generally, the spouse) prior to distributing the residue to family members. Civilian regimes such as France and Quebec provide examples of the first approach (III-B-1); whereas common law jurisdictions generally grant a set sum from the estate—a statutory legacy—to the spouse prior to distributing the rest of the estate (III-B-2). This latter scenario raises more unexpected issues when blended families are involved.

1. Fixed Shares Systems

Civil law regimes such as France, as well as Quebec, divide the estate outright into specific shares granted to the deceased's spouse and children.[191] In Quebec, if an intestate leaves one spouse and one or more children, the spouse receives one third of the estate, and the children receive

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189 See Burns, *supra* note 44 at 117.

190 See *ibid* at 110–11.

191 Both of these jurisdictions apply matrimonial asset-sharing provisions before the division of the estate proper (see e.g. art 416, para 1 CCQ on the family patrimony).

the other two.[192] The sharing scheme does not take into account whether the spouse is the parent of the children. If there is no spouse, the children receive the whole of the estate;[193] if there are no children, the spouse receives two-thirds of the estate and the residue is divided between the deceased's parents.[194] In France, the forced heirship provisions will grant half to three-quarters of the estate to the children of the deceased (depending on their number).[195] Beyond this, intestacy provisions will grant a further three-quarters of the residue to the children, and the other quarter to the spouse.[196] If the deceased's children are all also children of the spouse, the spouse may elect to take the whole estate in usufruct.[197] If there is no spouse, the children may inherit the whole estate.[198] If there is a spouse but no children, the spouse will receive one quarter of the estate through the forced heirship provisions, and the residue will be shared between the spouse and parents of the deceased.[199] If the deceased leaves neither children nor parents, the spouse will take all.[200] Although the proportions vary between these two jurisdictions, they both grant the whole of the estate to the spouse and children if the intestate leaves members of both groups behind. Neither regime provides for a specific sum that would be granted to either group prior to the distribution of the shares. Moreover, these regimes take no account of whether a family is blended or nuclear in calculating the share available to each heir: this is determined by the presence of parentage or a matrimonial tie.

In both of these cases, the division into set shares ensures that the children of the deceased receive a part of the parent's inheritance, whether the spouse is their parent or their step-parent. As such, in these jurisdictions, there is no need for the conduit theory to apply in order for the children to receive a part of the estate. Yet, if we apply the conduit theory, we notice that the trajectory of the deceased's estate will be affected in the long term, because the share of the estate inherited by the spouse is unlikely to make its way to the deceased's children whose parentage to the spouse is not legally established.[201] Indeed, if the spouse dies intestate, the share of the

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192 See art 666 CCQ.

193 See art 667 CCQ.

194 See arts 672, 670 CCQ.

195 See art 913 C civ.

196 See art 757 C civ.

197 See *ibid*.

198 See arts 734–35 C civ.

199 See arts 914-1, 757-1 C civ.

200 See art 757-2 C civ.

201 See Part II, *above*.

estate they receive from the deceased will be inherited by this spouse's heirs rather than their stepchildren.

This outcome runs counter to the intention of the Quebec population, as established by the results of sociological research. In 2011, Agnès Martial and Thuy Nam Trân Tran concluded that most of the time step-parents wanted property to remain within their own *parenté* (bloodlines).[202]

Both the Quebec and French regimes are premised on notions of moral duty as well as presumed intention,[203] and both regimes recognize that a moral duty is owed to both spouses and children.[204] Evaluating the long-term trajectory of a deceased parent's estate through the lens of the conduit theory indicates that, in both jurisdictions, a part of the deceased's estate will be lost to their children. Nonetheless, the current systems do grant, outright, a portion of the estate to both spouse and children, in accordance with the notion of moral duty which underlies the Quebec and French regime. It appears, therefore, that the regimes are reaching a balance between their objectives (moral duty and presumed intention) that justifies this long-term outcome. In this light, it is useful to note that the French regime has specifically crafted an alternative pathway for the deceased's estate available only to nuclear families: the possibility for the spouse to take a usufruct over the whole of the deceased's estate. In the context of a nuclear family, a usufruct may permit for both of the regime's objectives to be reached in greater accordance with the deceased's presumed intention, as it ensures the spouse is the primary beneficiary of the estate and that the children are its final recipients. The limitation of this option to situations where the spouse is the parent of all of the deceased's children is also logical in light of the hold that usufruct places on property. This option is reminiscent of the dower that used to be the default mechanism in Canadian provinces until the late twentieth century, only the French system, in limiting its use to nuclear families, takes account of the different interests at play in diverse types of family structures. Given the contrast between Quebec's single default system and the multiple types of family that are emerging in our society, the French example is a good reminder that alternative systems can be envisaged to accommodate and better suit different realities and preferences.

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[202] See Martial & Trân Tran, *supra* note 114 at 239.

[203] See Part I, *above*.

[204] See art 585 CCQ; arts 212–13 C civ.

2. Statutory Legacies and Residual Shares

Intestate succession in the common law, in contrast, does not always provide for an outright division of the estate into shares: eight of the Canadian regimes[205] will give the spouse of the intestate a statutory legacy (often termed *preferential share*) in the estate before dividing the rest between the spouse and the children.

Ontario's regime, for instance, grants a statutory legacy of $200,000 to the spouse[206] and, if there is one spouse and one child, gives each half of the residue. If there is more than one child, the spouse will receive a third of the estate, and the children will divide evenly the other two thirds.[207] While the proportions of each family member's share might vary across jurisdictions, all eight provinces will divide the estate between those same family members.

In practical terms, the impact of the statutory legacy is that children receive assets from their parent's estate only if there is anything left after the preferential share has been deducted. In many jurisdictions, when an intestate leaves a spouse and children, the children will not receive any inheritance, as the estate will have been exhausted by the spouse, or they will receive only a small inheritance.[208] It has been argued that this outcome poses no issue because of the presumption of the conduit theory, whereby the spouse will upon their death leave their share of the first parent's estate to the children. As stated above, the weakness of this model is that it fails to take into account blended families: it is based on the model of the nuclear family, where the spouse is the parent of the deceased's children. This premise is flawed when applied to a blended family. In this context, in intestacy, the spouse's property (which they inherited from the first parent) will go only to the children with whom they have established parentage—not to their stepchildren—because stepchildren do not inherit by intestacy in Canada.[209] The spouse will therefore serve as a conduit for the deceased's stepchildren and the children common to both spouses. Therefore, unless the intestate's spouse decides to make a legacy in favour of their stepchildren, whether this spouse is the parent of the intestate's children will be determinative of the children's ability to, in turn, receive a share of the intestate's estate from the spouse.

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[205] These include British Columbia, Manitoba, Nova Scotia, Ontario, Saskatchewan, the Northwest Territories, Nunavut, and Yukon.

[206] See O Reg 54/95, s 1.

[207] See *Succession Law Reform Act* Ontario, *supra* note 144, ss 46(1)–(2).

[208] See e.g. *Specht v Archibald Estate* (1974), 16 NSR (2d) 354, 27 RFL 242 (SC); *Michalyshen v Michalyshen Estate* (1986), 45 Man R (2d) 178, [1987] 2 WWR 419 (QB) [*Michalyshen* cited to Man R].

[209] See Part II, *above*.

The situation of blended families has been more carefully addressed in some United States jurisdictions, where the amount of the statutory legacy is reduced in the case where the deceased's spouse is not the parent of all the deceased's children, the idea being to increase the likelihood that the child will receive a part of the estate.[210] In Canada, the British Columbia Law Institute's 2006 report considered the issue and made suggestions that align with the United States' approach,[211] resulting in the 2011 *Wills, Estates and Succession Act*.[212] Since the 2011 reforms, British Columbia grants the deceased's spouse a statutory legacy of $300,000 if this spouse is the parent of all the deceased's children (the case of a nuclear family), but only $150,000 if they are not the parent of *all* the deceased's children (the case of a blended family).[213] This is meant to ensure that the "intestate's biological children" have a higher chance of inheriting their half of the residual estate.[214]

In Manitoba, the spouse's statutory legacy will amount to the greater of $50,000 or one-half of the estate. If the spouse was the parent of all the deceased's children, the spouse also receives the whole of the residue. If the spouse was not the parent of all the deceased's children, the residue of the estate will be divided into two equal shares—one for the spouse, and one for the children of the deceased.[215] In Alberta, the devolution follows the same logic, but the statutory legacy amounts to the greater of $150,000 or one-half of the estate.[216]

Saskatchewan has recently considered reforming its law on this matter as well. In its report, the Law Reform Commission of Saskatchewan considers introducing a distinction between spouses who are the parents of all the deceased's children and those who are not. Unlike other jurisdictions' reports,[217] the Commission points not only to the logic of the conduit theory to support this distinction, but also to the potential need of and moral obligations owed to minor children:

> Distinguishing between spouses who share all their children and spouses who do not, reflects that there are situations where the intestate is less likely to desire to leave their entire estate to their

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[210] See Uniform Probate Code § 2-102 (2006); Elizabeth Cooke, "Wives, Widows and Wicked Step-Mothers: A Brief Examination of Spousal Entitlement on Intestacy" (2009) 21:4 Child & Family LQ 423 at 435–37.

[211] See British Columbia Law Institute, *supra* note 55 at xvii.

[212] SBC 2009, c 13.

[213] See *ibid*, ss 21(3)–(4), 21(6)(b).

[214] See British Columbia Law Institute, *supra* note 55 at 14.

[215] See *The Intestate Succession Act*, SM 1989–90, c 43, CCSM c I85, s 2(3) [*Intestate Act* Man].

[216] See *Wills and Succession Act*, SA 2010, c W-12.2, ss 60–61; Alta Reg 217/2011, s 1.

[217] See e.g. Alberta Law Reform Institute, *supra* note 46 at 52–53.

> spouse. *This could be because the intestate has other minor children they would plan to support, and could include children for whom child support payments were being made during the life of the intestate.* Such a distinction might also be a benefit to blended families where the spouses married later in life when they both have adult children and would want to keep their estates separate so that the assets of each remain within those family lines.[218]

Moreover, in its proposal, the Commission demonstrates a concern not only with the spouse's ability to retain the matrimonial home or with the children's ability to receive estate assets (in the short or long term), but also with "a desire to ensure that a spouse in a blended family scenario is not treated differently."[219]

The common law jurisdictions that created two levels of statutory legacy for the spouse who is the parent of all the deceased's children, and the one who is not, have attempted to respond to a concern expressed in many surveys: individuals want their children to obtain a share of their estate in the long term. In creating this dual level of statutory legacy, these schemes have adapted in an attempt to give effect to the presumed intention of the deceased from a blended family. Surveys have also shown that individuals desire their spouse to obtain a share in their estate, and—to a lesser extent—that some want their stepchildren to inherit from them as well. As many jurisdictions are considering the possibility of allowing stepchildren to inherit from a step-parent upon their intestacy—although no jurisdiction has enacted such a provision yet—it may be worth considering the impact of the conduit theory in these circumstances. Were a stepchild allowed to inherit from their step-parent's intestate estate, the step-parent would in fact become a conduit for the stepchild to receive a share of their parent's estate. Integrating the step-parental relationship into the intestacy regime, alongside the parental relationship, may therefore be another potential avenue to further translate the presumed intention of the deceased into the intestacy devolution schemes of jurisdictions already striving to include blended families.

C. Relief for the Deceased's Child

In Canada's common law jurisdictions, when the deceased's children receive no share of the estate because it has been exhausted by the statutory legacy, they can claim that their needs justify a variation of the distribution by having recourse to dependants' relief legislation. While this recourse exists, the estate's worth would have to be under the amount granted by statutory legacy to the spouse for the children to receive nothing. Given the costs of bringing a claim to court, it may not be profitable for

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[218] Law Reform Commission of Saskatchewan, *supra* note 117 at 10 [emphasis added].

[219] *Ibid*. The Commission's proposal follows the examples of Alberta and Manitoba.

the disappointed children of the intestate to bring an action in dependants' relief unless there was a substantial residual estate distributed between them and the spouse—which might weaken any needs-based claim.

Dependants' relief is an avenue for minor children to claim relief against the estate in all Canadian common law jurisdictions, but an adult, independent child has standing to claim in only five Canadian provinces (British Columbia, New Brunswick, Newfoundland and Labrador, and Nova Scotia). They may bring a claim in Alberta as well if they are a full-time student under twenty-two years old.[220] In British Columbia and Nova Scotia, dependants' relief legislation does not apply to intestacy, in which case all recourses are closed to the deceased's children.

Case law where dependants' relief is granted in intestacy generally confirms the desire to see the children of the deceased inherit from the estate because of the deceased's moral duty to their children and spouse, rather than any need on the latter's part. For instance, in *Michalyshen v. Michalyshen Estate*, the deceased had been estranged from his adult son and was unaware of the latter's financial and physical situation, but the court found that it must "determine what a wise and just father and husband would have done with full knowledge of the facts as they exist."[221] As a result, the judge did not vary the amount granted to the son in intestacy, refusing to grant the relief demanded by the deceased's spouse. In *Lamb (Litigation Guardian of) v. Lamb*, the court took account of the need and moral duty of the deceased toward his minor children, as well as the intentions he was presumed to have had.[222] As a result, and given the estate's insolvency, the court awarded the children the proceeds of an automobile insurance policy.

In spite of the focus on the conduit theory found in various law commissions' discussions, cases in Canada that will vary an intestacy have focused on the moral duty and need of the children of the deceased, rather than their right to inherit from their parent in order for the latter's property not to wind up in foreign hands in the long term. This trend is in keeping with the focus of the Canadian dependants' relief statutes,[223] but indicates that dependants' relief legislation is not the best mechanism to respond to the concerns raised by parties concerned with the conduit theory's impact on blended families' situations.

Two cases from England and Wales demonstrate a different approach to the concerns raised by the conduit theory. In *Re Callaghan*[224] and *Re*

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[220] See Popovici & Smith, *supra* note 34 at 525, n 99.

[221] *Supra* note 208 at paras 49–51 (quote at para 51).

[222] [1998] OJ No 1639 (QL) at para 44, 22 ETR (2d) 294 (Ct J (Gen Div)).

[223] See Part I, *above*.

[224] *Supra* note 166.

Leach,[225] the deceased's children were granted a share in their step-parent's intestacy in order to retrieve property that the latter had inherited from the claimants' parent in the first place. These cases demonstrate a desire to ensure the step-parent acted as a conduit for the parent's estate, and in so doing, they suggest a potential alternative to the dilemma posed by the conduit theory.

Where children or spouses of the deceased in blended families have attempted to vary a will in Canada, courts have demonstrated a narrower focus on need. Claimants have been successful whether the need was expressed by the children[226] or by the spouse.[227] Even where moral duty was claimed, the duty was framed as that to provide for a family member, thus shifting the analysis back to needs-based concerns.[228] When need was not at issue for either party, the court seemed willing to provide for the children's higher education.[229]

Only one case stands as an outlier for its focus on the conduit theory: in *Montrose v. Montrose*,[230] both the needs of the deceased's spouse and her relationship with him were examined before the court granted her the relief requested. The court limited the widow's relief, however, because it balanced the moral obligations the deceased had towards her with those owed to his son, and found the latter more important in this case because most of the deceased's assets would have been acquired during the deceased's relationship with the child's mother:

> I do not intend to imply that the testator would have no moral obligation whatsoever to his second wife but simply that the moral obligation must be weighed against the moral obligation to the legatee who is the sole issue of the first marriage wherein most of the testator's assets were accumulated. That is to say the imput [sic] and the contribution of the second wife of the testator could not have been nearly as great as that of the first wife and consequently the son of the first wife would stand in a much stronger position than an adult

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225 *Supra* note 166.

226 See e.g. *Re Tian Estate* (1952), 6 WWR (NS) 371, 1952 CarswellSask 35 (QB) (claim for an infant successful on needs ground); *Nielsen v Nielsen Estate*, [1991] BCJ No 2922 at para 22 (QL), 29 ACWS (3d) 585 (SC) (the court is clear that the parties' conduct and relationship is not at issue at para 10).

227 See e.g. *Kiss v Palachik*, 1980 CarswellOnt 3558 at paras 23–24, 5 ACWS (2d) 483 (H Ct J); *Gotfryd v Gotfryd*, 1996 CarswellOnt 3904 at paras 62, 67, 66 ACWS (3d) 799 (Ct J (Gen Div)).

228 See *Welsh v McKee-Daly*, 2014 NSSC 356.

229 See e.g. *Sheffiel-Lambros v Sheffiel* (2005), 137 ACWS (3d) 579, 2005 CanLII 4449 (Ont Sup Ct). See also *Hall v Hall's Estate* (1981), 10 Man R (2d) 168, 11 ACWS (2d) 13 (QB) (where the child's desire for funds allowing her to complete a business course is expressed in terms of need).

230 (1980), 39 NSR (2d) 339, 4 ACWS (2d) 393 (SC (TD)) [cited to NSR].

> child normally would. This son is not claiming as a dependant but under the provisions of his father's will.[231]

The outcome of this case seeks to endow the son with assets that would have been his had the deceased not remarried. The court is therefore acting as a conduit for the property to devolve to the child, as did the courts in *Re Callaghan* and *Re Leach*.

This overview of cases where members of blended families have sought relief against a deceased's intestacy or their will has shown that dependants' relief is not an effective solution to the concerns raised by law commissions and commentators in regards to the step-parent's failure to serve as a conduit for the deceased's child. It would seem that this is because the principles underlying dependants' relief legislation are at odds with the notion of courts acting as a conduit for the estate to make its way to the deceased's children. The focus of dependants' relief on needs, and sometimes moral duty,[232] does not always allow courts to yield to the children's claims for a share in the estate. Indeed, if they did, the aims underpinning statutory legacy schemes are the ones that would suffer.[233] If commissions believe that there is indeed an important issue in step-parents being an unreliable conduit for the deceased's children to benefit from the estate, it seems that either the objectives and parameters of dependants' relief legislation ought to be recast, or other solutions ought to be envisaged.

The approach of the English courts in *Re Callaghan* and *Re Leach* offers an interesting possibility to consider if one wanted to undertake the first option. The courts or the legislature could open the door for claims against a step-parent's estate for the purpose of receiving assets that originally were inherited from the children's parent. As discussed in Part II, some provinces already allow stepchildren to bring claims against their step-parents, although the logic behind these claims is unrelated to that of the conduit theory. It might be possible, however, to bring the two closer.

A second and more radical alternative is to consider the step-parent as a potential conduit for the estate to reach the stepchild. Folding the step-parental relationship into intestacy regimes may just serve to accomplish this objective, in part, while also allowing the child's stepsiblings and half-siblings—where applicable—to receive part of this estate. The details of such a change would have to be analyzed more carefully to determine its feasibility and its potential ability to answer the questions raised by the conduit theory—but this could prove to be a way of ensuring the stepchild indeed receives some assets from their parent's estate while also integrating stepfamilies further into intestacy regimes. As public opinion does not

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[231] *Ibid* at para 42 [emphasis added].

[232] See Part I, *above*.

[233] See Part III-A, *above*.

seem to be in favour of allowing stepchildren's claims yet, it appears there is still time to consider the details of such a proposal before it is truly on the table.

Lastly, note that equivalent alternatives are not possible in Quebec civil law due to the unavailability of claims for support obligations upon an estate by stepchildren. In Quebec, alternatives therefore have to be envisaged at the level of the intestacy regime, or by widening the availability of support obligations to include *in loco parentis* relationships. This last alternative has the advantage of applying to both intestacy and testacy. As *in loco parentis* relationships are already recognized as capable of grounding obligations of support between two live individuals, recognizing this obligation upon an estate would also be more inclusive toward children of the blended family.

IV. Relationships Between Siblings in a Blended Family

In a blended family, relationships between siblings can be of three types or degrees: siblings can be *full siblings* (if they share two common parents), *half-siblings* (if they share only one parent), or *stepsiblings* (if they have no parent in common, but their parents are married to one another). According to the statistics analyzed in the introduction, one in ten children in Canada under the age of fourteen lives in a blended household, and over half of these live in a complex or fertile blended family. This indicates that over 5 per cent of Canadian children are forming bonds during their formative years with half-siblings.[234]

In all the regimes discussed so far, in the absence of a spouse, children, and parents, a deceased's property will go to their siblings. This part asks whether half-siblings and full siblings of the deceased should receive an equal share of the latter's estate. To answer this question, I will first look at the entitlements granted to full and half-siblings upon intestacies in various jurisdictions (Part IV-A), before turning to the recourses available to full and half-siblings under dependants' relief legislation and what these recourses and the way they have been exercised suggest about the principles underpinning notions of the blood family in succession law (Part IV-B).

A. Intestacy Regimes Compared

All Canadian common law jurisdictions make it clear in their legislation that the term "siblings" refers to both half- and full siblings.[235] The

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[234] See *2011 Census*, *supra* note 2 at 14.

[235] See *Succession Act* BC, *supra* note 53, s 23(2)(c) (siblings are described as "descendants of the intestate's parents or parent", a formulation that makes no distinction between half- and full siblings); *Succession Act* Alta, *supra* note 53, ss 67(1) (siblings as "the descendants of the parents or of either of them"), s 68 ("descendants of the half-kinship

equal treatment of half- and full siblings in Canadian common law provisions is not controversial today.[236] Historically, however, Canada has been just as prone as all other jurisdictions to make distinctions drawn in blood. In the nineteenth century, Canadian commentators would have found that "[i]t is a fundamental principle of the common law that the land will rather escheat than go to the half-blood."[237] Courts would use colourful language, drawing upon English seventeenth-century sources that reflected the European approach to devolution based on quanta of blood: "If, in the present case, the property had descended to Edward Shannon, the intestate, from his father, Michael Shannon, then it is clear that, according to the rules of the common law, the property never could have descended to Mary Fortune, his half-sister, *because she had none of the blood of Michael Shannon in her*."[238] By 1875, however, "[kindred] of the half-blood" and those of the "whole blood" were found entitled to an equal share of the estate.[239]

The approach of Canada's common law provinces is in sharp contrast with the English and Scottish one: in these jurisdictions, if the deceased has any full siblings, their half-siblings will receive nothing; they are considered a category of relatives further removed from the deceased.[240] This differential treatment of half- and full siblings—which runs counter to public opinion,[241] contradicts past statements by the English and Scottish law

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inherit equally with those of the whole kinship in the same degree of relationship to the intestate"); *Intestate Act* Man, *supra* note 215, s 4(4) (siblings as "the issue of the parents of the intestate or either of them to be distributed per capita"). The expression "the kindred of the half-blood shall inherit equally with those of the whole-blood in the same degree" or variations thereof are found in the following seven statutes: *Intestate Succession Act*, RSNL 1990, c I-21, ss 8, 11; *Intestate Succession Act*, RSNS 1989, c 236, ss 8, 11; *Intestate Succession Act*, RSNWT 1988, c I-10, ss 6(1), 9(2); *The Intestate Succession Act, 2019*, SS 2019, c I-13.2, ss 8(2), 11(b); *Estate Administration Act*, RSY 2002, c 77, ss 84(1), 87(2); *Devolution of Estates Act*, RSNB 1973, c D-9, ss 26, 29; *Probate Act*, RSPEI 1988, c P-21, ss 91, 94. In Ontario, the statute does not qualify the notion of "brothers and sisters" of the deceased, but grants non-sibling "kindred of the half-blood" and "of the whole-blood" equal entitlements in a later subsection (see *Succession Law Reform Act* Ontario, *supra* note 144, s 47(8)). See also *Succession Law Reform Act*, RSO 1980, c 488, s 47(8); *Re Lainson Estate* (1986), 22 ETR 168 at 179–80, 1986 CarswellOnt 656 (Surr Ct).

236 See e.g. Alberta Law Reform Institute, *supra* note 46 at 179, noting that "nothing suggests that it causes a problem."

237 *Doe d Shannon v Fortune*, [1876] 16 NBR 259 at 260, 1876 CarswellNB 5 (SC).

238 *Ibid* at 262, citing Edward Coke, *The First Part of the Institutes of the Lawes of England* (London, UK: The Societie of Stationers, 1628) Lib 1, c 1 at 14 [emphasis added].

239 See *ibid* at 263.

240 See Kerridge, "Intestate Succession", *supra* note 45 at 347; *Succession (Scotland) Act 1964* (UK), s 3.

241 In England, see National Centre for Social Research, *supra* note 132 at 64; Sherrin & Bonehill, *supra* note 116 at para 1-029; SM Cretney, "Reform of Intestacy: The Best We Can Do?" (1995) 111:1 Law Q Rev 77 at 87. In Scotland, see Scottish Law Commission, *supra* note 117 at para 2.31.

commissions,[242] and causes inconsistencies with the broader reading of "siblings" in testamentary interpretation[243]—is anachronistic[244] and its continued presence in these statutes suggests an attachment to blood relations that is stronger than the supposed objective of the statutes: presumed intention.

Quebec's legislation also bears the marker of such an attachment to bloodlines, placing an emphasis on the *amount* of blood common to half- and full siblings. As a result, "full-blood siblings" may receive a share of the deceased's estate up to three times larger than that of a "half-blood sibling" of the deceased. This is a result of the institution commonly referred to as the *fente*.[245] The *fente*'s nature has changed over the course of civil law history, but for our purposes, in the *Civil Code of Québec* it can be summarized as follows: the institution seeks to ensure that the property of the intestate is divided evenly between the two *branches* of their family (referred to as the "paternal" and "maternal" branches by the legislator). As such, when property has to be divided between full and half-siblings upon an intestacy, the property is divided into two baskets—one for each family branch—with each sibling related to the deceased on the first branch sharing equally in the basket attributed to that branch, while the siblings related to the deceased on the second parental branch share equally in that second basket. The full sibling will get one share from each basket.[246] This also results in half-siblings from either side of the family not necessarily inheriting the same amount as one another. For instance, if an individual dies leaving behind one half-sibling on one parental branch, two half-siblings on the second branch, and one full sibling, the first half-sibling will receive one-quarter of the estate, the half-siblings in the second branch will receive one-sixth of the estate each, and the full sibling will receive five-twelfths. Thus, depending on the branch, a half-sibling may receive one-sixth of the estate while another receives one-quarter. This difference in the shares of the estate granted to half- and full siblings, and potentially as between siblings,

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242 In England, see English Law Commission, *Consultation Paper*, *supra* note 117 at para 6.53. In Scotland, see Scottish Law Commission, *Report on Succession*, Scot Law Com No 124 (Edinburgh: Her Majesty's Stationary Office, September 1990) at para 2.21; Scottish Law Commission, *supra* note 117 at 24.

243 Courts will presume that "siblings" includes both full and half-siblings. See e.g. *Grieves v Rawley* (1852), 10 Hare 63, 68 ER 840 (Ch); *Dowson v Beadle*, [1909] WN 245, 101 LT 671 (Ch); *Miles v Wilson*, [1903] 1 Ch 138, 87 LT 581; *Lynneberg v Kidahl* (1947), [1948] NZLR 207.

244 On the historical origins of the distinction, see *Watts v Crooke*, [1690] Shower 108, 1 ER 74; English Law Commission, *Consultation Paper*, *supra* note 117 at para 6.49, citing UK, *First Report Made to His Majesty by the Commissioners Appointed to Inquire into the Law of England Respecting Real Property* (20 May 1829) at 13.

245 See art 676 CCQ. On the origins of the *fente* and its integration in the *Civil Code of Lower Canada*, see Lionel Smith, "Intestate Succession in Quebec" in Reid, de Waal & Zimmerman, *Volume II*, *supra* note 44, 52 at 57.

246 See Auger, *supra* note 94 at 94.

is clearly tied to a rationale that has nothing to do with the life the heirs may have shared with the deceased or their mutual affection. Instead, the *fente* maintains this particularity because it is derived from an older mechanism which was meant to keep property within the bloodlines.[247] The *fente* was never meant to separate the intestate's property in accordance with their presumed wishes, or to be fair or egalitarian towards their collaterals—its aim is to treat "family lines" equally.

Although the institution of the *fente* originated in France, it no longer applies to siblings in that jurisdiction. Today, in France, the *fente* applies only to collaterals further removed from the deceased, and no distinction is drawn between the siblings that only have one parent in common with the deceased, as opposed to two.[248] This demonstrates a shift away from the blood conception to focusing instead on the presumed intentions of the deceased, a change reminiscent of that undergone in common law Canada over one hundred years ago.

B. Half-Siblings in Wills and as Dependants

In common law Canada, Manitoba is the only jurisdiction to clearly include half-siblings as well as full siblings in the list of relationships qualifying as "dependant", if the individual was "substantially dependant on the deceased at the time of the deceased's death".[249] Siblings are mentioned as a listed relationship able to claim dependants' support in Ontario's legislation, but the relationship is not qualified. It seems reasonable to assume that the word will be interpreted to include both half- and full siblings in the *Dependants' Relief Act* as it has been interpreted in the context of the *Succession Law Reform Act*. Other jurisdictions will bar siblings from claiming dependants' relief altogether.[250]

Similarly, in Quebec, siblings have no recourse when left out of a will or left in need upon an intestacy, since the obligation of support established at article 585 CCQ applies only between "relatives in the direct line in the

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[247] See Jacques Beaulne, Christine Morin & Germain Brière, *Droit des successions*, 5th ed (Montréal: Wilson & Lafleur, 2016) at paras 571, 577.

[248] See arts 737–38 C civ. See also art 749 C civ (only collaterals that are not siblings are subject to the *fente*).

[249] *Dependants Relief Act* Man, *supra* note 66, s 1 *sub verbo* "dependant" (g).

[250] See e.g. Saskatchewan's *Dependant's Relief Act*, where "dependants" are limited to spouses, cohabitants and issue (SS 1996, c D-25.01, s 2(1), *sub verbo* "dependant"); *Succession Act* Alta, *supra* note 53, s 72(b); *Dependants Relief Act* NWT, *supra* note 65, s 1 *sub verbo* "dependant"; *Dependants of a Deceased Person Relief Act*, RSPEI 1988, c D-7, s 1, *sub verbo* "dependant"; *Dependants Relief Act*, RSY 2002, c 56, s 1, *sub verbo* "dependant"; *Family Relief Act* NL, *supra* note 65, s 2(c) (siblings not listed in the categories provided). According to Popovici & Smith (*supra* note 34 at 525), the inclusion of brothers and sisters is unusual for a common law jurisdiction.

first degree" (that is, parents and children). In England, any person "maintained, either wholly or partly, by the deceased" prior to the latter's death can claim family provision from the estate.[251] This could certainly include siblings.

Some commentators have found both the English approach—which denies half-siblings entitlements unless the testator had no full siblings—and the French approach—which treats half-siblings and full siblings as equals in respect to the deceased's intestacy (as does Canadian common law)—too "extreme" and recommended the Quebec approach as a good middle ground.[252] Yet, the *fente* still functions on the premise that a half-sibling should only inherit from the deceased in proportion to what the deceased might have received from ascendants this half-sibling is related to; it is a sort of application of the conduit theory that tries to ensure property remains within bloodlines. Indeed, the *fente* is the remnant of an old institution, which may have changed the way it operates but remains ensconced in an ideology of bloodlines and the distinction of property based on the idea of maintaining such property if not within the family that it came from originally, then at least within the family the child was born in. This mechanism does not correspond to the manner in which most individuals in a blended family value their relationships—and presumably desire their estate to be distributed—and is grounded in antiquated premises. Therefore, I cannot agree with the authors who could consider it "[t]he most equitable solution."[253] Instead, I propose that the time has come to rethink the way devolution functions among siblings in Quebec to align such devolution mechanisms with the core objectives of Quebec succession law.

Conclusion

My analysis of the treatment of relationships specific to blended families in succession law has demonstrated that the law still considers the traditional, nuclear family as its template. As a result, in most cases, the law has not yet adapted to the new realities of a substantial segment of our society. This conclusion offers a few thoughts on ways to think more inclusively about modernizing succession law, using these findings on blended families as an example.

Across all the jurisdictions studied, there has been some interest in keeping bloodline relationships as a central focus. The major survey that informed the English and Welsh Law Commission's proposals, for instance, found that dependency and bloodline were the two main factors "for considering children to be entitled to a share of the estate under the intestacy

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[251] *Inheritance Act* 1975, *supra* note 89, s 1(1)(e).

[252] See Reid, de Waal & Zimmerman, "Intestate Succession", *supra* note 44 at 471.

[253] *Ibid*.

rules."[254] As far as the bloodline argument was concerned, the focus groups felt that the law should protect

> what was viewed as an offspring's rightful inheritance and the principle that assets should remain "within the family". From this viewpoint, it was not considered important whether the children were minors or adults or needed looking after, as descendants should be entitled to benefit from the deceased's estate for the fundamental reason that they were the biological next of kin.[255]

In spite of a similar focus on the bloodline across jurisdictions, the legal systems studied are increasingly recognizing relationships unrelated to bloodlines within default legal regimes. These regimes show a preference for such relationships when they are formalized: adoption or marriage, for instance, are preferred to *in loco parentis* relationships or cohabitation. Such a preference is in keeping with a desire for certainty while respecting the intentions of individuals—especially when these individuals can no longer express themselves, as is the case in succession law.

Yet, in the context of the blended family, many relationships are not formalized consensually between family members: they are born out of the decision of the spouses to marry or cohabitate. The repercussions of these decisions and this new lifestyle and family structure have major implications for the non-decisionmakers. For this reason, the realities of blended families warrant taking some distance from the bloodline conceptions of the family.

Two ways that emerge as potential means to integrate blended families' relationships into succession law are (a) by making presumptions available to recognize these relationships; or (b) providing new tools to allow members of blended families to formalize the relationships they deem of sufficient value. The first option is exemplified in my earlier suggestion to recognize a step-parental relationship in intestacy, the second in the mechanism of *adoption simple* currently used by many step-parents in France to ensure stepchildren are able to inherit.

It is also imperative that we stop considering the relationships inherent to blended families on an individual level and think of them instead in the context of blended families. We have seen above that analyzing the interactions between two such relationships has allowed us to consider new ways of addressing an issue raised by multiple commentators, the conduit theory. Placing the question of the stepchild's inheritance next to that of the child's

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[254] Gareth Morrell, Matt Barnard & Robin Legard, *The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional Families* (London, UK: National Centre for Social Research, 2009) at 16. See also English Law Commission, *Final Report*, *supra* note 132 at para 1.31; English Law Commission, *Consultation Paper*, *supra* note 117 at para 1.45.

[255] Morrell, Barnard & Legard, *supra* note 254 at 16.

ability to receive assets from their parent after the latter's remarriage has allowed us to consider the validity of the step-parent as conduit in a new angle.

In considering the relationships core to blended families, we must also reconsider the groups we use as comparators. Most commissions and commentators use the nuclear family not only as a default blueprint for any potential reforms, but also as a framework for the discussion of any alternatives—leaving aside any new developments in the structure of family law. In the last few years alone, we have seen major developments in the way family law will allow us to structure relationships. In Canada, a child may now have more than two parents at birth. A child may also be conceived years after a parent's death and still inherit from them.[256] When we compare the potential entitlements of children from blended families, we should compare them to the full range of families existing in society, whether they are recognized in law or not yet, and what they offer their children.

Lastly, this article has discussed many premises inherent in our regimes' rules, most of them tied to the notion of the family not only as a nuclear unit, but as one relying on blood relations. While there may be value to maintaining relationships of blood as the core focus of our succession regimes—if only for the sole reason that the general population maintains an attachment to this notion—it may be time to review some of the ways this notion manifests. For instance, the fact that some regimes still differentiate between siblings because of the quantum of blood they have in common with the deceased is plainly anachronistic. These are exactly the types of premises that should force us to take a careful look at the laws that determine what we will be leaving behind for the members of our family, or families, as the case may be.

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[256] See generally Laura Cárdenas, "Un/Related: Discrimination in Posthumous Conception for LGBTQ+ Families in Canada" (2021) 99 Can Bar Rev [forthcoming] for issues arising out of a similar focus on bloodlines and nuclear families, leading to discrimination.