

**The Inheritance Rights  
of Children  
in the United States**



# The Inheritance Rights of Children in the United States

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**Cases and Materials**

**Browne Lewis**

CLEVELAND-MARSHALL COLLEGE OF LAW

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*To my dad, Joe Lewis, for teaching me to love to read, and  
to my mother, Josephine Lewis, for teaching me to love to write.*



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# Preface

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*Inheritance Rights of Children* is designed for use as a supplementary text for a course on trusts and estates and the primary text in a seminar or course exploring the inheritance rights of children. The text also serves as an introduction to some of the legal issues arising as a result of the use of assisted reproduction.

Wealth in this country is transferred through the generations. Legislatures have established a system to regulate that distribution of wealth. The current inheritance system is made up of two component parts—a testacy system and an intestacy system. This book is divided up into two parts to conform to that dichotomy.

Part one deals with the legal issues that arise out of the testacy system. The testacy system is the process under which the owners of property decide how they want to dispose of the property they have accumulated. They have various options including executing wills, creating trusts, and granting powers of appointments. Under the inheritance system in the majority of states, a parent can legally disinherit his or her child(ren). That action is permissible because no one has the right to inherit property. The United States Supreme Court has stated that the right with regards to disposing of accumulated property belongs to the acquirer of the property. Therefore, the person's descendants do not have the right to inherit property. Nonetheless, even though a parent may legally disinherit his or her child(ren), courts strictly scrutinize restrictions or conditions placed upon the right to inherit. As consequence, courts will not enforce a testamentary condition that is illegal, discriminatory or against public policy.

Part two deals with the legal issues that arise out of the intestacy system. In particular, that part examines the legal issues that result because of the existence of different classes of children. The portion of the decedent's property not disposed of by will is covered by the intestacy system. The intestacy system is a default system for the distribution of property after death. In all fifty states and the District of Columbia, intestate succession is governed by a statutory scheme. In deciding how to divide a person's estate when he or she dies intestate, the probate court has a directive to carry out the person's presumed intent. The presumption is that, after the surviving spouse has received a portion of the estate, a reasonable person would want the remainder of his or her assets divided among his or her children. Thus, the probate system favors children. As previously stated, no class of children has the right to inherit from their parents. However, if the child has not been disinherited, the child has the opportunity to inherit from his or her parents. Litigation occurs when legislatures or courts put impediments in place to prevent children from being eligible to inherit from their parents.

Historically, a child born during the marriage was afforded the opportunity to inherit from both the wife and the husband. This was true even if the child did not have a biological connection to the husband. Courts recognized the non-biological child's right to

inherit by relying upon the marital presumption doctrine that stated that a man was presumed to be the father of any children born to his wife during their marriage. Eventually, couples started raising children that did not have a biological connection to either the man or the woman. These couples utilized the adoption process to create their families. Since adopted children were children of choice, for inheritance purposes legislatures and courts treated them exactly like marital children. The existence of adopted children has added an extra wrinkle to the intestacy process. Those children have four potential adults from which they may inherit—the adoptive parents and the natural parents.

The deterioration of the institution of marriage created two new classes of children—non-marital children and step children. Although non-biological marital children were allowed to inherit from their legally recognized parents, ironically, biological children who were born outside of marriage were not given the opportunity to inherit from their biological parents. Non-marital children were bastards and legally considered to be the children of no one. Hence, they were not eligible to inherit from any one. As more and more adults created children without the benefit of marriage, the legislatures and courts removed the stigma of illegitimacy and gave those children the chance to inherit from their biological parents. A consequence of the high divorce rate and the large number of blended families is the existence of step children. Traditionally, step children did not have the right to inherit from their step parents. Nonetheless, that trend is changing. Although the majority of states still refuse to let step children inherit from their step parents, some jurisdictions have statutes that permit step children to be recognized as heirs in limited situations.

As a result of advances in reproductive technologies, persons are able to establish families in various non-traditional ways. This phenomenon has impacted the intestacy system by creating three new classes of children—posthumously created children, artificially created children and children created as the result of surrogacy arrangements. Posthumously conceived children are children produced using the sperm of dead men. The children only have the right to inherit from the estate of their dead fathers in a few states. In order to exercise that option, the posthumously conceived child must meet certain specific conditions. Children created through the use of artificial insemination have the potential to inherit from two different classes of men—husbands of artificial inseminated women and sperm donors. Likewise, children born as the result of surrogacy agreements have the possibility of inheriting from two different classes of women—women who contract for their conception and surrogates who gestate them.

In addition to cases, the book contains problems, notes and questions. The cases are designed to give the student a clear understanding of the law. The problems are included to permit the student the opportunity to apply the law. The notes and questions are provided so the student will think critically about the policies behind the law and the outcome of the cases.