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Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family

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Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family

Danaya C. Wright* & Beth Sterner**

ABSTRACT

This article provides preliminary analysis of an empirical study of nearly 500 wills probated in Alachua and Escambia Counties in the State of Florida in 2013. The particular focus of the study is to determine if there are noticeable patterns of property distribution preferences among decedents based on their diverse family relationships. Earlier empirical studies of distribution preferences indicated that a majority of married decedents wanted to give all or most of their estates to their surviving spouses. As a result of these studies, most states amended their probate codes to give surviving spouses a sizable percentage of a decedent spouse's estate under their intestacy provisions. But with the explosive growth of nontraditional families, particularly blended families with stepchildren, the standard estate plan for these nontraditional decedents is actually a revocable trust with a QTIP provision to provide for the surviving second or third spouse, thus protecting a significant portion of the property for the children by a prior marriage. As family patterns have changed and the blended family has become more ubiquitous, there is a

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** J.D., University of Florida Levin College of Law, Articles Editor for the Florida Law Review, and Teaching Assistant for Legal Writing and Appellate Advocacy. I would like to thank Professor Danaya Wright for bringing this issue to my attention and allowing me to co-author this important work with her. It is my desire that reformation of intestacy laws will bring more equity to all individuals, especially those in nontraditional families. Most importantly, I want to thank the love of my life, Erik, who has supported me through all the long hours spent on this project and for his wiz-kid mastery of spreadsheets and help with pulling hundreds of court records. Finally, I want to thank my two children, Peter and Joel, to whom I am supremely grateful for their love and support as their mother goes through law school. To them, I hope to exemplify that they too can follow their dreams, no matter how late in life that may be.

growing divergence between the estate plans of those who can afford to make them, and the default rules of intestacy.

In this article, we report our initial findings in a comprehensive study of testate estates through the lens of family relationship patterns. Focusing on distributions to second or subsequent spouses, and bequests to stepchildren, we show that intestacy laws still tend to fit most decedents' preferences regarding bequests to surviving spouses, though certainly the fit is less close than with first spouses, but that there is a significant gap in the intestacy law's treatment of step-children. Moreover, there are definite gender-based differences in treatment of surviving second-spouses that suggest our intestacy laws are not providing as close a fit as they could.

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INTRODUCTION

Under the law, individuals have nearly unlimited testamentary freedom to direct the disposition of their property by executing a valid will.¹

¹ Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 884–85 (2012).

Nevertheless, many Americans do not have a will² and die intestate.³ At death, when a decedent has not prepared a will, intestacy statutes will direct the disposition of his or her property to the people most closely related by blood or marriage to the decedent.⁴ Thus, intestacy statutes are default rules that operate to channel property owned by a decedent at death to the people lawmakers assume would be the decedents' preferred beneficiaries. However, despite the seeming logic of benefitting children and spouses, do current intestacy statutes truly reflect a dispositive scheme in line with what most individuals would choose if they had executed a will? Scholars have long criticized intestacy statutes for prioritizing blood descendants over adopted or functional children, and legal spouses over unmarried cohabitants. In light of the fact that marriage is a waning institution⁵ and a majority of chil-

² See *id.* at 887–88 (“[D]ecades of empirical studies have repeatedly confirmed that most Americans do not have a will. Although no nationwide study has ever quantified the number of intestate decedents, scholars agree that a high rate of intestacy has persisted throughout most of American history.”) (footnotes omitted); Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIAC PROB. L.J. 36, 41 (2009) (finding that in a 2006 nationwide survey, sixty-eight percent of respondents lacked a will). Scholars have suggested that the primary reason many Americans do not have a will is likely due to procrastination or laziness. See Weisbord, *supra* note 1, at 885; Wendy S. Goffe & Rochelle L. Haller, *From Zoom to Doom? Risks of Do-It-Yourself Estate Planning*, 38 EST. PLAN. 27, 27 (2011) (estimating that sixty-five percent of Americans do not have a will); Contemporary Studies Project, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1077 (1978). In a 1978 survey of Iowa residents, 57% of respondents stated that the reason they did not have a will was that they had “not gotten around to making a will.” *Id.* See also Mary Louise Fellows, Rita J. Simon & William Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 321, 339 (1978). In an empirical study performed in 1977, 63.6% of respondents who did not have a will cited laziness as the reason. *Id.*

³ See Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 244 (1963) (reporting that of the estates that were probated in a 1957 sample group of Chicago decedents, 45% were intestate); Joel R. Glucksman, *Intestate Succession in New Jersey: Does it Conform to Popular Expectations?*, 12 COLUM. J.L. & SOC. PROBS. 253, 285 (1976) (reporting that in Morris County, New Jersey, in 1971, of the 2,556 decedents, 12% had a probate estate administered under the intestacy laws and 41% utilized an intestate affidavit or the estate was unprobated); Contemporary Studies Project, *supra* note 2, at 1059, 1070 (reporting that of the 3,122 probate files reviewed from six Iowa counties in 1973 and 1974, 28% of the decedents died intestate).

⁴ See Weisbord, *supra* note 1, at 891.

⁵ Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married: As Values, Economics and Gender Patterns Change*, PEW RES. CTR. SOC. & DEMOGRAPHIC TRENDS PROJECT (Sept. 24, 2014), <http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/> (“After decades of declining marriage rates and changes in family structure, the share of American adults who have never been married is

dren are currently being raised in nontraditional families⁶ – defined as blended, single-parent, or same-sex – the norms represented by intestacy statutes may not accurately reflect the preferences of not only those living in nontraditional families, but even those in many traditional nuclear families.

Despite many people's aspirations to marry and have children, the traditional nuclear family no longer prevails in the United States.⁷ Instead, divorce and multiple marriages abound, with single parents, non-marital, and blended families being the new normal.⁸ Additionally, more and more adults are cohabitating together in intimate partnerships, but remaining unmarried.⁹ Fewer and fewer children reach adulthood by residing in the home with their married parents, as a growing number of people choose to parent unmarried, single, in same-sex relationships, or with new partners. With the smorgasbord of family options that people are choosing, how can intestacy statutes, with their cookie-cutter distribution schemes based in large part on the traditional single-marriage nuclear family, be adapted to the changes in the modern family? To answer that question we need to know three things: 1) how intestacy laws currently distribute property upon death, 2) how people would prefer to have their property distributed if they do not make a will, and 3) whether any patterns or clear preferences exist based on certain family structures. If these patterns exist, we might be able to recalibrate our intestacy laws to better reflect the actual wishes of those who die intestate.

To determine how well the intestacy laws reflect the presumed wishes of twenty-first century decedents, we conducted an empirical

at an historic high. In 2012, one-in-five adults ages 25 and older (about 42 million people) had never been married . . . in 1960, only about one-in-ten adults (9%) in that age range had never been married Adults are marrying later in life, and the shares of adults cohabiting and raising children outside of marriage have increased significantly.”)

⁶ See Pew Res. Ctr., *Parenting in America: Outlook, Worries, Aspirations are Strongly Linked to Financial Situation* 15–26 (Dec. 17, 2015), http://www.pewsocialtrends.org/files/2015/12/2015-12-17_parenting-in-america_FINAL.pdf; *America's Families and Living Arrangements: 2016 Family Groups*, U.S. CENSUS BUREAU (Nov. 2016), <https://www.census.gov/data/tables/2016/demo/families/cps-2016.html> (select tbl. FG10) (last visited May 23, 2017) [hereinafter *America's Families*].

⁷ See Pew Res. Ctr., *supra* note 6, at 15, 21; *America's Families*, *supra* note 6.

⁸ See Pew Res. Ctr., *supra* note 6, at 15, 19; *America's Families*, *supra* note 6.

⁹ Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?*, 41 ACTEC L.J. 49, 53 (2016) (“As the marriage rate has declined, the cohabitation rate has risen. According to the [2010] Census Bureau report, ‘the unmarried partner population numbered 7.7 million in 2010 and grew 41% between 2000 and 2010.’”) (quoting Daphne Lofquist, et al., *Households and Families: 2010*, U.S. CENSUS BUREAU 3 (Apr. 2012), <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>).

study of hundreds of wills of decedents domiciled in Florida. Our goal was to see if what people actually did in their wills can tell us anything about what dispositions intestate decedents would likely prefer given certain relationship patterns. Of course, there is always the argument that people who die intestate do so with an understanding of the intestacy rules, and that intestacy defaults accurately reflect their wishes with regard to disposition of their property. But the fact that the likelihood of having a will is more closely correlated to wealth and race than family structure and intimate relationships¹⁰ suggests that people don't choose intestacy in quite the same way they choose testacy.

The predominant goal of intestacy statutes is to carry out the probable intent of most decedents in the disposition of their property.¹¹ This is rooted in the principle that succession law “places donative freedom at the apex of its hierarchy of values.”¹² As a result, “succession law should reflect the desires of the ‘typical person,’ both with regard to protecting expressions of desire and anticipating situations where those expressions are inadequately presented.”¹³ But as the typical person becomes less and less typical, the disjuncture between the cookie-cutter intestacy model and the atypical decedent becomes wider. We would

¹⁰ See Weisbord, *supra* note 1, at 897 (“Demographic analyses reveal that individuals are more likely to have a will if they are white, male, married or formerly married, educated, older, and wealthy; this demographic pattern has endured over time.”); DiRusso, *supra* note 2, at 42–51; Fellows, Simon & Rau, *supra* note 2, at 324–25; Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 492 (2010).

¹¹ See, e.g., UNIF. PROBATE CODE, art. II, pt. 1, general cmt. (UNIF. LAW COMM'N 2010) (“The pre-1990 Code’s basic pattern of intestate succession, contained in Part 1, was designed to provide suitable rules for the person of modest means who relies on the estate plan provided by law. The 1990 and 2008 revisions were intended to further that purpose, by fine tuning the various sections and bringing them into line with developing public policy and family relationships.”); Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 8-9 (2000) (“Although many sources cite the decedent’s intent as the primary goal of intestacy laws, commentators have also identified goals that benefit society more broadly.”); John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 UNIV. OF MIAMI L. REV. 497, 501 (1977) (noting that it is generally agreed that the purpose of succession laws is “to give effect, subject to the constraints of other public policies, to the wishes of the decedent while providing for the well-being of his family.”); Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 230 (1991) (“Various considerations drive the formulation of intestate-succession laws. The most obvious and perhaps predominant consideration is the decedent’s intention.”); Contemporary Studies Project, *supra* note 2, at 1043 (noting that furthering the perceived intent of the decedent has become the primary goal of intestacy statutes).

¹² E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1068 (1999).

¹³ Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 912 (1992); Spitko, *supra* note 12, at 1068.

like to explore whether there are sufficient patterns in testamentary dispositions to justify restructuring intestacy statutes to better reflect the diversity and nuances of individualized preferences and if there are ways to restructure a default rule to be more reflective of diverse preferences.

In this article we provide preliminary results of our study to help determine the *probable intent* or *range of intent* of those dying without a will, and thereby offer possible reforms to intestacy statutes to better reflect the changes in the modern "family" unit. The theory behind the study is that by analyzing the will dispositions of recently passed decedents, patterns will emerge that demonstrate the probable intent of decedents sharing similar relationships to potential beneficiaries of their estate. Indeed, this is not the first empirical study related to testate or intestate distributions. But, this is the first such study of actual wills that focuses on the distributions in relation to the decedents' family relationships.

Part I of this article summarizes the history and findings of earlier empirical studies that shaped intestacy laws in the United States. Part II details the method and findings of our empirical study. Lastly, Part III examines the gaps between presumed intent of testators and state intestacy laws and proposes a variety of reforms to intestacy statutes with an order of succession that more accurately reflects the succession patterns of modern decedents.

I. HISTORY OF EMPIRICAL STUDIES

Various inquiries have been made into individuals' preferences for the distribution of their assets with and without a will. Two types of empirical studies have been primarily performed: phone surveys of living persons and an analysis of probate records in specific geographical regions. Both have their benefits and their disadvantages. While this information has been relied on in the past to shape intestacy laws, more needs to be done to better calibrate our intestacy statutes to reflect the nontraditional family structures of today.

A number of phone surveys have been done, gathering useful information from living people about their property distribution preferences. Phone surveys of individuals can gather useful information that a study of probate records may be unable to glean. For instance, studies have shown that most people do not prepare a will until they are much older,¹⁴ so analyzing probate records may not demonstrate how a

¹⁴ See, e.g., Edward H. Ward & J. H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393, 412-15 (1950) ("Once a person is retired he has more time to think about the disposition of his property after his death."); Dunham, *supra* note 3, at 245 n.9 (discussing that in 1949, "of the total voting age population, 3 out of 4 men and 6 out of 7 women had no wills."); MARVIN B. SUSSMAN, JUDITH N. CATES, & DAVID T.

younger intestate decedent would have distributed her property had she prepared a will. As a result, surveys of younger individuals may yield distribution patterns that are more reflective of the modern family. However, phone interviews may only reflect the respondent's aspirational ideals at that moment, which are subject to change as the respondent grows older or as his or her family unit changes.¹⁵

Empirical studies of probate records have generally examined probated wills and death certificates from a particular locality. Among these studies, which have focused on both testate and intestate probate records, four issues are commonly researched: (1) the percentage of people dying intestate; (2) what factors make it more likely that someone will die intestate; (3) the demographics of those who die with a will; and (4) to whom decedents have chosen to leave their property.¹⁶ By examining probated wills, researchers are able to compile a record of testamentary beneficiaries based on the decedent's express intent. To be fair however, those dying with a will are generally older, wealthier, whiter,¹⁷ and held occupations with a higher status and annual income than those dying intestate, so this type of study may not be fully reflective of the probable intent of all individuals.¹⁸ However, the distributive preferences of respondents in phone surveys have shown few differences attributable to age, education, income, wealth, or occupation.¹⁹ Therefore, by studying probated wills, patterns of actual succession preferences can provide valuable clues to the hypothetical preferences of the intestate decedent that can assist lawmakers in modifying intestacy statutes to reflect probable intent where there is none expressed.

A. Empirical Studies to Date

The first empirical studies tended to review probate records, including death certificates and probated wills. The first important study, conducted in 1930 by Richard Powell and Charles Looker, analyzed probate records and inheritance tax records from multiple counties in New

SMITH, *THE FAMILY AND INHERITANCE* 62–82 (1970); Fellows, Simon & Rau, *supra* note 2, at 324–25 (“People who die with wills tend to be older . . .”).

¹⁵ See Gary, *supra* note 11, at 15.

¹⁶ *Id.* at 14.

¹⁷ See Dunham, *supra* note 3, at 250 (analyzing probate estates in Illinois initiated in 1953 and 1957 and finding that frequency of testacy increased correspondingly with the size of the decedent's estate; decedents with probate estates of less than \$5,000 had wills 25% of the time, whereas decedents with probate estates of more than \$100,000 had wills 96% of the time).

¹⁸ Fellows, Simon & Rau, *supra* note 2, at 324–25.

¹⁹ See, e.g., *id.* at 321 (“The distributive preferences of the respondents revealed few significant differences that could be attributed to age, education, income, wealth or occupational status.”).

York.²⁰ From 1937-1969, five other studies were performed where, in some, the analysis included both testate and intestate files.²¹

The 1970s was the genesis of several influential empirical studies that also brought the first phone surveys of living individuals.²² One of the most prolific scholars in the area of intestacy is Mary Louise Fellows, whose empirical studies have primarily focused on telephone interviews with individuals.²³ Her empirical study in 1978, along with other studies

²⁰ Richard R. Powell & Charles Looker, *Decedents' Estates*, 30 COLUM. L. REV. 919, 920-21 (1930).

²¹ Stuart Henderson Britt, *The Significance of the Last Will and Testament*, 8 J. OF SOC. PSYCHOL. 347 (1937) (studying 49 wills from New York between 1880 and 1885); Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1304 (1969) (examining 223 testate estates in Washtenaw County, Michigan from 1963 plus 100 English wills, also from 1963, selected at random); Dunham, *supra* note 3, at 241 (studying 170 probate proceedings initiated in Illinois in 1953 and 1957); Lawrence M. Friedman, *Patterns of Testation in the 19th Century: A Study of Essex County (New Jersey) Wills*, 8 AM. J. OF LEGAL HIST. 34, 34 (1964) (studying 150 New Jersey wills from 1850, 1875, and 1900); Ward & Beuscher, *supra* note 14, at 393 (reviewing death certificates from Dane County, Wisconsin, from the years 1929, 1934, 1939, 1941 and 1944, and a sample of 415 testate and intestate probate files from those years).

²² See, e.g., SUSSMAN, CATES, & SMITH, *supra* note 14, at 11-15 (performing three types of studies: (1) reviewing 659 probate cases, which represented a 5% random sample of all closed estates in Cuyahoga County, Ohio, between November 1964 and August 1965, (2) interviewing approximately 55% of the legal next of kin or testate successors of these decedents, and (3) interviewing 70 attorneys-of-record selected from the 659 probate cases in the dataset); Fellows, Simon & Rau, *supra* note 2, at 321, 326, 331, 335, 339-40 (performing 750 telephone interviews of individuals residing in five states—Alabama, California, Massachusetts, Ohio and Texas—to determine the respondent's distributive preferences, whether they had a will and if not, the reason why, their knowledge of their state's intestacy law, and their attitudes about property distribution at death); Mary Louise Fellows et al., *An Empirical Study of the Illinois Statutory Estate Plan*, 1976 U. ILL. L. F. 717, 720 (1976) (analyzing data obtained from 182 telephone interviews of Illinois residents); Glucksman, *supra* note 3, at 255, 261-62, 267, 278 (conducting three studies: (1) a review of death certificates and probate records of 100 Morris County, New Jersey residents dying in 1971, (2) a 1975 telephone survey of 50 Morris County residents to determine their knowledge of New Jersey intestacy law, and (3) a telephone survey of 50 Morris County residents as to their dispositive preferences, along with collecting the distribution patterns of 53 randomly drawn wills filed in Morris County Surrogate's Court); John R. Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction*, 50 WASH. L. REV. 277, 285 (1975) (examining death certificates, probate records and inheritance tax records for a random sample of 211 decedents dying in King County, Washington in 1969); Contemporary Studies Project, *supra* note 2, at 1052-53 (gathering data from three sources: (1) reviewing probate files from 150 testate estates and 150 intestate estates from six Iowa counties in 1973 and 1974, (2) interviewing 74 survivors who received some distribution of one of the 150 intestate estates, and (3) interviewing 600 randomly selected Iowa citizens).

²³ E.g., Fellows et al., *supra* note 22; Fellows, Simon & Rau, *supra* note 2 (explaining a telephone survey conducted providing insights in public attitudes concerning property distribution at death); Mary Louise Fellows et al., *Committed Partners and Inheritance:*

largely from the 1970s, heavily influenced the 1990 revisions of the Uniform Probate Code's intestacy distribution scheme, particularly by increasing the share allocated to a surviving spouse.²⁴

From 1980-1998 only four empirical studies were published in the United States.²⁵ One of these studies was the first of its kind—interviewing unmarried couples, including same-sex couples, as to their dispositive preferences.²⁶ The primary purpose of this study was to determine whether a decedent's surviving committed partner should take a share of the estate under intestacy, as well as how to define a committed partner for these purposes.²⁷

An Empirical Study, 16 LAW & INEQ. 1 (1998) [hereinafter *Committed Partners and Inheritance*] (describing “an empirical study designed to assess public attitudes about the inclusion of surviving committed partners as heirs”); Mary Louise Fellows, E. Gary Spitko, & Charles Q. Strohm, *An Empirical Assessment of the Potential for Will Substitutes to Improve State Intestacy Statutes*, 85 IN. L. J. 409 (2010) (investigating public attitudes about will substitutes and determine if the public prefers current law).

²⁴ See UNIF. PROBATE CODE § 2-102 cmt. (UNIF. LAW COMM'N 2010) (“Empirical studies support the increase in the surviving spouse's intestate share, reflected in the revisions of this section. The studies have shown that testators in smaller estates . . . tend to devise their *entire* estates to their surviving spouses, even when the couple has children.”); Lawrence W. Waggoner & J.H. Langbein, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871, 874 (1992) (stating that the share of the surviving spouse in the 1990 revision of the UPC was greatly increased due to the changes in family and gender relations and the prevalence of multiple marriages); Waggoner, *supra* note 11, at 230-31 n.25 (citing the following empirical studies as being influential in the 1990 revisions of the UPC's spousal shares in intestacy: CAROLE SHAMMAS, MARYLYNN SALMON & MICHAEL DAHLIN, *INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT* 184–85 (1987); SUSSMAN, CATES, & SMITH, *supra* note 14, at 86, 89–90, 143–45; Browder, *supra* note 21, at 1307–08; Dunham, *supra* note 3, at 252; William W. Gibson, Jr., *Inheritance of Community Property in Texas—A Need for Reform*, 47 TEX. L. REV. 359, 364–66 (1969); Price, *supra* note 22, at 283, 311–17; Fellows, Simon & Rau, *supra* note 2, at 351–54, 358–64, 366–68; Contemporary Studies Project, *supra* note 2, at 1089; U.K. LAW COMM'N, *Report on Family Law: Distribution on Intestacy*, 1989, No. 187, at 28). Of note, Lawrence Waggoner served as Reporter for the 1990 and 2008 revisions of the Uniform Probate Code. Lawrence W. Waggoner, *Why I Do Law Reform*, 45 U. MICH. J.L. REFORM 727, 727 (2012).

²⁵ SHAMMAS, SALMON & DAHLIN, *supra* note 24, at 184–85 (comprehensive treatment of the history of U.S. inheritance law); Gerry W. Beyer, *Statutory Fill-in Will Forms—The First Decade: Theoretical Constructs and Empirical Findings*, 72 OR. L. REV. 769, 797 (1993) (interviewing 51 persons regarding their opinions of statutory wills and whether they currently had a will); *Committed Partners and Inheritance*, *supra* note 23, at 31–32 (conducting a 1996 telephone survey of 256 Minnesota residents, administered to four different groups, assessing their attitudes about the inheritance rights of couples who are not married, but living together); Frederick R. Schneider, *A Kentucky Study of Will Provisions: Implications for Intestate Succession Law*, 13 N. KY. L. REV. 409, 412 (1987) (reviewing 449 wills from nine different counties in Kentucky filed in 1981 and 1982).

²⁶ *Committed Partners and Inheritance*, *supra* note 23, at 31–32.

²⁷ *Id.* at 9.

Since 1998, only two empirical studies have been published. One is a phone survey by Mary Louise Fellows and Gary Spitko, conducted in 2006 and 2007, interviewing individuals regarding their attitudes towards will substitutes, which in turn is useful in evaluating whether beneficiary designations of such substitutes may approximate donative intent in intestacy.²⁸ Lastly, the most recently published study is by David Horton, which analyzed 668 probate estates, both testate and intestate, of individuals who died in 2007 in Alameda County, California.²⁹

B. Key Findings of Recent Empirical Studies

It is useful to analyze the results of prior studies, and build on this empirical evidence with the results from the current study, so that intestacy laws can be revised in a way that more accurately reflects probable intent. As noted earlier, the findings from several empirical studies discussed above were utilized to revise the intestacy provisions in Article II of the Uniform Probate Code (UPC) in 1990.³⁰ Accordingly, only the key findings from the most recent studies, those published from 1987 through the present, are summarized.

The first study, conducted by Frederick Schneider, reviewed 449 wills from nine different counties in Kentucky filed in 1981 and 1982.³¹ The study found that 4 out of 5 testators (80%) gave all of the estate to their surviving spouse.³² Of the 241 who were survived by a spouse, 144 decedents (60%) provided that if his or her spouse was predeceased, all or substantially all of the estate would pass to the children equally.³³ Where the testator was widowed and did not include a provision for a spouse, but had surviving children, 53 out of 101 testators gave all or substantially all of their property to their children equally and 21 out of 101 testators gave their estate to their children, but in unequal shares.³⁴ Only one testator among 449 provided for a parent, leaving the entire estate to the mother.³⁵ In this case, the testator died survived by both parents, but had no spouse or children.³⁶ Of the 43 testators who died

²⁸ Fellows, Spitko, & Strohm, *supra* note 23, at 412, 421–22 (using phone interviews to test whether beneficiary designations in will substitutes are reliable evidence, in the absence of a will, to approximate donative intent in intestacy).

²⁹ David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L. J. 605, 611, 627 (2015).

³⁰ See *supra* note 24 and accompanying text; UNIF. PROBATE CODE § 2-102 cmt. (UNIF. LAW COMM'N 2010).

³¹ Schneider, *supra* note 25, at 412.

³² *Id.* at 437.

³³ *Id.* at 424.

³⁴ *Id.* at 425.

³⁵ *Id.* at 430–31.

³⁶ *Id.* at 430.

survived by siblings, but no surviving spouse, children or parents, 37% gave their property to their siblings in equal shares and 65% gave their property to other named persons, with little or nothing to siblings.³⁷ While this study revealed other statistical findings,³⁸ the primary conclusion was that the Kentucky intestacy statute should be amended to increase the surviving spouse's share.³⁹

In 1993, Professor Beyer set out to critique the legal and non-legal ramifications of statutory fill-in-the-blank wills, available at that time in California, Maine, Michigan and Wisconsin.⁴⁰ This type of will was designed to increase the number of individuals executing a will.⁴¹ As part of his analysis, Beyer conducted two studies.⁴² He first tested the ability of individuals to satisfactorily complete the fill-in-the-blank wills, thereafter interviewing them to determine their reactions to the form.⁴³ Secondly, he interviewed practicing estate planners and probate judges as to their opinions of these statutory form wills.⁴⁴ Based on the theories underlying form wills and his empirical findings, Beyer made three recommendations.⁴⁵ First, these statutory wills should be improved, evaluated, and expanded to include a comprehensive set of forms, like trusts, powers of attorney, declarations of guardians, burial instructions, and living wills.⁴⁶ Second, modern technology should be used to improve the delivery method of fill-in-the-blank wills to reduce the likelihood that they are filled out improperly or misunderstood.⁴⁷ Third, states should increase education to its citizens regarding basic estate planning and the use of form wills.⁴⁸

In a novel study published in 1998, Professor Mary Louise Fellows and other scholars set out to assess public attitudes towards the inheri-

³⁷ *Id.* at 432.

³⁸ In ten cases where the decedent was survived only by nieces or nephews, only two gave their property to the nieces and nephews in equal shares, whereas eight gave all or substantially all of their property to other named persons. *Id.* at 433-34. No cases were found where the decedent was survived by grandparents, aunts, or uncles, and only two decedents were survived by first cousins, who were not given any of the estate; instead, all passed to named persons. *Id.* at 434. Lastly, no decedent gave his or her estate to "laughing heirs." *Id.* at 435. Although six decedents died not survived by a spouse, children, parent, siblings, nieces, nephews, grandparents, aunts, uncles, or first cousins, these decedents gave their estate to named persons or charity. *Id.* at 435.

³⁹ *Id.* at 437.

⁴⁰ Beyer, *supra* note 25, at 772-73.

⁴¹ *Id.* at 772, 841.

⁴² *Id.* at 773.

⁴³ *Id.* at 773, 799.

⁴⁴ *Id.* at 773.

⁴⁵ *Id.* at 835-41.

⁴⁶ *Id.* at 836-38.

⁴⁷ *Id.* at 838-40.

⁴⁸ *Id.* at 840-41.

tance rights of couples who are not married, but are living together.⁴⁹ Four different groups of Minnesota residents were surveyed by telephone: 87 were persons from the general public (i.e. married or single persons who were not in nonmarital intimate relationships), 33 were persons with opposite-sex committed partners, 51 were men with same-sex committed partners and 85 were women with same-sex committed partners.⁵⁰ Significantly, this study collected the first empirical data regarding the distribution preferences of a decedent with surviving children who were unrelated to the decedent by blood or adoption, such as stepchildren and children of same-sex couples.⁵¹ The four major findings of this study were: (i) a substantial majority of the respondents in each sample group consistently preferred that the partner take a share of the decedent's estate; furthermore, the respondents with same-sex partners were consistently more generous to partners than those from the general public or with opposite-sex partners; (ii) the respondents in each sample group consistently preferred that same-sex and opposite-sex couples be treated the same under inheritance laws; (iii) for purposes of inheritance laws, committed relationships can be identified through readily observable attributes that demonstrate a preference for having a partner share in a decedent's estate; and (iv) respondents consistently recognized the social ties between the decedent and the partner's child.⁵²

In yet another study by Professors Mary Louise Fellows, E. Gary Spitko and Charles Q. Strohm, published in 2010, it was tested whether beneficiary designations in will substitutes provide reliable evidence to approximate donative intent in the absence of a will.⁵³ To that end, 190 randomly selected individuals from 48 states were surveyed by phone.⁵⁴ The goal was to investigate public attitudes about will substitutes, whether the public prefers current intestacy law (which ignores will substitutes in determining succession) or an intestacy law that takes into account the beneficiary designations of will substitutes.⁵⁵ The results of the study suggested that beneficiary designations in will substitutes should not be used as evidence for the supposition that the decedent prefers the will substitute beneficiary over other heirs.⁵⁶ However, the results provided some support for the idea that will substitute benefi-

⁴⁹ *Committed Partners and Inheritance*, *supra* note 23, at 9, 31.

⁵⁰ *Id.* at 31–32.

⁵¹ *See id.* at 72–84.

⁵² *Id.* at 89. For a summary of the results of this empirical study, see Table 14 in the Appendix, *id.* at 94–95.

⁵³ Fellows, Spitko, & Strohm, *supra* note 23, at 412.

⁵⁴ *Id.* at 421–22.

⁵⁵ *Id.* at 412.

⁵⁶ *Id.* at 446.

ary designations in favor of nonheirs should be used to create new heirs, particularly where the takers under the intestacy statute are more distantly related to the decedent.⁵⁷ It was concluded that, as a general rule, will substitutes should only affect the intestacy distribution scheme for those decedents dying without a surviving spouse or descendants, since these are the individuals whose likely donative intent is most unknown.⁵⁸

In 2015, David Horton published a study that analyzed 668 probate estates, both testate and intestate, of individuals who died in 2007 in Alameda County, California.⁵⁹ The purpose of his study was to analyze the contemporary probate process in light of the “nonprobate revolution,” i.e., using trusts and other techniques to avoid probate.⁶⁰ His conclusions about the probate process were that probate court oversight adds more value and costs less than one might assume, that eliminating traditional probate functions can cause serious harm to creditors, and that the probate process itself is slow.⁶¹ Horton recommended reforming the probate process by scaling back judicial involvement and adding the options of informal probate and unsupervised administration, but cautioning that a majority of estates would need court involvement at some point.⁶² Lastly, the bond requirement for personal representatives could be eliminated and, by privatizing appraisals when valuing a decedent’s assets, the valuation process could take less time and be less costly.⁶³

All of these studies have made important contributions to our understanding of how the probate process works and support recent statutory changes to benefit spouses or domestic partners. The partnership theory of marriage, which holds that couples work together to amass wealth and intend to jointly benefit from that wealth, supports the current practice of giving the surviving spouse most if not all of a decedent spouse’s wealth. Compared to the stingy historical dower share of a life estate in one-third of a decedent’s real property that prevailed until the mid-twentieth century, the new partnership model of shared wealth is definite progress. But intestacy changes to benefit spouses occurred simultaneously with the explosion in no-fault divorce in the 1970s and merely brought the law of succession up to the 1950s, rather than the

⁵⁷ *Id.* at 446–47.

⁵⁸ *Id.* at 447.

⁵⁹ Horton, *supra* note 29, at 611, 627.

⁶⁰ *Id.* at 613, 620–24.

⁶¹ *Id.* at 664.

⁶² *Id.* at 662–63. Of the 668 probate cases analyzed, 31% did not include a contingent event, such as litigation or real property sales, which would require the parties to seek judicial assistance. *Id.* at 663.

⁶³ *Id.* at 663–64.

twenty-first century. Today, some statistics show the divorce rate is over 50%⁶⁴ and many people will pass through their life with multiple spouses or partners. Ironically, the rise of the QTIP trust as the mainstay of estate planners for decedents with independent wealth in blended families reflects a move back to the support theory of marriage, especially for the second wife, in order to protect property for the children by the first wife. This occurred just as intestacy law began entrenching the marital model of the monogamous, heterosexual, traditional, nuclear family that is best protected by the partnership theory.

What we teach in our estates and trusts classes is that blended families need a trust to protect the children from the first marriage and provide adequately for the second spouse, but ultimately to give the decedent spouse final control over most of the property. QTIP trusts, powers to consume, and a variety of elective share trusts are all being used to diminish the surviving spouse's power and control over any property beyond what is needed for support and maintenance. Thus, while working and middle class couples are more likely to have succession plans (either intentional or by default) that reflect the partnership theory of marriage,⁶⁵ the wealthy are turning to modern mechanisms that, ironically, recreate the old common law form of dower based on the support model of marriage.⁶⁶ This is especially true in blended families where the parents worry that the generous intestacy laws giving all to a surviving spouse could result in complete disinheritance of the first-to-die's children.⁶⁷

The empirical studies to date have not focused on how blended families, second marriages, and the presence of step-children may alter preferred succession schemes, leaving a significant disconnect between the default rules and the estate planning advice we are teaching the next generation of trusts and estates practitioners. But trying to discover what people would want in their estate plans, just as more and more of

⁶⁴ However, there are many ways to measure divorce rates. See, e.g., Glenn Stanton, *What is the Actual US Divorce Rate and Risk?*, THE WITHERSPOON INSTITUTE: PUBLIC DISCOURSE, <http://www.thepublicdiscourse.com/2015/12/15983/> (Dec. 16, 2015) (last visited May 23, 2017).

⁶⁵ See DiRusso, *supra* note 2, at 50-51; see also Waggoner, *supra* note 11, at 230-32 (discussing how amendments to the uniform probate code are consistent with the modern trend to favor spousal inheritance).

⁶⁶ See Robert Frank, *How the Rich are Paying less in Estate Taxes*, CNBC, Sept. 23, 2016, <http://www.cnbc.com/2016/09/23/how-the-rich-are-paying-less-in-estate-taxes.html> ("Another reason the estate tax is quietly dying is that the rich have become better at avoiding it."); see also, e.g., Joseph M. Dodge, *A Feminist Perspective on the QTIP Trust and the Unlimited Marital Deduction*, 76 N.C. L. REV. 1729, 1734-37 (1998).

⁶⁷ See Horton, *supra* note 29, at 624; Waggoner, *supra* note 11, at 230-31.

those who can get what they want are using private non-probate mechanisms, is a very tricky endeavor.

II. CURRENT EMPIRICAL STUDY

We now turn to the current empirical study, the focus of this article. The probate cases reviewed in our study are from two counties in Florida and were obtained by pulling all wills that were recorded in the county's official public records from January 1, 2013 to December 31, 2013. Among other types of data gathered, we analyzed to whom a testator gave his property and the relationship status of that beneficiary to the decedent. To the best of our knowledge, we attempted to gather information on multiple marriages, the presence of stepchildren or adopted children in the family, and the extent to which testators left their property in ways that deviated from intestate norms. We also gathered information on whether testators were routinely using wills that poured over their probate property into a revocable trust, the holy grail of estate planners. To account for changing demographics, we noted the time between execution of the will and death to see if more recent wills reflected different patterns than older wills executed many years prior to death. We chose the year 2013 because that was recent enough to capture more blended and nontraditional family structures, yet was far enough in the past to ensure that the probate process was mostly completed.

Some of the data we are collecting has not yet been analyzed, or carefully calibrated to reflect changing norms with more modern family relationship patterns. At this point our dataset is still too small, despite our having examined nearly 500 wills, to see if there are notable differences between wills executed in the year of death, as against those executed many years before death, for instance. But as we collect more data, we hope to be able to further refine our results to provide better guidance to lawmakers and estate planners.

A. Demographics of Dataset

One of our strategies was to obtain a broad pool of wills from decedents residing in areas of Florida that vary culturally, demographically and economically. Accordingly, the study was performed in Alachua and Escambia counties. We plan to add Palm Beach County in the future, as well as counties in other parts of the country.

Alachua County, located in the north central region of Florida, is the home of the University of Florida in the college town of Gainesville. Much of the economy in the county revolves around the University of Florida; indeed, the university employs over 14,000 people and is the

largest employer in the county.⁶⁸ More than 40% of Alachua County residents have a bachelor's degree or higher level of education.⁶⁹ As of the 2010 U.S. Census, the total population was 247,336, with a racial composition of 63.7% White (not Hispanic or Latino), 20.3% Black or African American, 8.4% Hispanic or Latino, 5.4% Asian, 0.3% American Indian or Alaska Native, and 0.1% Native Hawaiian or Pacific Islander, with 2.6% listed as two or more races.⁷⁰ The median household income from 2011-2015 was \$43,073.⁷¹ Of registered voters in Alachua County, 48% are registered Democrat, 28% are registered Republican, and 24% are registered Independent or with no affiliation.⁷²

Neighboring the state of Alabama is Escambia County, the westernmost county in the Florida Panhandle, boasting sugar-white sand beaches and one of the largest military training operations in the Navy.⁷³ The Naval Air Station in Pensacola employs over 23,000 people and its impact on the local economy is over one billion dollars annually.⁷⁴ In 2010, the total population of Escambia County was 297,619, with a racial makeup of 66.2% White (not Hispanic or Latino), 22.9% Black or African American, 4.7% Hispanic or Latino, 2.7% Asian, 0.9% American Indian or Alaska Native, and 0.1% Native Hawaiian or Pacific Islander, with 3.2% listed as two or more races.⁷⁵ The median household income from 2011-2015 was \$45,390.⁷⁶ Of registered voters in Escambia County, 35% are registered Democrat, 45% are registered Republican, and 20% are registered Independent or with no affiliation.⁷⁷

⁶⁸ Alachua Cty., Fla., *Alachua County's Economic, Demographic & Fiscal Trends* 25 (Dec. 3, 2013), <http://www.alachuacounty.us/Businesses/InformationCenter/Graphs/Economic.Demographic.Fiscal.Trends> Dec 3.pdf.

⁶⁹ *Quick Facts: Alachua County, Florida*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/EDU635215/12001,00> (last visited May 24, 2017).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Fla. Div. of Elections, *Voter Registration - Current by County*, FLA. DEP'T OF STATE, <http://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-monthly-reports/voter-registration-current-by-county/> (last updated Dec. 31, 2016) (last visited May 23, 2017).

⁷³ *Florida Beach Vacation*, VISIT PENSACOLA, <https://www.visitpensacola.com/things-to-do/beaches/> (last visited May 24, 2017); *Naval Air Station Pensacola: History*, COMMANDER, NAVY INSTALLATIONS COMMAND, https://www.cnic.navy.mil/regions/cnrse/installations/nas_pensacola/about/history.html (last visited May 24, 2017).

⁷⁴ *Naval Air Station Pensacola*, *supra* note 73.

⁷⁵ *Quick Facts: Escambia County, Florida*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/12033,00> (last accessed May 24, 2016).

⁷⁶ *Id.*

⁷⁷ Fla. Div. of Elections, *Voter Registration - Current by County*, FLA. DEP'T OF STATE, <http://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/>

Although Florida may not be entirely representative of the country as a whole, it is remarkably diverse, is the third most populous state, and is home to a significant retired and transient population. Yet despite Florida's reputation as a state full of snow-birds and retirees, there were remarkably few wills executed in states outside of Florida. Of course, the less time that elapsed between will execution and death, the more likely the will was executed in Florida with a presumed understanding of the operation of Florida probate law, particularly Florida's generous homestead and elective share rules.⁷⁸

B. Method of Empirical Study

Once a will has been admitted to probate in Florida, it is usually recorded in the official public records of the county where the decedent was domiciled. Thus, the first step in the study was to gather a dataset of all decedents whose wills or codicils were recorded in the official public records from January 1, 2013 to December 31, 2013 in each of the two Florida counties: Alachua and Escambia. After compiling the list of testate decedents, duplicates were removed from the dataset (e.g., decedents with multiple last names because of a name change were sometimes listed in the dataset twice). Once the dataset was complete, the probate records totaled 293 in Alachua County and 378 in Escambia County. Because only a statistically significant sample is required to provide sufficient evidence of distributive patterns among decedents, and due to the time required to review each probate record, our empirical study compiles data from a total of 493 probate records: 293 from Alachua County and 200 from Escambia County. A random, blind selection of 200 probate records was used to gather records from Escambia County.

voter-registration-monthly-reports/voter-registration-current-by-county/ (last updated Dec. 31, 2016) (last visited May 23, 2017).

⁷⁸ See FLA. CONST. art. X, § 4; FLA. STAT. § 732.401 (2017). Under Florida law, a surviving spouse is entitled to a life estate in the real property used as a homestead by the decedent, with a vested remainder interest belonging to the decedent's descendants. If a surviving spouse is left a life estate, he or she has six months from the decedent's date of death to make an election to take a one-half interest in the homestead property as a tenant in common. See also FLA. STAT. § 732.2065 (a surviving spouse has a right to an elective share of the decedent's estate equal to 30% of the elective estate); FLA. STAT. § 732.2035 (the elective estate to which the surviving spouse is entitled to 30% is comprised of probate estate assets and other nonprobate assets, such as transfer on death or pay on death accounts, interest in property held by the decedent with another in joint tenancy or tenancy by the entirety, certain revocable transfers, pension funds, retirement funds, deferred compensation plans, the net cash surrender value of a life insurance policy immediately before the decedent's death, and property transferred during the one year preceding the decedent's death).

The second more tedious step was to go to the website of the Clerk of Court for each county and pull the probate case of each decedent in the dataset. At least three documents were reviewed in every probate case: (1) Petition for Administration,⁷⁹ (2) Death Certificate, and the (3) Last Will and Testament, plus any codicils.

We gathered the following data from the documents: date of death, gender, race, marital status, date the will was executed, number of decedent's children, size of the probate estate, court costs, the relationship status of the primary and contingent personal representatives to the decedent, testamentary dispositions, whether a trust existed, and the relationship status of the trustee to the decedent. As to the testamentary dispositions of the decedent, they were separated into two categories, specific dispositions and residuary dispositions. Each category was coded as one of the following: (1) all to spouse, but if predeceased, then to children; (2) some to spouse and some to children; (3) all to children; (4) split between children and others; (5) all to others; and (6) pour over to trust. When it was apparent that the spouse was from a second or subsequent marriage of the decedent, this was noted. Also documented were any dispositions that were given to stepchildren or foster children, if so designated in the will or Petition for Administration. Harder to decipher were dispositions to committed partners of single or divorced decedents, whether same-sex or opposite-sex, as the relationship status of the beneficiary was generally termed as "friend," with a few exceptions where the decedent named a distinct relationship of the beneficiary in his or her will. Speculation could be made that in some instances, a "friend" was actually a committed partner of the decedent. But, in the absence of a specific designation by the decedent, no presumptions were made in the results of this study.

C. Results

The cumulative and county-specific results of the empirical study are documented in Tables 1 through 7 below. Briefly, the cumulative results are summarized according to topic, beginning with the

⁷⁹ The Petition for Administration was especially helpful to determine the relationship status of beneficiaries named in the will. This petition is the document that initiates a probate proceeding, usually filed by the personal representative or executor of the decedent's estate. The Petition for Administration lists basic information about the decedent and summarizes the probate estate to be administered, including the following: the beneficiaries of the probate estate (based on the will), the relationship status of the beneficiaries to the decedent (spouse, daughter, friend, charity, etc.), the percentage of the estate bequeathed to each beneficiary (or the particular bequeathed asset), the size of the probate estate (e.g., less than \$50,000), the decedent's real property in Florida subject to probate, and the name of the personal representative as nominated by the decedent in his or her will.

demographics of the 493 decedents who are the focus of this study, and then by testamentary disposition and family relationship, with a particular focus on nontraditional family relationships. All of the decedents in this study executed wills that were admitted to probate and recorded in the official public records of the county where they were domiciled.

i. *Demographics*

More women than men had their estates probated (43% male and 57% female) and 60% of the wills were executed five or more years prior to death. As to race, 91% of the decedents were White, 5.8% Black, 1% Hispanic, 0% Asian and 1.6% Other. At the time of their death, 83% were 70 years or older, 10% were in their 60s, 5% were in their 50s, and 1.6% were 49 years or younger.

Most of the decedents were widowed on the date of their death (57%). But, 21% were married, 15% were divorced, and 5% had never been married. Most of the decedents had surviving children, 84%, while 15% did not have any children.

The size of most of these probate estates was relatively small, with nearly 60% being under \$100,000. Another 21% had estates between \$100,000 and \$500,000, and only 4.6% had estates over \$500,000. A large percentage, 14%, was of unknown size. The wealth of these decedents is particularly unreliable for numerous reasons. First, the inventories of these estates are not public records and so the actual total wealth of these decedents was unattainable. The Petitions for Administration, however, ask for the size of the estate and some people put what appeared to be the actual total size of the decedent's estate. Others only listed the probate property that was being probated, leaving out personal property or nonprobate property. In other cases, the only important property being probated was the homestead, which is protected under Florida law up to any value.⁸⁰ Thus, many personal representatives simply listed "homestead" as the property and only sometimes its value to be probated. Florida also allows for summary administration of estates that are valued at under \$75,000.⁸¹ Consequently, many petitions simply stated that the personal property of the decedent was a value under \$75,000 and then listed homestead as additional property. Because Florida homestead is treated separately from the rest of the estate, the value of the homestead often was not listed in the Petitions. Nonetheless, we were able to obtain approximate indications of wealth for many decedents, less any nonprobate property that passed via a will substitute.

⁸⁰ FLA. CONST. art. X, § 4.

⁸¹ FLA. STAT. § 735.201.

TABLE 1. CUMULATIVE RESULTS OF DECEDENT DEMOGRAPHICS

	Alachua Co. 293 Decedents		Escambia Co. 200 Decedents		Cumulative Average of Both Counties 493 Decedents	
Gender of Decedent	Male	43% (127)	Male	44% (88)	Male	43% (215)
	Female	57% (166)	Female	56% (112)	Female	57% (288)
Race of Decedent	White	92% (269)	White	91% (181)	White	91% (450)
	Black	4% (13)	Black	8% (16)	Black	5.8% (29)
	Hispanic	2% (5)	Hispanic	0% (0)	Hispanic	1% (5)
	Asian	0% (1)	Asian	0% (0)	Asian	0% (1)
	Other	2% (5)	Other	2% (3)	Other	1.6% (8)
Age at Death	90+	28% (82)	90+	23% (46)	90+	26% (128)
	80-89	35% (102)	80-89	38% (75)	80-89	36% (177)
	70-79	19% (57)	70-79	24% (47)	70-79	21% (104)
	60-69	10% (30)	60-69	10% (20)	60-69	10% (50)
	50-59	6% (18)	50-59	4% (7)	50-59	5% (25)
	40-49	1% (3)	40-49	2% (3)	40-49	1% (6)
	30-39	0% (1)	30-39	1% (2)	30-39	.6% (3)
	18-29	0% (0)	18-29	0% (0)	18-29	0% (0)
Length of Time Between Will Execution and Death	< 6 wks	6% (16)	< 6 wks	4% (8)	< 6 wks	5% (24)
	6 wks–3 mos	3% (8)	6 wks–3 mos	1% (2)	6 wks–3 mos	2% (10)
	3–12 mos	9% (25)	3–12 mos	8% (16)	3–12 mos	8% (41)
	1–2 yrs	7% (21)	1–2 yrs	10% (19)	1–2 yrs	8% (40)
	2–5 yrs	16% (47)	2–5 yrs	15% (29)	2–5 yrs	15% (76)
	5–10 yrs	22% (63)	5–10 yrs	25% (50)	5–10 yrs	23% (113)
	> 10 yrs	37% (107)	> 10 yrs	38% (75)	> 10 yrs	37% (182)
Marital Status of Decedent	Married	21% (61)	Married	22% (44)	Married	21% (105)
	Divorced	13% (38)	Divorced	19% (38)	Divorced	15% (76)
	Widowed	59% (173)	Widowed	55% (110)	Widowed	57% (283)
	Never Married	7% (19)	Never Married	4% (7)	Never Married	5% (26)
	Unknown	0% (1)	Unknown	1% (1)	Unknown	0% (1)
Decedents with Children	Yes	85% (250)	Yes	82% (164)	Yes	84% (414)
	No	14% (40)	No	18% (36)	No	15% (76)
	Unknown	1% (3)	Unknown	0% (000)	Unknown	1% (3)
Size of Estate (generally excludes homestead)	<\$50,000	37% (109)	<\$50,000	30% (60)	<\$50,000	34% (169)
	50-100K	23% (68)	50-100K	29% (58)	50-100K	26% (126)
	100-500K	23% (68)	100-500K	18% (36)	100-500K	21% (104)
	500K-1M	4% (12)	500K-1M	1% (2)	500K-1M	2.8% (14)
	>1M	2% (7)	>1M	1% (2)	>1M	1.8% (9)
	Unknown	9% (27)	Unknown	21% (42)	Unknown	14% (69)

Florida has a somewhat unique homestead law. Enshrined in the constitution of the state, it provides that the primary residence is protected from creditors up to any value.⁸² Most importantly for our purposes, it also limits testamentary disposition of the homestead if a homeowner decedent left a spouse or minor children.⁸³ The homestead can be devised freely if a decedent leaves only adult children. But, if

⁸² FLA. CONST. art. X, § 4(a).

⁸³ *Id.* § 4(c); FLA. STAT. § 732.401(1) (2017).

there are minor children, the homestead cannot be devised at all, and must pass to the children and surviving spouse, if any, by intestacy. If there is only a surviving spouse and no minor children, which was the more common situation, the testator could devise the homestead to the surviving spouse entirely. But, if it was not devised outright to the spouse, then the spouse was entitled to a minimum of a life estate or, at the spouse's election, a one-half interest in the homestead property.⁸⁴ Because of the testamentary limitations on devising homestead property, many of the probated estates involved primarily a declaration of homestead or excluded the value of the homestead from the value of the estate because homestead passes independently from the rest of the decedent's estate in many cases.

Real estate organizations put the median home values in Alachua County for the past few years in the neighborhood of \$150,000 and in Escambia between \$125,000 and \$135,000.⁸⁵ With the exclusion of the value of most homesteads from the estate inventories and calculations, most of the estate values in the database are low. These also, of course, do not reflect the value of wealth passing through will substitutes, such as joint accounts, beneficiary designations, or revocable trusts, and therefore underestimate the value of these estates significantly. The one reliable piece of information was the indication required on the Petition for Administration as to whether federal estate taxes would be due on the estate, for which only two estates qualified.

ii. *Testamentary Dispositions*⁸⁶

The testamentary dispositions in the decedents' wills were separated into different categories: specific bequests and residuary dispositions, and then further broken down if the estate involved stepchildren or dispositions to second or third spouses. The single most common dis-

⁸⁴ FLA. CONST. art. X, § 4(c); FLA. STAT. § 732.401(2).

⁸⁵ See *Alachua County Home Prices & Values*, ZILLOW, <http://www.zillow.com/alachua-county-fl/home-values/> (last visited May 24, 2017); *Escambia County Home Prices & Values*, ZILLOW, <http://www.zillow.com/escambia-county-fl/home-values/> (last visited May 24, 2017). See also *Pensacola Home Prices & Values*, ZILLOW, <http://www.zillow.com/pensacola-fl/home-values/> (last visited May 24, 2017).

⁸⁶ Testamentary dispositions are difficult to code precisely. In some wills, a decedent left some or all property to an individual, and then the residue or lapsed bequests into trust. Other wills directed all of the property into trust, but if the trust failed the residue to the children outright. Whether to code these as bequests into a trust or not took some judgment and discretion. Discretion was also used in coding bequests that did not use trusts, and it wasn't clear if a specific bequest to an individual was of a small memento, or was actually a significant percentage of the estate. For this reason we tried to be as precise as possible in coding bequests involving married individuals and those decedents with step-children, but we recognize that some small range of error is inevitable.

position was to leave everything to the children equally (or nearly equally), which was the disposition in 35% of cases. The next most common disposition was to leave everything to a surviving spouse, but if the spouse predeceased then everything was to pass equally to the children, which was the disposition 29% of the time. In many of these latter cases, the spouse had indeed predeceased and thus everything passed to the children after all. But in a large number of the wills where the disposition was to leave everything to the children, it appeared that the surviving spouse had made a new will after the death of a spouse. It is likely that many of these decedents originally had wills that left everything to a spouse as a primary beneficiary, and then to the children as alternate beneficiaries, but they changed the will upon the death of the spouse. Many others who had such wills did not execute new ones after the death of the first spouse, so their property did not actually pass to their spouse; instead it went to the children.

For the vast majority of wills with these two dispositions, the wills very closely approximate the results that would have occurred under intestacy. In many states, including Florida, if the children are the children of both spouses, the surviving spouse takes the entire intestate estate, but if there are children of a different spouse than the surviving spouse, the latter takes only half the estate or a portion of the estate and the children or their issue take the remainder.⁸⁷ Although many wills fell in line with the intestacy outcome for the single marriage family, almost none expressly fell in line with the intestacy outcome for the decedent with children by a prior marriage and a surviving spouse. We explore the details of that below.

The rest of the decedents mostly left their property either entirely to others (not a child or a spouse) in most cases because they didn't have a surviving spouse or children, or they poured their property into a trust which we could not examine to determine the eventual disposition of the decedent's property.

⁸⁷ FLA. STAT. § 732.102(2)-(3).

TABLE 2. CUMULATIVE RESULTS OF TESTAMENTARY DISPOSITIONS

	Alachua Co. 293 Decedents	Escambia Co. 200 Decedents	Cumulative Average of Both Counties 493 Decedents
Testamentary Dispositions	All to spouse, if predeceased, then children 25% (73)	All to spouse, if predeceased, then children 29% (57)	All to spouse, if predeceased, then children 26% (130)
	Some to spouse & some to children 1.7% (5)	Some to spouse & some to children 1% (1)	Some to spouse & some to children 1% (6)
	All to children 30% (89)	All to children 24% (70)	All to children 32% (159)
	All to children & others 1% (3)	All to children & others 5% (10)	All to children & others 2.6% (13)
	All to others 15% (45)	All to others 11% (31)	All to others 15% (76)
	All to trust (unknown beneficiaries) 27% (79)	All to trust (unknown beneficiaries) 15% (30)	All to trust (unknown beneficiaries) 22% (109)

iii. *Second and Third Marriages*

Although it was not always possible to identify if the decedent was in a second or a subsequent marriage, there were certain wills that clearly indicated that a surviving spouse was not the parent of the children, or that a decedent was providing for a previously divorced spouse or a second spouse. This was easy if the Petition or the will stated as such. It could also be gleaned from the wills of certain female decedents whose male children had a different last name. We tried to confirm this through a study of the Petitions for Administration that listed the beneficiaries and their relationships to the decedent. Where it was unclear, we erred on the side of assuming a surviving spouse was the first spouse. Despite that, there were some striking differences in the wills between those in a first marriage and those in a second or subsequent marriage.

In Alachua County, 60 of the decedents were married and at least 23 appeared to be in a second or subsequent marriage. Twenty of all married decedents (33%) left their property in trust, which is marginally higher than the entire population of decedents which was only 30%, but lower than the decedents in second marriages who left their property in trust in 39% of the cases. In Escambia County, 44 of the decedents were married and 11 poured their property into a trust (25%), which is noticeably higher than the entire population of decedents using a trust, which was only 15%. But this was the same percentage as those in second marriages, in which 3 decedents out of 12 used a trust. So being married was likely to lead to the use of a trust in between one-quarter and one-third of decedents' estates. The likelihood of using a trust in a second or third marriage went up in Alachua County but stayed the same in Escambia County, although the numbers are sufficiently small

that it would be difficult to speak of a trend or pattern. This is precisely the kind of statistic we should try to tease out better through further research because the trust, and of course the ability to tailor the specific trust terms, are at the heart of most estate planning involving couples in second or third marriages.

TABLE 3. DISPOSITIONS TO ALL SPOUSES SURVIVING THE DECEDENT

	Alachua Co. 61 Decedents		Escambia Co. 44 Decedents		Cumulative Average of Both Counties 105 Decedents	
	Dispositions to All Spouses Surviving the Decedent	All to spouse, if predeceased, then children	52% (32)	All to spouse, if predeceased, then children	67% (29)	All to spouse, if predeceased, then children
Some to spouse & some to children/others		7% (4)	Some to spouse & some to children/others	4.5% (2)	Some to spouse & some to children/others	6% (6)
Life estate only to spouse		(0)	Life estate only to spouse	2% (1)	Life estate only to spouse	1% (1)
Nothing to spouse		5% (3)	Nothing to spouse	2% (1)	Nothing to spouse	4% (4)
All to trust (unknown beneficiaries)		36% (22)	All to trust (unknown beneficiaries)	25% (11)	All to trust (unknown beneficiaries)	31% (33)
Pretermitted Spouse		1.6% (1)	Pretermitted Spouse		Pretermitted Spouse	1% (1)

TABLE 4. DISPOSITIONS TO SECOND OR THIRD SPOUSES

	Alachua Co. 23 Decedents		Escambia Co. 12 Decedents		Cumulative Average of Both Counties 35 Decedents	
	Dispositions to Second or Third Spouses	All to spouse, if predeceased, then children	30% (7)	All to spouse, if predeceased, then children	58% (7)	All to spouse, if predeceased, then children
Some to spouse & some to children/others		17% (4)	Some to spouse & some to children/others	8% (1)	Some to spouse & some to children/others	14% (5)
Nothing to spouse		9% (2)	Nothing to spouse	8% (1)	Nothing to spouse	9% (3)
All to trust (unknown beneficiaries)		39% (9)	All to trust (unknown beneficiaries)	25% (3)	All to trust (unknown beneficiaries)	34% (12)
Pretermitted Spouse		4% (1)	Pretermitted Spouse		Pretermitted Spouse	3% (1)

Other interesting factors appear when we try to figure out what dispositions people in second or subsequent marriages preferred to

make. After removing the trust estates, for which we have little dispositive information, the next clear preference by these decedents was to leave everything to their surviving spouse. Roughly 40% of decedents in multiple marriages chose to leave everything to their surviving spouse, which was lower than in the married dataset, in which 58% left their entire estates to their surviving spouses. So a second marriage led to a general decline in dispositions entirely to the surviving spouse and a marginal increase in the use of trusts.

In many of these multiple marriages, dispositions spreading the estate between a surviving spouse and children or other relatives increased. Thus, in the married population generally, only 6% of decedents split their estates, while 14% did so in the multiple marriage population of decedents. Similarly, in the married population generally only 4% entirely disinherited their surviving spouse, while that number rose to 9% in the multiple marriage population. Again, these numbers are relatively small, but they do show that most of the diversity of spousal dispositions arose in cases involving multiple marriages, which is to be expected. The question now, of course, is whether intestacy laws do or can be reformed to properly account for that discrepancy. But we take that issue up in the next section.

What is quite noticeable, however, was the significant deviation from the general pattern when we looked at dispositions to second or third spouses by the sex of the decedent.

TABLE 5. DISPOSITIONS TO SECOND OR THIRD SPOUSES BY SEX

	Alachua Co. 23 Decedents	Sex	Escambia Co. 12 Decedents	Sex	Cumulative Average of Both Counties 35 Decedents	Sex
Dispositions to Second or Third Spouses	All to spouse, if predeceased, then children 30% (7)	M=6 F=1	All to spouse, if predeceased, then children 58% (7)	M=4 F=3	All to spouse, if predeceased, then children 40% (14)	M=10 F=4
	Some to spouse & some to children 17% (4)	M=3 F=1	Some to spouse & some to children 8% (1)	M=1	Some to spouse & some to children 14% (5)	M=4 F=1
	Nothing to spouse 9% (2)	M=1 F=1	Nothing to spouse 8% (1)	F=1	Nothing to spouse 9% (3)	M=1 F=2
	All to trust (unknown beneficiaries) 39% (9)	M=8 F=1	All to trust (unknown beneficiaries) 25% (3)	M=3 F=0	All to trust (unknown beneficiaries) 34% (12)	M=11 F=1
	Pretermitted Spouse 4%(1)	M=1	Pretermitted Spouse		Pretermitted Spouse 3% (1)	M=1

These numbers are quite astounding. For instance, of the 12 married decedents in a multiple marriage that used a pour over will to a trust, 11 were men. Also, of the 14 married decedents who left everything to their surviving spouse, 10 were men and 4 were women. Women left nothing to their surviving spouses in 2 out of 3 instances, while

men split the estate between their surviving spouse and their children in 3 out of 4 instances. It is also notable that of the total of 35 decedents in multiple marriages, 27 (77%) were men, and only 8 (23%) were women. This contrasts sharply with the fact that women were the significant majority of decedents in the entire sample. So while the percentage of men and women who were in first marriages was roughly similar in percentage to the number of men and women who were in second marriages, their dispositions were dramatically different by gender if they were in a second marriage rather than a first marriage.

This deviation confirms earlier studies that show women historically tended to devise property to a variety of children, nieces and nephews, and grandchildren while men tended to devise property just to their children, more in conformity with intestate priorities.⁸⁸ Certainly many women devised all of their property directly to their children in equal shares, and many men devised property to children in unequal shares. However, this data show that more research needs to be done to determine if women in subsequent marriages devised property differently from women who were only married once, and if they devised property to a wider variety of recipients than women who only married once. It would make sense that people in multiple marriages would be more likely to spread their property among a wider group of beneficiaries, but why women would be more likely to disinherit their second spouses than men may relate more to wealth than to gender.

iv. *Race as a Factor*

Not surprisingly, race is a factor in the use of a will. And it also correlated to different dispositions regarding spouses and the use of a trust.

⁸⁸ See, e.g., R.J. MORRIS, MEN, WOMEN, AND PROPERTY IN ENGLAND, 1780-1870: A SOCIAL AND ECONOMIC HISTORY 260 (2005); AMY LOUISE ERICKSON, WOMEN AND PROPERTY IN EARLY MODERN ENGLAND 211-21 (2002).

TABLE 6. DISPOSITIONS OF DECEDENTS BY RACE AND MARITAL STATUS

	Alachua Co.		Escambia Co.		Cumulative Average of Both Counties	
Race of General Population	White	63.7%	White	66.2%	White	65%
	Black	20.3%	Black	22.9%	Black	22%
	Hispanic	5.4%	Hispanic	4.7%	Hispanic	5%
	Asian	.3%	Asian	.9%	Asian	.6%
	Other	2.3%	Other	3.3%	Other	2.8%
Race of Decedents in Study	White	92% (269)	White	91% (181)	White	91% (450)
	Black	4% (13)	Black	8% (16)	Black	5.8% (29)
	Hispanic	2% (5)	Hispanic	00% (0)	Hispanic	1% (5)
	Asian	00% (1)	Asian	00% (0)	Asian	0% (1)
	Other	2% (5)	Other	2% (3)	Other	1.6% (8)
Race of Married Decedents	White	97% (59)	White	93% (41)	White	95% (100)
	Black	(0)	Black	7% (3)	Black	3% (3)
	Hispanic	1.6% (1)	Hispanic	(0)	Hispanic	1% (1)
	Asian	1.6% (1)	Asian	(0)	Asian	1% (1)
	Other	(0)	Other	(0)	Other	0% (0)
Dispositions of Decedents by Race (both counties)	All to spouse, if predeceased, then children	Some to spouse & some to children	All to children	All to children & others	All to others	All to trust (unknown beneficiaries)
White	26% (120)	1% (5)	31% (142)	2% (10)	15% (70)	23% (106)
Black	17% (5)	13% (1)	62% (18)	10% (3)	7% (2)	00% (0)
Hispanic	00% (0)	00% (0)	50% (3)	00% (0)	00% (0)	50% (3)
Asian	100% (1)	00% (0)	00% (0)	00% (0)	00% (0)	00% (0)
Other	25% (1)	00% (0)	25% (1)	00% (0)	50% (2)	00% (0)

A number of striking results emerge when we break down the testamentary dispositions by race. Not surprisingly, decedents of color were far less likely to die testate or have their estates probated than White decedents. Although the White population of the combined counties is only 65%, White decedents comprised 91% of the testate estates. And although the Black population of the combined counties is 22%, only 5.8% of the testate estates were of Black decedents. Similarly, no Black, Asian, or Other decedent had a will that poured over into a trust. Only White and Hispanic decedents had trusts, and the latter had a higher rate of trust use than even Whites. Fifty percent of Hispanic decedents had a trust, while only 24% of White decedents used a trust, although the total number of Hispanic decedents was quite low (6).

In examining patterns between the two largest groups of decedents, Whites and Blacks, the former had relatively equal dispositions between spouses, children, others, and trusts. This was not the case with Black decedents who left their property to their children twice as often as White decedents. Black decedents left their estates to their spouses in only 17% of cases, compared with 26% of White estates. There were no

Black decedents in Alachua county who had been married more than once or who included bequests to step-children and only one in Escambia County who had been married more than once, and that decedent was estranged from her second spouse and had executed a postmarital agreement waiving inheritance rights. These numbers are not surprising since significantly fewer Black decedents were married compared to White decedents. But the number is disturbing in many ways. It further supports studies showing that the Black family is under more stress and more likely to forego marriage, which provides significant social and economic benefits.⁸⁹ For estates and trusts policy makers, this is particularly disturbing because it suggests that our inheritance and family laws do not adequately meet the needs of Black or other decedents of color. This gap between the needs of the population and the law becomes even more apparent when we look more carefully at dispositions for children.

v. *Dispositions Involving Children and Stepchildren*

As noted above, children were the primary beneficiaries of the majority of wills, which is not surprising since the majority of decedents were widowed with surviving children. Where there were surviving spouses, the vast majority of decedents benefitted their spouses with all or a lion's share of their estates. And where the decedent was widowed leaving children, the children took all or the lion's share of those estates. But, two important patterns jump out. The first is that a significant number of decedents used a will to disinherit a child or make significantly unequal distributions to children. The unequal distributions appeared to be for many reasons, sometimes punitive and sometimes because a particular child appeared to have had a greater or lesser need than other children. And second, the majority of decedents with stepchildren left at least some property to their stepchildren. Some did this because they had no children of their own, which makes sense. But many others distributed their property quite unevenly, sometimes benefitting stepchildren above their own children. Thus, unlike the dispositions to spouses, which generally prevailed regardless of whether the

⁸⁹ See *Marital Status: 2011-2015 American Community Survey 5-Year Estimates*, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_5YR_S1201&prodType=table (last visited May 24, 2017). In 2015, it was estimated that only 29.1% of Blacks were married compared to 48.2% of all Americans over age 15. Additionally, 49.2% of Blacks are estimated to never have been married, compared to 32.8% of all Americans over age 15. See also Elizabeth Davenport Pollock, Josh B. Kazman, & Patricia Deuster, *Family Functioning and Stress in African American Families: A Strength-Based Approach*, 41(2) J. BLACK PSYCHOL. 144, 145 (2015).

spouse was a first or a subsequent spouse, the dispositions to children significantly deviate from the default rules of intestacy.

TABLE 7. DISPOSITIONS INVOLVING STEPCHILDREN

	Alachua Co. 24 Decedents		Escambia Co. 8 Decedents		Cumulative Average of Both Counties 32 Decedents	
Dispositions Involving Stepchildren	All to children & nothing to stepchildren	13% (3)	All to children & nothing to stepchildren	13% (1)	All to children & nothing to stepchildren	13% (4)
	All to stepchildren & nothing to children	13% (3)	All to stepchildren & nothing to children	13% (1)	All to stepchildren & nothing to children	13% (4)
	Small bequests to stepchildren with primary bequests to children	13% (3)	Small bequests to stepchildren with primary bequests to children	13% (1)	Small bequests to stepchildren with primary bequests to children	13% (4)
	Equal treatment of children and stepchildren	38% (9)	Equal treatment of children and stepchildren	13% (1)	Equal treatment of children and stepchildren	31% (10)
	All to stepchildren because no children	17% (4)	All to stepchildren because no children	50% (4)	All to stepchildren because no children	25% (8)
	All to trust (unknown beneficiaries)	8% (2)	All to trust (unknown beneficiaries)	0% (0)	All to trust (unknown beneficiaries)	6% (2)

Table 7 shows that, of the 32 estates where stepchildren were clearly identified, 82% of the cases involved a decedent giving the stepchild at least a small bequest, and more often than not a more substantial bequest. Of course, there may have been many other estates in which stepchildren were simply not mentioned and no bequest was given to them. But since stepchildren often become relevant in cases of second marriages, it makes sense that decedents who are quite generous to their second spouse would also be generous to their stepchildren. But this is one area in which the law of intestacy simply has not caught up with practice.

Moreover, of these 32 estates involving stepchildren, none of the decedents were of any race other than White. To the extent this data reflect larger patterns in the population, families of color are particularly subject to inheritance inequities. The more people in non-traditional family structures must rely on intestacy for passing wealth to their loved ones, the less likely the fit will be equitable, as the intestacy laws rely heavily on marriage and biological relationship for inheritance rights.

III. THE TENUOUS FIT OF INTESTACY LAWS

Much more needs to be done to amass a larger sample of wills from nontraditional families and examine more closely their dispositions by race, gender, class, and marital status than we have been able to do here. Nonetheless, the results of our initial inquiry suggest important avenues for further research and suggest some specific weaknesses in our current intestacy laws as they deal with marriage and parental status. They also suggest that the default intestacy laws may not be working as well for certain populations, particularly those who cannot afford to do estate planning that involves a trust or even a basic will.

Every state in the U.S. has enacted an intestacy statute governing the distribution of assets when a decedent does not have a will, but there are many variations among the states. Seventeen states⁹⁰ and the U.S. Virgin Islands have enacted the UPC, originally promulgated in 1969, but most recently amended in 2010.⁹¹ Article II of the UPC, which includes the rules for intestate succession, was significantly revised in 1990 and again in 2008,⁹² in order to bring the succession rules in line “with developing public policy and family relationships.”⁹³ The 1990 revisions increased the surviving spouse’s share in intestacy and the 2008 revisions added stepchildren as last-resort takers, prior to the estate escheating to the state.⁹⁴ Yet our data suggest that these UPC revisions are actually fifty years behind the times. The UPC revisions are based on the dominance of single marriage families, which is waning in today’s society, and they do not adequately account for stepchildren, which clearly contravenes the testamentary intentions of the decedents in this study.

The definition of “family” in intestacy is generally based on legal status, such as blood, marriage, or adoption.⁹⁵ While two of the goals for

⁹⁰ The seventeen states enacting the UPC are Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, South Carolina, South Dakota and Utah. *Legislative Fact Sheet—Probate Code*, UNIF. LAW COMM’N, <http://uniformlaws.org/LegislativeFactSheet.aspx?title=probate%20Code> (last visited May 24, 2017).

⁹¹ *Probate Code Summary*, UNIF. LAW COMM’N, <http://uniformlaws.org/ActSummary.aspx?title=probate%20Code> (last visited May 24, 2017). The 1991 revision of the original 1969 UPC was the result of a systematic study conducted by the Joint Editorial Board for the Uniform Probate Code, which is an organization representing the National Conference of Commissioners on Uniform State Laws, the Real Property, Probate and Trust Law Section of the American Bar Association, and the American College of Trust and Estate Lawyers. *Id.* Additionally, the revised version has been accepted in part by many of the remaining states. *Id.*

⁹² UNIF. PROBATE CODE art. II, prefatory note (UNIF. LAW COMM’N 2010).

⁹³ UNIF. PROBATE CODE art. II, pt. 1, general cmt.

⁹⁴ *Id.*

⁹⁵ Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 U. MICH. J.L. REFORM 787, 792 (2012).

the UPC revisions to Article II were to favor the imputed intent of more decedents and reflect the “advent of the multiple-marriage society,”⁹⁶ sizeable gaps still exist for those in non-traditional family relationships with the decedent.⁹⁷ For example, the UPC does not provide an intestate share for unmarried, committed partners of the decedent or for non-genetic children who have not been adopted by the decedent, beyond the last-resort share for stepchildren.⁹⁸

A. Spousal Shares in Intestacy

Table 8 below shows the spousal share in intestacy under the UPC,⁹⁹ Florida,¹⁰⁰ Kentucky¹⁰¹ and Arkansas¹⁰² statutes to demonstrate some of the dramatic variations in spousal shares. Some states have particularly restrictive provisions for surviving spouses.¹⁰³ In Kentucky, for example, other than \$15,000 in exempt personal property that passes to the surviving spouse, the spouse takes an intestate share only if there are no surviving children, grandchildren, parents, siblings, or nieces and nephews of the decedent.¹⁰⁴ Additionally, the surviving spouse will be barred from taking a share if the spouse “leaves the other and lives in adultery,” unless the spouses “afterward become reconciled and live together as husband and wife.”¹⁰⁵

⁹⁶ UNIF. PROBATE CODE art. II, prefatory note.

⁹⁷ Gary, *supra* note 95, at 793.

⁹⁸ *Id.*

⁹⁹ UNIF. PROB. CODE § 2-102 (UNIF. LAW COMM’N 2010).

¹⁰⁰ FLA. STAT. § 732.102 (2017).

¹⁰¹ KY. REV. STAT. ANN. §§ 391.010, 391.030(1)(c) (West 2017).

¹⁰² ARK. CODE ANN. § 28-9-214(2) (2017).

¹⁰³ *See, e.g., id.* (if there are no surviving children or descendants of the children, then 100% of the estate goes to the surviving spouse, but only if married continuously for 3 years prior to the decedent’s death and 50% to the surviving spouse if married less than 3 years prior to death); IND. CODE § 29-1-2-1(c) (2017) (“if the surviving spouse is a second or other subsequent spouse who did not at any time have children by the decedent, and the decedent left surviving the decedent a child or children or the descendants of a child or children by a previous spouse, the surviving second or subsequent childless spouse shall take only an amount equal to twenty-five percent (25%) of the remainder of: (1) the fair market value as of the date of death of the real property of the deceased spouse; minus (2) the value of the liens and encumbrances on the real property of the deceased spouse. The fee shall, at the decedent’s death, vest at once in the decedent’s surviving child or children, or the descendants of the decedent’s child or children who may be dead. A second or subsequent childless spouse . . . shall, however, receive the same share of the personal property of the decedent as is provided . . . to surviving spouses generally.”).

¹⁰⁴ KY. REV. STAT. ANN. §§ 391.010, 391.030(1)(c).

¹⁰⁵ KY. REV. STAT. ANN. § 392.090. Kentucky is not the only state barring the surviving spouse from taking an intestate share if desertion or adultery is involved. *See, e.g.,* N.H. REV. STAT. ANN. § 560:19 (2017) (“If, at the time of the death of either husband or wife, the decedent was justifiably living apart from the surviving husband or wife because

TABLE 8. SPOUSAL SHARES IN INTESTACY

UPC	Florida	Kentucky	Arkansas
<p>Surviving spouse (SS) receives:</p> <p>(1) the entire estate if:</p> <p>(a) no descendant or parent of the decedent survives the decedent; or</p> <p>(b) all of the descendants of the decedent are also descendants of the SS and there is no other descendant of the SS;</p> <p>(2) the first 300K, plus $\frac{3}{4}$ of any balance of the estate if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;</p> <p>(3) the first 225K plus $\frac{1}{2}$ of any balance of the estate if all of the decedent's surviving descendants are also descendants of the SS and the SS has one or more surviving descendants who are not descendants of the decedent; or</p> <p>(4) the first 150K, plus $\frac{1}{2}$ of any balance of the estate, if one or more of the decedent's surviving descendants are not descendants of the SS.</p>	<p>Surviving spouse (SS) receives:</p> <p>(1) the entire estate if:</p> <p>(a) there is no surviving descendant of the decedent, or</p> <p>(b) there are surviving descendants of the decedent, all of whom are also lineal descendants of the SS.</p> <p>(2) 50% of the estate if:</p> <p>(a) there are surviving descendants, one or more of whom are not lineal descendants of the SS; or</p> <p>(b) there are surviving descendants, all of whom are descendants of the SS, and the SS has one or more descendants who are not descendants of the decedent.</p>	<p>\$15,000 in personal property is exempt from distribution and upon application, passes either to the surviving spouse or surviving children.</p> <p>As to the rest of the estate:</p> <p>(1) 100% to surviving children of the decedent or descendants of the children. If none, then:</p> <p>(2) 100% to surviving parents of the decedent. If none, then:</p> <p>(3) 100% to surviving siblings of the decedent or descendants of the siblings. If none, then:</p> <p>(4) 100% to surviving spouse of decedent.</p>	<p>(1) 100% to surviving children or descendants of a deceased child. If none, then:</p> <p>(2) 100% to surviving spouse, if married continuously for at least 3 years prior to death, but if married less than 3 years prior to death, only 50%.</p>

Multiple scholars have proposed model statutory language to correct the inequitable treatment for committed partners falling outside the

such survivor was or had been guilty of conduct which constitutes cause for divorce, such guilty survivor shall not be entitled to any interest or portion in the real or personal estate of said decedent, except such as may be given to such survivor by the will of the deceased"); N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(5)–(6) (McKinney 2017) ("The spouse abandoned the deceased spouse, and such abandonment continued until the time of death. A spouse who, having the duty to support the other spouse, failed or refused to provide for such spouse though he or she had the means or ability to do so"); 20 PA. CONS. STAT. § 2106(a)(1) (2017) ("A spouse who, for one year or upwards previous to the death of the other spouse, has willfully neglected or refused to perform the duty to support the other spouse, or who for one year or upwards has willfully and maliciously deserted the other spouse, shall have no right or interest . . . in the real or personal estate of the other spouse"); VA. CODE ANN. § 64.2-308(A) (2017) ("If a spouse willfully deserts or abandons the other spouse and such desertion or abandonment continues until the death of the other spouse, the party who deserted the deceased spouse shall be barred of all interest in the decedent's estate by intestate succession, elective share, exempt property, family allowance, and homestead allowance.").

definition of “spouse” under typical probate codes¹⁰⁶ and others have suggested changes to better calibrate the shares taken by second or subsequent spouses when there are children by a prior marriage.¹⁰⁷ Our research suggests that most decedents want their surviving spouse to take most of their estates, even when the spouse is a second or third spouse and there are children and stepchildren. But a significant minority of decedents clearly used prenuptial agreements, trusts, and shared dispositions to reduce the share of a second spouse. The greater use of trusts among second spouses indicates that people tend to recognize that estate planning is more important when the family situation gets complicated. The obvious problem with simply relying on testators intentionally executing estate documents, however, is that access to lawyers and use of these devices, particularly trusts, differs by race and to some extent by gender. The clear message here is that we have two laws: the law of testamentary freedom for the White and the wealthy, and the default rules of intestacy for persons of color and the poor. Yet if any statistic jumps out, it is that nontraditional family structures do not occur only in the White and wealthy population, but actually occur more frequently as one moves down the economic ladder and across different racial divides.

B. Shares to Children and Others

Although the law of intestacy that privileges spouses conforms generally to the data we found, the same is not true of the intestacy rules involving children. The general order of priority under intestacy, with variations among the states, proceeds as follows: spouse, children, par-

¹⁰⁶ See, e.g., E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255, 325–26, 340 (2002) (proposing an intestate share for a committed partner who either has registered as a domestic partner with the decedent under state law or proves by clear and convincing evidence that the partner and decedent had lived together “as a couple in an emotionally and physically intimate partnership such that the intestacy scheme should protect the decedent’s interest in donative freedom, or the surviving committed partner’s reciprocity or reliance interests.” For unmarried couples not registered with the state as domestic partners, the court would use a multi-factor test to determine whether the claimant has met his or her burden of proof. If entitled to an intestate share, the size of the share increases based on the length of time the decedent and committed partner had cohabitated before the decedent’s death); T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55, 86–90 (2004) (proposing a statute in response to a request from the Joint Editorial Board for Uniform Trust and Estate Acts that created an intestate share for unmarried partnerships in a “qualified relationship” and that also removed the duration of the relationship as a factor).

¹⁰⁷ See, e.g., Danaya C. Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Nontraditional Families*, 25 CORNELL J.L. & PUB. POL’Y 1, 57–65 (2015).

ents, siblings, grandparents, aunts and uncles, cousins, sometimes descendants of cousins (“laughing heirs”), sometimes stepchildren, then the state.¹⁰⁸ In 2008, Section 2-103 of the UPC was revised to include shares to stepchildren, but they are last in the order of takers prior to escheating to the state.¹⁰⁹ Other states similarly followed the UPC by adding stepchildren as last resort takers.¹¹⁰ As a result, a stepchild is a potential heir in intestacy only if the decedent has no other living next-of-kin. Furthermore, the UPC does not provide an intestate share for non-genetic children who have not been adopted by the decedent, beyond the last resort share for stepchildren.¹¹¹ Thus, a same-sex partner’s child who is parented by the decedent would have no inheritance rights under intestacy in any state, even if the parents are married, without a formal adoption. And foster or other functional children would have no inheritance rights whatsoever, despite what appears to be evidence by many of our decedents of an intent to benefit children who are not related to the testator by blood or adoption.

Table 9 below reflects similar variation among intestacy statutes for the shares to a decedent’s children and other family members.

¹⁰⁸ See *infra* Table 9 for examples of state variations in the distribution of intestate shares to children and others.

¹⁰⁹ UNIF. PROBATE CODE art. II, pt. 1, general cmt. (UNIF. LAW COMM’N 2010).

¹¹⁰ See, e.g., CAL. PROB. CODE § 6402.5 (West 2017) (passing to the “issue of [a] predeceased spouse” if there is no surviving issue of a decedent, parent, issue of a parent, grandparent or issue of a grandparent); CONN. GEN. STAT. § 45a-439(a)(4) (2017) (passing to stepchildren if there are no descendants, parents, brothers, sisters or next of kin, limited to collaterals); FLA. STAT. § 732.103(5) (2017) (passing to “the kindred of the last deceased spouse of the decedent”); MD. CODE ANN., EST. & TRUSTS § 3-104(e) (LexisNexis 2017) (passing to stepchildren, if no surviving blood relative); N.J. STAT. ANN. § 3B:5-4(f) (West 2017) (passing to “decedent’s step-children or their descendants” if no surviving descendants of grandparents); OHIO REV. CODE ANN. § 2105.06(J) (LexisNexis 2017) (passing to stepchildren or their lineal descendants, if there is no next of kin of the decedent, with no cut-off for laughing heirs).

¹¹¹ Gary, *supra* note 94, at 793. See also the UPC’s treatment of “family” relationships for purposes of inheritance laws. UNIF. PROBATE CODE § 1-201(5) (defining “child” to expressly exclude stepchildren, foster children and grandchild. This definition is also in conflict with sections 2-115 and 2-116 which allow functional child-parent relationships for purposes of inheritance); UNIF. PROBATE CODE § 2-114 (barring parents from inheriting in certain circumstances); § 2-115 (defining a child and parent in a functional parent-child relationship); § 2-116 (detailing the effect of a functional parent-child relationship for purposes of inheritance); § 2-117 (establishing that a parent-child relationship exists between a child and the child’s genetic parents regardless of the parents’ marital status); § 2-118 (treatment of adoptee and adoptee’s adoptive parents); § 2-119 (treatment of adoptee and adoptee’s genetic parents); § 2-120 (treatment of children conceived by assisted reproduction other than a child born to a gestational carrier); § 2-121 (treatment of children born to a gestational carrier); § 2-122 (equitable adoption).

TABLE 9. CHILDREN AND OTHERS' SHARES IN INTESTACY

UPC ¹¹²	Florida ¹¹³	Wyoming ¹¹⁴
<p>Any part of the intestate estate not passing to a decedent's surviving spouse passes in the following order:</p> <p>(1) to the decedent's descendants. If none:</p> <p>(2) to the decedent's parents equally if both survive, or to the surviving parent if only one survives. If none:</p> <p>(3) to the descendants of the decedent's parents. If none, then:</p> <p>(4) if the decedent is survived on both the paternal and maternal sides by one or more grandparents or descendants of grandparents:</p> <p>(A) ½ to the decedent's paternal grandparents equally if both survive, or to the survivor of them, or to the descendants of the decedent's paternal grandparents taking by representation; and</p> <p>(B) ½ to the decedent's maternal grandparents equally if both survive, or to the survivor of them, or to the descendants of the decedent's maternal grandparents taking by representation;</p> <p>(5)(a) if the decedent is survived by one or more grandparents or descendants of grandparents on either the paternal or maternal side, but not on the other, to the decedent's relatives on the side with one or more survivors. If none, then:</p> <p>(b) If the decedent has:</p> <p>(1) one deceased spouse who has one or more descendants who survive the decedent, the estate passes to that spouse's descendants; or</p> <p>(2) more than one deceased spouse who has one or more descendants who survive the decedent, an equal share of the estate passes to each set of descendants.</p> <p>(6) if none, then the estate reverts to the state.</p>	<p>The part of the intestate estate not passing to the surviving spouse descends as follows:</p> <p>(1) to the descendants of the decedent. If none:</p> <p>(2) to the decedent's father and mother equally, or to the survivor of them. If none:</p> <p>(3) to the decedent's brothers and sisters and the descendants of deceased brothers and sisters. If none:</p> <p>(4) the estate shall be divided, ½ of which shall go to the decedent's paternal, and the other half to the decedent's maternal, kindred in the following order:</p> <p>(a) to the grandfather and grandmother equally, or to the survivor of them. If none:</p> <p>(b) to uncles and aunts and descendants of deceased uncles and aunts of the decedent. If none:</p> <p>(c) If there is either no paternal kindred or no maternal kindred, the estate shall go to the other kindred who survive. If none:</p> <p>(5) the whole of the property shall go to the kindred of the last deceased spouse of the decedent.</p> <p>(6) if none, then the estate reverts to the state.</p>	<p>If there is no surviving husband or wife, the estate of any intestate shall descend and be distributed as follows:</p> <p>(i) To his children surviving, and the descendants of his children who are dead, the descendants collectively taking the share which their parents would have taken if living. If none, then:</p> <p>(ii) to his father, mother, brothers and sisters, and to the descendants of brothers and sisters who are dead, the descendants collectively taking the share which their parents would have taken if living, in equal parts. If none, then:</p> <p>(iii) to the grandfather, grandmother, uncles, aunts and their descendants, the descendants taking collectively, the share of their immediate ancestors, in equal parts. If none, then:</p> <p>(iv) the estate reverts to the state.</p>

Many scholars have critiqued the problems plaguing inheritance laws that affect children in nontraditional families.¹¹⁵ An article pub-

112 UNIF. PROBATE CODE §§ 2-103, 2-105.

113 FLA. STAT. § 732.103 (2017).

114 WYO. STAT. ANN. §§ 2-4-101(c), 9-5-202(b) (2017).

115 See, e.g., Wright, *supra* note 106, at 1; Gary, *supra* note 11, at 31–34 (proposing a model intestacy statute to replace UPC § 2-114, adding an additional means for a person to meet the definition of parent or child for purposes of intestacy and providing that a child can qualify for a share as the decedent's biological child, adopted child or a child for whom a parent-child relationship is established.); Gary, *supra* note 94, at 787, 820–824

lished in 2015 explored the scope of the inheritance penalties, which result from traditional state probate codes, that are imposed on children living in nontraditional families.¹¹⁶ Two primary problems exist: the lack of inheritance rights by children who are not adopted by their functional parents and the disinheritance of many children who are adopted by an unmarried co-parent.¹¹⁷ Children who may be affected by traditional inheritance laws include stepchildren in blended families, children adopted by a co-parent, and children being raised by grandparents, neighbors, friends, foster parents or other relatives.¹¹⁸

A variety of legal changes could be made to modernize the intestate shares of surviving spouses and children.¹¹⁹ Just as marital status no longer determines parental rights under family law, the marital status of a child's parents should not determine a living child's inheritance rights.¹²⁰ Additionally, a state's probate code definitions of a parent and child should match the definitions of parent and child in the state's family code, so long as the family code favors functional parent-child

(proposing that the court should have the power to reduce intestate shares to spouses, children or parents, and enlarge the categories of potential takers by including domestic partners, persons who functioned as a parent or child, and persons who provided uncompensated care to the decedent); Lee-Ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Success*, 62 SMU L. REV. 367, 368-69 (2009). Professor Tritt argued that in determining testamentary intent, a functionally based approach should replace the approaches used in traditional succession law (a sanguinary nexus between the decedent and heir) and the 2008 amendments to the UPC (which expanded the definition of children in its model statutes beyond blood relations). *Id.* at 372, 407. Inheritance law should focus on the rights and best interests of the decedent only, not on the rights and best interests of the child, appropriate for other areas under family law, but not in determining inheritance rights. *Id.* at 372. Instead, estate law jurisprudence with its property-owner-centered view should govern, with one caveat: the traditional sanguinary nexus test defining child status should be replaced with an unadulterated functionally based approach to defining a parent-child relationship. *Id.* at 404, 429. Professor Tritt proposed a list of factors that could be used to guide the court in determining whether a parent who functioned as a parent or a child who functioned as a child should inherit under succession law. *Id.* at 405. These factors are as follows: (i) whether the decedent held him/herself out to be a parent of the child for a substantial period of time (if the decedent died while the child was in gestation, such time could include the pregnancy of a partner or surrogate mother or the time and effort spent during which [assisted reproductive technology] is procured); (ii) whether benefits of love and affection accrued to the child; (iii) whether the parent-child relationship was publicly recognized (which could include the period while the child was in gestation); (iv) whether the decedent desired to have the rights afforded to a parent; and (v) whether the decedent performed obligations of parenthood for a substantial period of time. *Id.* (footnote omitted).

¹¹⁶ Wright, *supra* note 106, at 1.

¹¹⁷ *Id.* at 5-6.

¹¹⁸ *Id.* at 81.

¹¹⁹ *Id.* at 82.

¹²⁰ *Id.*

relationships and uses the “best interests of the child” standard.¹²¹ Where the status of a functional child is at issue and the testator has not expressed contrary instructions, some argue that the best interests of the living child should be the norm in inheritance law.¹²²

This empirical study clearly shows, we believe, that intestacy laws do not adequately reflect the presumed intent of parents or other adults who leave property to their children. When 82% of decedents with stepchildren choose to leave at least some property to those children who would have no rights under intestacy, it would appear the law needs to change. But how? One easy change would be to recognize that many people who do not have children of their own, but do have stepchildren, seem to want to benefit those children to the exclusion of other relatives. It might make sense for the intestacy laws to place stepchildren, or perhaps only stepchildren who were raised in the decedent’s home, before collateral relatives. In cases in which the decedent has both children of his or her own and stepchildren, the majority resulted in the children sharing, with no clear disfavoring of stepchildren over natural or adopted children. If legislators feel uncomfortable with having stepchildren take equally with children, even though that was the predominant disposition in our sample, perhaps a model in which the stepchildren take one-half shares what the biological children take might make sense.

It was also quite clear that many decedents used a will to deviate from the equal treatment for their children that is the default rule under intestacy. Many children were disinherited, or specific items of property were devised to certain children. While deviation from unequal treatment might be difficult under a default intestacy rule, it would not be difficult to provide a form will that decedents could use to identify certain items of property that should pass to different children without requiring all the formal steps and expenses of a will. Much like the separate writing provision that allows for the relatively simple disposition of tangible personal property,¹²³ a notarized document that distributes property unevenly within a specific class of beneficiaries, like children and stepchildren, who end up being the primary takers in the vast majority of estates, could ease the pressure among those populations for whom complex or expensive estate planning is not feasible.

¹²¹ *Id.* at 81.

¹²² *Id.* at 76. This is contrary to Lee-Ford Tritt’s argument that inheritance rights should focus on the rights and best interests of the decedent only, not on the rights and best interests of the child, which may be appropriate for other areas under family law, but not under the property owner centered view of estate law jurisprudence. Tritt, *supra* note 114, at 372, 429.

¹²³ See UNIF. PROBATE CODE § 2-513 (UNIF. LAW COMM’N 2010).

In the case of blended families where both spouses have children from prior relationships, the intestate priorities giving most of the decedent's property to the surviving spouse could result in completely disinheriting the decedent's biological children. The marriage of Carol and Mike Brady is exemplary.¹²⁴ Carol and Mike married, each bringing three children from previous marriages to their new family. Mike's wife had died, leaving him a widower with three small sons. Assuming he inherited all of his first wife's property upon her death intestate, and Carol inherits that property upon Mike's death if he dies intestate, then upon Carol's death intestate all of the property will pass to Carol's three daughters and none to Mike's three sons. This would include property that Mike had inherited from his first wife. One possible way to reform intestacy statutes that might deprive children of property from both of their parents would be to give Mike only a life estate in his first wife's property, such that it passes from him to his sons upon Mike's death, and does not pass to Carol. All other property Mike acquires after his marriage to Carol should pass to Carol, but perhaps not property he inherited from his first wife or his parents. Similarly, upon Carol's death, property she inherited from Mike could pass to Mike's sons rather than her daughters. Such a solution, although seemingly moving away from the partnership theory of marriage, better reflects likely testamentary intent, certainly the intent of first spouses who don't want their property passing to the children of their surviving spouse's new spouse.

These are just a few ways in which inheritance law reforms may be able to better reflect the presumed intentions of the growing number of decedents with nontraditional family relationships. But much more needs to be done to discover patterns in the way these people dispose of their property and to devise solutions that better calibrate their intentions to their dispositions.

CONCLUSION

This has been a tremendously interesting project and one that we hope to continue, and one which we hope will generate interest and commentary by many scholars and lawmakers. As we continue to amass more information about how people actually do leave their estates at their death, we can try to provide more tailored tools to make it easier to effectuate their intentions and to facilitate the process of the inter-generational transmission of property. These findings are only prelimi-

¹²⁴ Carol and Mike Brady are from the popular TV show, *The Brady Bunch*, airing from 1969-1974 and featuring a blended family. *The Brady Bunch*, www.cbs.com/shows/the_brady_bunch/ (last visited Sept. 11, 2017).

nary, but they reveal trends that we feel are in line with common human emotions. Most people want to benefit those they love, with whom they have formed relationships, and those who need or will appreciate the gifts. To the extent the laws of intestacy can accomplish these myriad goals, the law will better serve our growing diverse population. Moreover, most of our decedents in this study were elderly. What will the distributions look like twenty years from now, when the next generation of decedents reflects the growing disparities in wealth and family status that are growing today?

Our key findings in this study show that most decedents want to benefit their surviving spouse, regardless of whether the spouse is from a first or subsequent marriage. Most decedents also want to benefit children and step-children next. The use of trusts has grown in our society, so that nearly a quarter of all decedents poured all or most of their estates into a revocable trust. But the use of a trust clearly correlated to race and wealth. It was also significant that people in second or subsequent marriages were somewhat more likely to use a trust than those in their first marriages. This isn't surprising, and in fact reflects the common advice among estate planners, to use trusts when clients' family situations get complicated. Much more needs to be done, however, to try to uncover the extent to which wealth, domicile, and family relationships affect estate planning. For instance, a decedent in Alachua County was almost twice as likely to have a trust as one in Escambia County, despite the lower average income of Alachua County. Alachua is the home of the University of Florida and contains a more liberal and possibly more educated population. Escambia is the home of a military base and a large rural population that, despite higher income levels, seemed to have fewer indications of non-traditional family structures and estate plans. While the divorce and remarriage rate appears similar between the two counties, there were noticeable differences in testamentary dispositions. Most notable was the dramatic lack of estate planning that existed in the Black community. Further research is warranted to see how default estate planning rules may in fact be merely rules for the rich or the White, and not rules for the poor or the person of color.

