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Without a Will, There is Still a Way: A Statutory Solution to Increase the Value of a Small Estate and Aid in Reducing the Racial Equity Gap in Wisconsin

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WITHOUT A WILL, THERE IS STILL A WAY: A STATUTORY SOLUTION TO INCREASE THE VALUE OF A SMALL ESTATE AND AID IN REDUCING THE RACIAL EQUITY GAP IN WISCONSIN

By: Isabella V. Avila Perez*

ABSTRACT

For generations, communities of color have struggled to increase their generational wealth. Lack of access to estate planning tools leaves minority groups and low-income families compromised and more likely to die intestate. While the current probate system creates a safety net for those that die intestate, this comment aims to address the need for a statutory solution to aid in combatting Wisconsin's racial equity gap. More specifically, this Comment suggests how increasing and indexing Wisconsin's summary settlement and summary assignment small estate values to include estates of \$100,000 or less will allow for more minority and low-income families to qualify as small estates. Further, this Comment also suggests that increasing the value of the small estate under Wis. Stat. 876.01 will aid in reducing the estate-planning racial equity gap.

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INTRODUCTION

Not all wealthy people have an estate plan...maybe it is the word “estate” that makes *estate planning* sound as if someone must be wealthy to need it. Estate planning is not only for the wealthy. While the task to plan can be daunting, people often misunderstand that they do not need to own a lot to still plan for a lot. Just because an estate “isn’t complicated” does not excuse anyone from planning ahead.

Testamentary freedom is the guiding principle behind succession law. Essentially, this freedom allows every individual to distribute their property after death to whomever they chose. It is not just for the wealthy, but it offers advantages to those who utilize it and becomes a detriment to those who are unaware of it.

For generations, communities of color have struggled to increase their wealth. While several factors have contributed to communities of color struggling to increase their wealth, a lack of access to estate planning tools has left minority groups compromised and more likely to die intestate. Rooted deep in American and English history, the concept of estate planning was created for individuals to maintain their wealth over time¹ – to *succeed* in the next generation.²

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¹ LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW*, STANDARD LAW BOOKS 7-9 (2009).

² See generally *id.* at 4 (referring to the concept of “*succession* – a shorthand way of summing up social processes and institutions and their legal echoes, which govern the way property moves from generation to generation and to the living from the dead. ‘*Succession*’ includes the law of wills, the law of intestacy, the law of trusts...”).

Curiously, those who could benefit from it most are the least likely to implement it.³

This Comment argues how adjusting and indexing Wisconsin's summary settlement and summary assignment small estate amounts will aid in increasing minority groups and people of color's generational wealth and attempt to narrow the generational racial equity gap. To address the issue and the solution presented by this Comment, a necessary background of the probate process, the problems with probate, alternatives for the probate process, Wisconsin Statute 867.01 Summary Settlement, Wisconsin Statute 867.02 Summary Assignment, and an overview of systemic racism and estate planning follows.

I. Background

This part will explain what the process of probate entails, probate problems, alternatives to probate, Wisconsin Statute 867 for summary settlement and summary assignment.

A. The Probate Process

The probate process is the official way a deceased person's estate is settled to properly conduct a transfer of assets.⁴ A net estate, an estate, is created when an individual passes away and includes all the property subject to probate administration.⁵ A testator or

³ 2020 *Estate Planning and Wills Study*, CARING.COM, <https://perma.cc/TH4Q-SLR3>, (last visited May 18, 2020) (referencing 4% in 2017 compared to 12% in 2020).

⁴ *The Probate Process: What is Probate?* ABA https://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/the_probate_process/ (last visited May 18, 2023).

⁵ WIS. STAT. § 851.17 (2021).

testatrix, if a woman, is a person who makes a will.⁶ A person who dies without a will or dies with a will that is deemed invalid or revoked, is said to have died *intestate*.⁷ A deceased's belongings that need to be distributed through probate are considered to be in their estate.⁸ Thus, probate entails sorting out all the belongings, debts, and property that the deceased individual held legal title in.⁹

Typically, probate covers everything from settling any outstanding debts and taxes to paying out assets and property to any heirs or beneficiaries as well as any final wishes made by the decedent.¹⁰ Probate does not only protect the decedent's rights to have her final wishes recognized... probate also seeks to protect the rights of the beneficiaries and others who have a protected interest in the estate of the decedent.¹¹ Its purpose is to ensure that the decedent's testamentary freedom is carried out without fraud and in compliance with state law.¹² Further, probate is unique to each state and each state is at liberty to dictate its own probate code or opt into the uniform probate code.¹³

The probate process is governed by the state law of the

⁶ THOMAS CONYNGTON ET AL., *WILLS, ESTATES, AND TRUSTS: A MANUAL OF LAW, ACCOUNTING, AND PROCEDURE, FOR EXECUTORS, ADMINISTRATORS, AND TRUSTEES*, (1921). link.gale.com/apps/doc/F0151997452/MOML?u=waicu_marq&sid=bookmark-MOML&xid=e5e41e9d&pg=39. (last visited May 18, 2023).

⁷ *Id.*

⁸ WIS. STAT. § 851.17 (2021).

⁹ *Legal title*, BLACK'S L. DICTIONARY (2nd ed. 1910), <https://thelawdictionary.org/legal-title/> (explaining how legal title is the "legal ownership of an asset or property specified as a clear and enforceable title.").

¹⁰ *What is probate? When is probate unnecessary? What does a personal representative do?, Who oversees the probate process?*, STATE BAR OF WIS., (last revised Sept. 2016). <https://www.wisbar.org/forpublic/inneedinformation/pages/probate.aspx>.

¹¹ *Id.*

¹² Howard S. Erlanger, *Wisconsin Lawyer October 1998: Wisconsin's New Probate Code*, STATE BAR OF WIS. (Oct. 1, 1998) <https://www.wisbar.org/NewsPublications/Wisconsin-Lawyer/Pages/Article.aspx?Volume=71&Issue=10&ArticleID=20207> (referencing "1) protection against fraud and coercion; and 2) implementation of transferor's intent.").

¹³ *The Probate Process*, *supra* note 4.

decendent's domicile¹⁴ and at times under the supervision of a state court.¹⁵ In Wisconsin, Statutes Chapters 851 through 882 govern probate court actions.¹⁶ Wisconsin has also adopted most of the Universal Probate Code.¹⁷ The process first seeks to follow the decendent's testamentary wishes expressed in a will.¹⁸ However, in the case where no will is properly executed by the decendent then the probate process moves forward under the default laws set by the State of Wisconsin.¹⁹

Wisconsin law has two types of administration, Formal and Informal. Both types of probate administrations require the appointment of a personal representative, also commonly known as an "executor" by the court.²⁰ The main difference between Informal and Formal is that the latter requires the assistance of an attorney.²¹ By contrast, Informal Administration may be carried out without the assistance of an attorney, leaving only the Personal Representative in charge.²² Wisconsin Statute 865.01 clarifies this difference as, "without exercise of continuous supervision by the court."²³ However, an attorney is best suited to determine which administration is best

¹⁴ *Domicile*, BLACK'S L. DICTIONARY (2nd ed. 1910) <https://thelawdictionary.org/domicile/> (last accessed Nov. 21, 2021) (explaining how domicile is "a place in which a man has voluntarily fixed the habitation of himself and family, not for a mere special or temporary purpose but with the present intention of making a permanent home, until some unexpected event shall occur to induce him to adopt some other permanent home.").

¹⁵ Because state laws vary heavily, this Comment will solely focus on the probate process in Wisconsin and how it affects Wisconsin residents from all social economic backgrounds.

¹⁶ WIS. STAT. §§ 851-882 (2021).

¹⁷ 1997 Wis. Act 188, § 233; *see also* Erlanger, *supra* note 12.

¹⁸ *What is Probate?*, *supra* note 10.

¹⁹ WIS. STAT. § 852.01 (2021).

²⁰ WISCONSIN REGISTER IN PROBATE ASSOCIATION, A PERSONAL REPRESENTATIVE'S GUIDE TO INFORMAL ESTATE ADMINISTRATION IN WISCONSIN 3 (2013).

²¹ *Id.*

²² *Id.*

²³ WIS. STAT. § 865.01 (2021).

sued for distributing a decedent's estate.²⁴

The Probate Registrar must grant Informal Administration for the estate before allowing its use.²⁵ The Personal Representative petitions via an application for Informal Administration.²⁶ The Personal Representative works with the Probate Registrar in preparation of the documents required to be filed with the court.²⁷ The following forms are required to start the filing: Application for Informal Administration (PR-1801), Proof of Heirship (PR-1806), Consent to Serve (PR-1807), Statement of Informal Administration (PR-1808), Domiciliary Letters (PR-1810).²⁸ If the signatures of all interested persons have been obtained on the Waiver and Consent form, then a Waiver and Consent (Informal Administration) and Notice to Creditors form will be required.²⁹ If not all the signatures from interested persons have been obtained on the Waiver and Consent form, then a Notice Setting Time to Hear Application and Deadline for Filing Claims (Informal Administration) (PR-1804) will be required instead.³⁰

The Probate Registrar may require follow-up documents depending on local practice and who the heirs/beneficiaries are to complete the informal estate administration process.³¹ The follow-up documents for completion of probate include Proof of Publication, Inventory (Informal and Formal Administration) (PR-1811), Affidavit of Service (Probate)(PR-1817), Estate Receipt (Informal and Formal Administration) (PR-1815), and Statement of Personal

²⁴ WISCONSIN REGISTER IN PROBATE ASSOCIATION, *supra* note 20, at 3 (referencing that it is recommended to consult an attorney before attempting to distribute a foregoing estate administration).

²⁵ *Id.* at 4.

²⁶ *Id.*

²⁷ WISCONSIN REGISTER IN PROBATE ASSOCIATION, *supra* note 20, at 5.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

Representative to Close (Informal Administration) (PR-1816).³² If there is a will, the Registrar must deem whether the document will be entitled or whether it will be denied because statutory requirements have not been met.³³

The above presents a tedious process for those who must undertake it. Obtaining the necessary information for all required documents can be burdensome to those who are unorganized and unprepared. The denial of an Informal Administration application merely means that Formal Administration will be required of the estate and a court will supervise all the estate's property distribution.³⁴

B. Problems with Probate

What should be a seemingly simple process has over time become frustrating and confusing for both attorneys and grieving beneficiaries and heirs. There are problems with the probate process that could cause delays and excess expenses for families that do not necessarily have the fiscal resources to do so.

The main concern with probate is how timely and costly the process can be. While a specialized attorney may aid in speeding up the process, not all estates and or families can afford the specialized legal fees in general. This affects how many estates and families are prepared to undergo probate. The whole process can take up to two years depending on the size of the estate, how quickly the people

³² *Id.*

³³ *Id.* at 4; see also WIS. STAT. § 853.03 (2021) (referencing that "every will, in order to be validly executed, must be in writing and executed with all of the following formalities:

1.The signing of the will as provided under sub. (1), in the conscious presence of the witness.

2.The Testator's implicit or explicit acknowledgement of the testator's signature on the will, in the conscious presence of the witness.

3.The testator's implicit or explicit acknowledgement of the will, in the conscious presence of the witness.).

³⁴ WISCONSIN REGISTER IN PROBATE ASSOCIATION, *supra* note 20, at 4.

involved act, whether the involved parties are cooperative or not, the decedent's prior estate planning efforts, creditors, and the personal representative. Per Wisconsin requirements, the process must be completed between 12-18 months of filing.³⁵

One reason for the delay in time is the four-month waiting period offered to creditors.³⁶ Once a petition for probate is filed, the attorney or personal representative must file a Notice to Creditors and Deadline for Filing Claims.³⁷ During the four-month waiting period, Notices must be published in a local county newspaper usually designated by the court.³⁸ The court designates which newspaper and how many Notices will be published during the Creditor waiting period.³⁹ While intended to protect Creditors,⁴⁰ this waiting period only adds to the mandatory timeframe. For families and estates that need immediate access to home assets or belongings of loved ones, the timeline can be financially burdensome.

1. Wis. Stat. 814.66 governs the fees associated with the process of probate and those most in need of expedited services and low costing fees are typically the least prepared to endure them.⁴¹ Sec. 814.66(1)(a)(2) inventory fee for an estate valued at \$10,000 or less is \$20.⁴² An inventory filing fee for an estate valued at more than \$10,000 is 0.2% of the value of property subject to administration, less encumbrances, liens, or charges.⁴³ An objection to probate of will is subject to a \$20

³⁵ *What is Probate?*, *supra* note 10.

³⁶ WIS. STAT. § 859.01 (2021).

³⁷ WISCONSIN REGISTER IN PROBATE ASSOCIATION, *supra* note 20, at 5.

³⁸ *Id.* at 6.

³⁹ *Id.* at 30.

⁴⁰ *See generally* WIS. STAT. CH. 859 (2021).

⁴¹ WIS. STAT. § 814.66 (2021).

⁴² *Probate Filing Fees*, WIS. REG. IN PROB. ASS'N, <http://www.wriipa.org/probate-fee-schedule.html> (last visited Feb. 22, 2022).

⁴³ *Id.*

filing fee under Sec. 814.66(1)(b)(3)(f).⁴⁴ The list includes other fees that could arise for an estate during the probate administration.⁴⁵

In 1998, the Wisconsin legislature comprehensively revised Chapter 867 of the Wisconsin Statutes providing for seven summary procedures.⁴⁶ Each summary procedure was created for a different scenario produced by an estate. Below consider the seven options for estates that qualify for Informal Administration:

- (1) Summary settlement may be used if an estate is \$50,000 or less and a spouse or one or more minor children survive.
- (2) Summary assignment may be used if an estate is \$50,000 or less and subject to creditors and summary settlement does not apply.
- (3) Transfer by affidavit may be used to transfer assets of \$50,000 or less without court supervision.
- (4) Termination of joint tenancy and life estate are administrative, non-probate methods to designate the survivor of a property interest.
- (5) Summary confirmation of interest in property is used to claim an interest (and terminate a decedent's interest) in the property passing through any of several possible non-probate transfers.
- (6) Determination of descent of property is used if an intestate estate has not been administered within six years of the decedent's death and heirs are uncertain.
- (7) Special administration is used if a designated person is needed to conduct the affairs of an estate in the absence

⁴⁴ WIS. STAT. § 814.66 (2021).

⁴⁵ *Probate Filing Fees*, *supra* note 42.

⁴⁶ WIS. STAT. § 867 (2021).

of a personal representative.⁴⁷

C. Alternatives for Probate Process in Wisconsin

Other non-probate inheritance alternatives include creating a living trust, life insurance policies, 401(k)s, IRAs, other retirement accounts, securities in transfer-on-death accounts, pay-on-death bank accounts, real property held by a transfer-on-death deed or beneficiary deed, joint tenancy real property and survivorship marital property.⁴⁸

A living trust account is created by an estate planning attorney and can hold virtually any tangible or intangible asset of value including but not limited to homes, stocks, cars, and jewelry.⁴⁹ Once the property is transferred to the trust, it is no longer in an individual's estate and does not have to go through probate.⁵⁰ While this is a viable option, only select groups of people have access to and the means to contract the assistance of an expert to form said trust. It is important to note that while a living trust document does avoid the process of probate, merely executing a will does not avoid probate.⁵¹ Executing a will dictates how the deceased would like to distribute his/her property during the process of probate.⁵²

Other alternative options such as life insurance policies, retirement accounts, transfer-on-death accounts, pay-on-death accounts,

⁴⁷ WIS. STAT. § 867.01(1)(b), .02(1), .03(1g), .045(1), .046(1m), .05(1), .07-.21 (2021) (respectively referring to summary settlement, summary assignment, transfer by affidavit, termination of joint tenancy and life estate, administrative joint tenancy or life estate termination for certain property, summary confirmation of interest in property, determination of descent of property and appointment of special administrator).

⁴⁸PATRICK V. ALDERL, ET. AL, ECKHARDT'S WORKBOOK FOR WISCONSIN ESTATE PLANNERS §3.1 (7th ed. 2019).

⁴⁹ *Id.* at § 1.6 Trusts.

⁵⁰ *Id.*

⁵¹ *Id.* at § 1.5 (referencing that "[o]nly property subject to the jurisdiction of the probate court may be disposed of by the will.").

⁵² *What is Probate?*, *supra* note 10.

and property held by a transfer-on-death/beneficiary deed all avoid the probate process simply by individuals being proactive and planning with available resources.⁵³ Individuals need only sign and register the form at the Register of Deeds Office of the country in which real property is located and designate a beneficiary.⁵⁴

Options such as holding property as joint tenants or survivorship marital property are also viable alternatives for individuals that have planned accordingly or are living with a domestic partner or a spouse in Wisconsin (a community property state).⁵⁵

D. Wisconsin Statute 867 Summary Settlement & Summary Assignment

Historically, Wisconsin has authorized summary dispositions of small estates since 1925.⁵⁶ Wisconsin Statute 867.01 allows for a summary settlement of small estates and Wisconsin Statute 867.02 allows for summary assignment of small estates.⁵⁷ The key difference between summary settlement and summary assignment is whether or not a decedent has a surviving spouse.⁵⁸ Summary settlement requires that there is a surviving spouse but summary assignment only requires the decedent have surviving children, heirs, or beneficiaries.⁵⁹ Aside from this key difference, the processes that follow both summaries remain the same.

To qualify as a small estate, an estate must be valued at “less the

⁵³ ECKHARDT’S WORKBOOK, *supra* note 48, at § 3.127; *see also* 2017 Wis. Act 332.

⁵⁴ 2017 Wis. Act 332, § 4 (1)(b)-(c).

⁵⁵ *See generally* WIS. STAT. § 766 (2021-22); *see also*, WIS. STAT. § 766.001 (Wisconsin statutes refer to the adoption of a marital property system rather than a community property system, the legislature clarified that it was their intent that marital property be a form of community property).

⁵⁶ Michael T. Sullivan & Stanley F. Hack, *Streamlining Probate – A Proposal to Expand Summary Settlement*, 51 MARQ. L. REV. 150 (1967)

⁵⁷ WIS. STAT. §§ 867.01-02 (2021-22).

⁵⁸ *Id.*

⁵⁹ *Id.*

amount of the debts for which any property in the estate is security, does not exceed \$50,000 in value and the decedent is survived by a spouse or domestic partner, or one or more minor children or both.”⁶⁰ Qualifying as a small estate means an expedited probate process, for families who are financially compromised it could mean having quicker access to necessary funds.

A principal drawback of summary settlement and summary assignment is that they are only applicable to those estates that meet the qualifying limitations.⁶¹ If the assets of an estate exceed the statutory liabilities, the estate does not qualify and will be required to conduct a full-blown probate.⁶² Additionally, if any other disputes arise among beneficiaries, creditors or other interested parties, a Wisconsin court is required to conduct and supervise the process of probate.⁶³

The importance of summary settlement and summary assignment are that they prioritize family allowances over certain creditor rights and permits families to distribute the estate at hand with minimal court involvement and expenses.⁶⁴ The statutes aim to ensure that families with small estates can reduce the costs of probate by allowing for an expedited version.⁶⁵ As previously mentioned, Wis. Stat. 814.66 governs the filing fees that accompany probate registration.⁶⁶ While the Stat. 814.66 aims to be accommodating of all estates charging only .2 percent of the value of a property subject to administration, families with small estates are most aware that every penny counts.⁶⁷ The other advantage of summary settlement and summary

⁶⁰ WIS. STAT. § 867.01.

⁶¹ WIS. STAT. §§ 867.01-02.

⁶² *Id.*

⁶³ WISCONSIN REGISTER IN PROBATE ASSOCIATION, *supra* note 20, at 7.

⁶⁴ WIS. STAT. §§ 867.01-02.

⁶⁵ WIS. STAT. § 867.01.

⁶⁶ WIS. STAT. § 814.66.

⁶⁷ *Probate Filing Fees, supra* note 42.

assignment is that there is no waiting period to process the estate.⁶⁸ Thus, reducing the turnaround time it takes to gain access of necessary assets for those most in need.

II. Systemic Racism in Estate Planning & Milwaukee

This part gives an overview of systemic racism in estate planning and in Milwaukee. It briefly addresses how lack of estate planning has further impacted Wisconsin people of color's wealth succession over generations.

A. Systemic Racism: Estate Planning

Due to a long history of discrimination and discriminatory practices, minority folk have been subjected to a vicious cycle of systemic racism.⁶⁹ For people of color systemic racism is commonly depicted as "devastating rates of poverty, intense segregation in housing and education, a criminal justice system that arrests, incarcerates and devours communities of color at vastly disproportionate rates."⁷⁰ With respect to wealth, the racial equity disparity is a consequence of historical patterns of socioeconomic disadvantages and racial

⁶⁸ WIS. STAT. § 867.01 (3)(d) (2021); *see also* WIS. STAT. § 867.02 (2)(d) (2021).

⁶⁹ *Estate & Trust Section Learns How Probate and Intestacy Laws Perpetuate the Racial Wealth Gap*, MD. STATE BAR ASS'N (February 5, 2021) <https://www.msba.org/estates-trust-section-learns-how-probate-and-intestacy-laws-perpetuate-the-racial-wealth-gap-and-what-can-be-done-about-it/> (referring to "the chief culprit was centuries of slavery, when Blacks were deprived of the right to own property, and were themselves property used to generate wealth for white.").

⁷⁰ Sean Wilson, *As National Spotlight Shines on Milwaukee, Its History of Systemic Racism Should Be Front and Center*, ACLU WIS., <https://www.aclu-wi.org/en/news/national-spotlight-shines-milwaukee-its-history-systemic-racism-should-be-front-and-center> (last visited May 18, 2023).

discrimination.⁷¹ Additionally, also driven in part by educational attainment or occupation, exclusion from higher paying jobs and the devaluation of jobs held primarily by Black workers.⁷² Many speculate that the sole issue is that people of color have trouble maintaining a steady stream of income.⁷³ While income inequality also exists and plays into the racial equity disparity, minority folk have struggled longer to maintain their wealth than the average white American.⁷⁴

Put differently, wealth and income are not the same. Income can be understood as the water flowing out of the shower head while wealth is the water accumulating at the bottom of the tub for the bath.⁷⁵ Systemic racism inhibits people of color from obtaining opportunities that would allow them to accumulate their tub with wealth.⁷⁶ The Black-white racial wealth disparity is a reflection that society has not been able to and does not afford equality of opportunity to all its members.⁷⁷ Formerly, Black Americans used to be property, now they are trying to own property and many do not know how.⁷⁸

Overall, estate planning has become less prevalent for people of

⁷¹ Colin Gordon, *Race in the Heartland: Equity, Opportunity, and Public Policy in the Midwest*, UNIV. OF IOWA POL'Y PROJECT, 15 (Oct. 2019) <https://files.epi.org/uploads/Race-in-the-Midwest-FINAL-Interactive-1.pdf>.

⁷² *Id.* at 10.

⁷³ *Id.*

⁷⁴ ROBLES, ET AL., *THE COLOR OF WEALTH*, 3 (2006). (Figure 1-1 and Figure 1-2 referencing the median net worth by race and the median financial assets by race).

⁷⁵ HOWARD J. SHERMAN, MICHAEL A. MEEROPOL, PAUL D. SHERMAN, *PRINCIPLES OF MACROECONOMICS: ACTIVIST V. AUSTERITY POLICIES: CHAPTER 11, INCOME AND PROFIT* (2d. ed. 2015).

⁷⁶ *Id.* (referring to how the tub accumulates with water).

⁷⁷ Kristen McIntosh et. al, , *Examining the Black-white wealth gap*, BROOKINGS (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/>.

⁷⁸ *Estate & Trust Section Learns How Probate and Intestacy Laws Perpetuate the Racial Wealth Gap*, *supra* note 69.

all socioeconomic backgrounds.⁷⁹ A growing number of people of color lack the knowledge and resources to obtain a will or any estate plan claiming that they “don’t know how to get a will.”⁸⁰ Since 2017, the number of adult Americans that have a will or other type of estate planning document has decreased by nearly 25%.⁸¹ This study shows that older and even middle-aged adults are less likely to have a will.⁸² Surprisingly, about 60% of people believe that “estate planning is very or somewhat important” however, the number of people who have not thought about whether estate planning is important for them increased by 12% compared to 2019.⁸³

Popular reasons people claim they do not have a will are because they have not gotten around to it, they believe they do not have enough assets to leave anyone, it is too expensive to set up and lastly, they do not know how to obtain a will or living trust.⁸⁴ This is likely to lead people of color, those who could most benefit from maintaining their wealth, to die intestate.⁸⁵ Dying intestate means undergoing probate, further expenses, and potentially frozen assets from a loved one during the grieving process. It can be an unpleasant process and a process that can be planned for and avoided entirely if done correctly. Early planning is extremely important to get ahead of the procrastination and avoid the consequences of not planning ahead; about 50.4% of people in 2019 claimed they had not gotten around to

⁷⁹ Daniel Cobb, *2020 Estate Planning and Wills Study*, CARING.COM (captured May 18, 2020, 9:54 pm), <https://perma.cc/TH4Q-SLR3>.

⁸⁰ *Id.* (referencing that 4% in 2017 compared to 12% in 2020).

⁸¹ Cobb, *supra* note 79.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* (referencing Key Findings graph regarding “Reasons People Don’t Have a Will”).

⁸⁵ *Estate & Trust Section Learns How Probate and Intestacy Laws Perpetuate the Racial Wealth Gap*, *supra* note 69 (referencing “the wealth of Black Americans, who are more than twice as likely as whites to die without a will, is disbursed rather than consolidated in the hands of those it was intended to benefit.”).

planning compared to only 35.7% in 2020.⁸⁶ Procrastinating can mean major consequences for loved ones and other beneficiaries in the event of an unexpected death.

Data demonstrates people's income levels are indicative of whether they are more likely to obtain estate plans.⁸⁷ Surprisingly, about 30.4% of individuals in higher income brackets still felt that they had not planned for an estate plan because they did not believe they had enough assets to leave anyone.⁸⁸ Unsurprisingly, about 50% of people with income under \$40,000 said that they do not have a will or living trust because they do not have enough assets to leave to anyone.⁸⁹ Hispanics are the ethnic group most likely to put off planning for a will or living trust because they have no knowledge of how to start the process.⁹⁰ This could be due to a language barrier, a general lack of knowledge or a firm belief in not having enough to plan for. In 2019 and in 2020, 12% of Blacks and Hispanics, respectively, responded to the survey that they simply did not know how to go about executing a will or living trust.⁹¹

Fortunately, in 2021 the number of young adults planning for their future with a will has increased by 63% since 2020.⁹² The young adults refer to individuals aged between 18-34 years old and for the first time ever, they are more likely to have a will than 35-54-year-olds.⁹³

⁸⁶ Cobb, *supra* note 79.

⁸⁷ Cobb, *supra* note 79 (referencing the Percentage of Respondents Who Have Estate Planning Documents by Income Group graph).

⁸⁸ *Id.*

⁸⁹ *Id.* (referencing the "Income Breakdown of Respondents Who Feel That They Do Not Have Enough Assets to Leave Anyone" graph).

⁹⁰ *Id.*

⁹¹ *Id.* (referencing the "Respondents Who Do Not Know How to Get a Will or Living Trust" graph).

⁹² Rachael Lustbader, *Caring.com's 2023 Wills Survey Finds That 1 in 4 Americans See a Greater Need for an Estate Plan Due to Inflation*, CARING.COM (Jan. 2023) <https://www.caring.com/caregivers/estate-planning/wills-survey/>.

⁹³ *Id.*

B. Systemic Racism: Milwaukee

Even before the COVID-19 crisis, Milwaukee County was leading the ranks, ranking “among the worst in the nation on all kinds of indicators.”⁹⁴ Milwaukee holds the “lowest Black median household income, adjusted for metro area cost-of-living differences, of any of the nation’s 50 largest metropolitan areas.”⁹⁵ With the exception of Minneapolis, Milwaukee holds the second-lowest Black homeownership rate among the nation’s largest metropolitan areas at 27.2 percent.⁹⁶

It is no secret that Milwaukee is one of the most highly segregated metropolitan areas in the nation.⁹⁷ In 2018, the city ranked as the nation’s most racially segregated metropolis⁹⁸, its Black-white segregation index just barely below 80 at 79.4.⁹⁹ Since the 1970s, “the racial segregation of its residents in the U.S. has declined steadily”¹⁰⁰... but somehow, “the median Black household in Milwaukee today is significantly poorer than it was 40 years ago.”¹⁰¹ Milwaukee’s racial equity gap is among the widest of all the nation’s metropolitan areas.¹⁰² According to the Hamilton Project, a racial equity gap exists “in every income group with the exception of the bottom quintile

⁹⁴ J. Carlisle Larsen, *Wisconsin Considered One of the Worst States for Racial Disparities, Report Shows There’s Been Little Improvement Since 2013*, WIS. PUB. RADIO (2017) <https://www.wpr.org/wisconsin-considered-one-worst-states-racial-disparities> (quoting Laura Dresser, Associate Director of COWS).

⁹⁵ Levine, Marc V., *The State of Black Milwaukee in National Perspective: Racial Inequality in the Nation’s 50 Largest Metropolitan Areas*. In *65 Charts and Tables*, UNIV. OF WIS. MILWAUKEE (July 2020). https://dc.uwm.edu/ced_pubs/56

⁹⁶ *Id.* at 5.

⁹⁷ *Id.* at 4.

⁹⁸ *Id.* at 10.

⁹⁹ *Id.* at 14.

¹⁰⁰ *Id.* at 10.

¹⁰¹ *Id.* at 20.

¹⁰² *Id.* at 22.

(23.5 percent Black), where the median net worth is zero for everyone.”¹⁰³ Wisconsin faces an extreme racial disparity problem that must be addressed.

III. Issue

Black Americans and other communities of color continue to suffer by not taking advantage of estate planning opportunities. It is another detriment that inhibits communities of color from attempting to pursue economic upward mobility and even social mobility.¹⁰⁴ Not taking advantage of estate planning opportunities further inhibits families of color to build generational wealth and develop a source of financial stability and independence.

The history behind systemic racism matters because it is the foundation for the wealth inequality that still exists today.¹⁰⁵ This legacy of wealth inequality has been passed down generation-to-generation through unequal inheritances or lack thereof.¹⁰⁶ The succession figure is often disputed but an approximate \$41 trillion is estimated to pass from the deceased to the living before the second half of the twenty-first century alone.¹⁰⁷ In 2020 alone, “Americans inherited approximately \$765 billion in gifts and bequests excluding wealth transfers to spouses and transfers that support minor children.”¹⁰⁸ Many of these inheritances go untaxed by the U.S. government and accounted for roughly 4 percent of annual household

¹⁰³ McIntosh et al., *supra* note 77, at Figure 2.

¹⁰⁴ FRIEDMAN, *supra* note 1, at 4-5 (referencing social impact of inheritance is more than a matter of money... it is also a matter of what money buys and brings about. In our society—and in many societies— money determines social class, social structure.”).

¹⁰⁵ See Robles, *supra* note 74, at 3; see also Friedman, *supra* note 1.

¹⁰⁶ *Id.* at 4 (referencing, “in a rich country, the stock of wealth that turns over as people die, one by one, is staggeringly large.”).

¹⁰⁷ *Id.* (referencing how “an argument ranges among economists as to the exact amounts—all the way from ‘only’ \$10 trillion to the high estimate of \$41 trillion. But no matter who is right, clearly, we are dealing with immense amounts of money.”).

¹⁰⁸ McIntosh et al, *supra* note 77.

income.¹⁰⁹

As previously mentioned, the state of Wisconsin has authorized a summary settlement for small estates since 1925.¹¹⁰ The procedures of a small estates' summary settlement and summary assignment is governed by Wis. Stat. 867.01(3) and Wis. Stat. 867.02(2).¹¹¹ The statutes clarify that to qualify as a small estate, an estate must be valued at "less the amounts of the debts for which any property in the estate is security, does not exceed \$50,000 in value and the decedent is survived by a spouse or domestic partner, or one or more minor children or both."¹¹² Summary settlement and summary assignment for small estates is only applicable to those estates that meet the qualifying limitations.¹¹³

Wisconsin Statute 867 small estates value has not been amended since 1993.¹¹⁴ While the small estate amounts remain unchanged, socioeconomics have evolved over time, changing families' and individuals' financial and economic needs.¹¹⁵ The law has not evolved as the people and economy have. Inflation and an inconsideration of economic inequality (income disparity and wealth succession) must be considered to adjust the small estate values of summary settlement and summary assignment to aid in increasing the generational racial equity gap.

IV. Solution

This Comment proposes that only the statute's small estate value must be amended to increase and indexed to accommodate future families and individuals. The increase in value would allow those

¹⁰⁹ *Id.*

¹¹⁰ See Sullivan & Hack, *supra* note 56.

¹¹¹ WIS. STAT. § 867.01(3) & WIS. STAT. § 867.02 (2).

¹¹² *Id.*

¹¹³ WIS. STAT. § 867.01(1).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

who qualify to opt for a simplified probate, saving them the cost of time and money. In turn, this change would facilitate a passive retention or a generation of wealth for those who need it most. The statute should now read, “an estate must be valued at less the amounts of the debts for which any property in the estate is security, does not exceed \$100,000 in value and the decedent is survived by a spouse or domestic partner, or one or minor children or both.”¹¹⁶

Wisconsin Statute 867 has not been amended to account for inflation since 1993 and the small estates settlement amount needs to be readjusted after almost 30 years.¹¹⁷ Wisconsin legislature needs to amend the statute to increase the values of what qualifies as a small estate for both summary settlement and summary assignment. The statute should increase its estate value to \$100,000¹¹⁸ and be indexed to adjust for inflation.¹¹⁹ Increasing the small estate value to \$100,000 would account for inflation over the past 30 years¹²⁰ and indexing the amount from this point forward would allow for a proper adjustment for future inflation.¹²¹ Merely, adjusting the values to account for the past 30 years is no longer enough. To satisfy the legislature’s intent, the small estate’s value must be indexed for inflation to allow the amount to evolve over time with the economic changes of society.¹²²

¹¹⁶ WIS. STAT. § 867.01.

¹¹⁷ Wisconsin Statute 867 last amended in 1993 and in 2023 will be 30 years without accounting for inflation.

¹¹⁸ Previously valued at \$50,000.

¹¹⁹ *Inflation Indexing* TAX’N FOUND. <https://taxfoundation.org/tax-basics/inflation-indexing/> (last visited May 9, 2023) (referring to “without indexing, inflation can distort tax liability because inflation changes do not affect all [persons] equally and are not in line with legislative intentions.”); see *Policy Brief on Indexing Income Taxes for Inflation: Why It Matters*, INS. ON TAX’N & ECON. POL’Y (August 2011) <https://itep.sfo2.digital-oceanspaces.com/pb8infl.pdf>.

¹²⁰ *CPI Inflation Calculator*, <https://data.bls.gov/cgi-bin/cpi-calc.pl?cost1=50%2C000&year1=199301&year2=202112> (last visited Jan. 29, 2022).

¹²¹ *Policy Brief on Indexing Income*, *supra* note 119.

¹²² *Inflation Indexing*, *supra* note 119.

Increasing the value amount accommodates more low-income families that need protection from undergoing a timely and costly probate. This proposed change creates a default safety net for those who are just above the current small estates amount, who do not have the knowledge to seek out estate plans, who do not have the financial means to seek out estate plans and those who do not believe they have enough to plan.

This is the best solution for attacking Wisconsin's racial equity gap because it is a direct change to the law that will increase a default value for those who are not able to plan ahead, not thinking of planning ahead, or are on the cusp of qualifying. This increase will be able to accommodate and aid more than just the most vulnerable, it will now be able to accommodate those families and individuals that are trying to persevere against the difficult odds that came before them and are still presented to them today. Despite people believing estate planning to be somewhat important¹²³, they are not planning for it, nor do they believe that they have enough to plan for it.¹²⁴

This solution is simple because it only changes a nominal amount term of the statute and aids in an area of the law that has been overlooked in the fight against financial racial disparities. It will also help generate passive waves of wealth for low-income families. The time and cost effects of encompassing more families to expedite their probate process could aid in maintaining day-to-day life. Economists Darrick Hamilton and Sandy Darity have concluded that inheritances and other intergenerational transfers "account for more of the racial wealth gap than any other demographic and socioeconomic indicators."¹²⁵ This demonstrates how wealth goes beyond a family's steady stream of income.¹²⁶ It is primarily generated through

¹²³ Cobb, *supra* note 79.

¹²⁴ Cobb, *supra* note 79.

¹²⁵ Darrick Hamilton & William Darity, Jr., *Can 'Baby Bonds' Eliminate the Racial Wealth Gap in Putative Post-Racial America?*, 37 REV. OF BLACK POL. ECON. 3-4, 207-216 (Jan. 2010).

¹²⁶ Sherman, *supra* note 75.

generations in unequal inheritances and interfamily transfers creating cushions of wealth for some families. In fact, an inheritance in white families is associated with a \$104,000 increase in median wealth but this translates to a mere \$4,000 increase among Black families.¹²⁷ For years, White families have been inheriting their wealth from generations of privilege, indicating that the racial equity gap is historical and has persisted over generations. Meanwhile, Black families that are successful in climbing the wealth ladder are more likely than their white counterparts to be called upon to assist other struggling family members and neighbors.¹²⁸

As previously mentioned, income may help generate wealth, but wealth and income are not the same,¹²⁹ especially because Wisconsin has income tax but no estate tax.¹³⁰ Some examples of inherited property that would not be subject to income tax include “stock, bank accounts, life insurance proceeds, and real property.”¹³¹

Increasing the small estate value from the current \$50,000 to this Comment’s proposed \$100,000 would generate several positives. Firstly, more low-income families would be able to take advantage of qualifying for a “small estate”. Qualifying as a smaller estate means a speedier and more simplified probate process. Less time and money are involved thus promoting the intergenerational transfer or inheritance for the family and loved ones. Inheriting a family car or a family home makes all the difference for vulnerable families that cannot afford or do not think about planning ahead. It can mean better resources for food, housing and education. For low-income families with less than \$25,000, every penny counts as well as every

¹²⁷ Lily L. Batchelder, *Leveling the Playing Field between Inherited Income and Income from Work through an Inheritance Tax*, N.Y. UNIV. L. SCH., 47 (2020) https://www.hamiltonproject.org/assets/files/Batchelder_LO_FINAL.pdf.

¹²⁸ Hamilton & Darity, *supra* note 125.

¹²⁹ Sherman, *supra* note 75.

¹³⁰ *Estates, Trusts, Fiduciaries*, WIS. DEPT OF REVENUE, <https://www.revenue.wi.gov/Pages/FAQS/ise-estate.aspx> (last visited May 16, 2023).

¹³¹ *Id.*

hour because every hour is \$7.25 (minimum wage).¹³²

V. Alternatives

Over the years, government and public officials have attempted to create programs that offer reparations towards minority communities.¹³³ While many programs have been successful in administering aid and necessities to low-income families, none do much to promote or generate any sort of wealth succession between generations.

Other thoughtful literature and comments have offered different statutory solutions such as revising the ABA's Model Rule on soliciting legal services.¹³⁴ This option addresses the estate planning crisis by allowing attorneys to seek out clients and solicit services to create an estate plan for them. While a seemingly valid solution, attempting to educate and seek out clients by knocking on everyone's door might not solve the problem in time. This solution does not create a default, nor a safety net embedded within the body of law. Rather, it shifts the burden to attorneys to seek out more workload and clients. Whether there are enough estate planning attorneys to carry out this burden and workload is uncertain and out of the scope of this Comment.

Other economists have proposed tax policy solutions. Well-designed taxes on inheritances, reforms to capital income taxation, and even taxes on wealth could be solutions in the foreseeable future for

¹³² *Wisconsin's Current Minimum Wage Rates*, WIS. GOV. DEP'T WORKFORCE DEVELOP. (Jul. 24, 2009) <https://dwd.wisconsin.gov/er/laborstandards/minimumwage.htm>. See generally, ROBLES, ET AL., *THE COLOR OF WEALTH*, 4 (2006) (referring to "[f]or every dollar owned by the average white family in the United States, the average family of color has less than one dime.").

¹³³ Programs such as WHEDA, Obama's CARES Act, State of Wisconsin's HAF, DSPS's Minority Health Program, HUD's Homeownership Assistance program, SNAP (food stamp assistance), LIHEAP (Low Income Home Energy Assistance Program).

¹³⁴ Diane J. Klein, *Knocking On Heaven's Door: Closing The Racial Estate-Planning Gap By Ending The Ban On Live Person-To-Person Solicitation*, 44 J. LEGAL PROF. 3 (2019).

Wisconsin. These taxes could even be more useful if their generated revenues could be invested into programs that provide low-income children with community resources or educational scholarships to develop their economic success. While tax reforms could be a part of the solution in the future, achieving their desired reform is more complex. Tax complexity is demonstrated through the fact that gift tax and the generation skipping tax (GST) were supposed to account for or address the omission of inheritance tax.¹³⁵

The problem with introducing more tax reform is increasing the complexity of the tax code. There is no guarantee that the wealthy, those intentionally targeted, will be impacted by the new reform and that the tax reform will indeed generate the intended revenue.¹³⁶ Once implemented return of revenue can take years. This solution does not contribute towards aiding the estate planning crisis and encouraging people of color to create estate plans and plan for their family's wealth succession after death.

While increasing estate planning clientele or introducing tax reforms are both viable options and could very well contribute to addressing the racial equity disparity in Wisconsin, neither is the best solution. Increasing the small estate value will account for inflation that has not been accounted for in over 30 years. Essentially, it will increase the value of the Wisconsinites it is intended to protect. While inflation has been unaccounted for during the past 30 years, many low-income or even mid-range families on the cusp of developing and generating wealth could likely have benefitted from a simple probate. This increase will create a default statutory provision that encompasses more families that may still be vulnerable and in need of developing a cushion of wealth as they attempt to combat the racial equity gap.

¹³⁵ Batchelder, *supra* note 127, at 44.

¹³⁶ KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON LAW AND ITS STUDY*, 4-5 (1930) (referencing the *rule of law*, a jurisprudential idea of law on paper versus law in action. "Judges say they are bound by, "what [judges] say and compare[d] with what they do.").

CONCLUSION

Just because people feel like there isn't enough water at the bottom of their tub of wealth does not excuse them from creating an estate plan. In fact, maybe the lack of accumulation at the bottom is a better indicator signaling they need an estate plan to retain what they do have. Because attorneys do not have the capability of preparing an estate plan for everyone, a statutory solution is needed.

It is time to implement a more direct statutory solution by increasing the small estate's value amount and allowing for an index of the value to address the racial equity problem that troubles Wisconsin. Racial disparities can no longer be treated as merely political issues by debating policies and programs. Wisconsin's racial disparity issue is extreme and must be treated with direct statutory actions that create a default law to protect those individuals and families in vulnerable positions.¹³⁷ Increasing the small estate's value would allow for more low-income families to take advantage of Wisconsin's 867 statute. If Wisconsin cannot fix its lack of estate planning for people of color, then it will have to settle to increase its summary settlement and summary assignment of small estate amounts to combat the racial equity gap.

¹³⁷ *Wisconsin's Extreme Racial Disparity*, COWS, 1 (Jan. 2017) <https://cows.org/wp-content/uploads/sites/1368/2020/04/2017-Wisconsin-Extreme-Racial-Disparity-2017.pdf>.