THE CONNECTION BETWEEN UNINTENTIONAL INTESTACY AND URBAN POVERTY

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American inheritance law provides sweeping protections for testamentary freedom, a legal doctrine that grants the owner of property during life the power to control its disposition at death. Americans strongly favor testamentary freedom,[2] a preference reflecting deeply engrained attitudes about ownership and property rights.[3] When a person dies without a will, however, testamentary freedom lapses, and property is distributed to heirs determined by statutory rules of intestacy. Intestacy statutes generally reflect the probable intent of the typical decedent and distribute property to surviving family members roughly in the following order: spouse, descendants, parents, descendants of parents, grandparents, descendants of grandparents, and (in some states) stepchildren.[4]

Although popular domestically, the principle of testamentary freedom is not shared universally. Indeed, our views about testamentary freedom distinguish American inheritance law from foreign countries that severely constrain the power to control the transmission of property at death. For example, civil law countries like France maintain a system of forced heirship, which prohibits parents from disinheriting their children.[5] The civil law inheritance

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2. Mary L. Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 3 AM. B. FOUND. RES. J. 321, 335-36 (1978).

3. RALPH C. BRASHIER, INHERITANCE LAW AND THE EVOLVING FAMILY 109 (2004) (noting that the freedom of testation "remains ingrained in the American psyche" and "[t]here is little reason to believe that the notion will change substantially in the near future").

4. *See, e.g.*, UNIF. PROBATE CODE §§ 2-102; 2-103; N.J. STAT. ANN. § 3B:5-4 (West 2009).

5. 1 JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING §12.02 (3d ed. 2006).

regime traces historical roots to the ancient Roman tradition of treating property as owned by the family unit rather than the individual.[6] Testamentary freedom, therefore, is somewhat unique when viewed from a comparative law perspective.

The actual number of Americans who exercise testamentary freedom, however, reveals a more complex picture of inheritance law. Inheritance patterns in the United States are starkly inconsistent with its valued tradition of testamentary freedom. When asked, most Americans cannot correctly identify their intestate heirs and say they plan to execute a will.[7] But when observed, most Americans die without one.[8] This suggests that most individuals invoke the default rules of heirship unintentionally, rather than by deliberately opting into intestacy. Thus, while American inheritance law does not impose a system of forced heirship as in France, pervasive avoidance of estate planning yields a de facto heirship regime in the United States.

The standard explanation for unintended intestacy is that the will-making process requires contemplating death, and humans instinctively avoid confronting their own mortality. But this seemingly intuitive explanation is disproved by the widespread use of nontestamentary transfers, such as life insurance, joint bank and brokerage accounts, and contractual death beneficiary designations, all of which require the individual to think about the disposition of property at death.[9] I have argued that most Americans lack a will because the will-making process is too obscure, complex, and expensive, not because they fear death or agree with the default rules of heirship.[10] In most cases, failure to obtain a will does not reflect an intent to die without one. As the twelfth century French abbot Saint Bernard of Clairvaux might have warned, the road to intestacy is paved with good intentions.

A high rate of inadvertent intestacy exacerbates numerous socioeconomic problems and most directly impacts disinherited

6. 2 PATRICK MAC CHOMBAICH DE COLQUHOUN, A SUMMARY OF THE ROMAN CIVIL LAW, ILLUSTRATED BY COMMENTARIES ON AND PARALLELS FROM THE MOSAIC, CANON, MOHAMMEDAN, ENGLISH, AND FOREIGN LAW § 1188 (1851).

7. Fellows et al., *supra* note 2, at 340.

8. *See, e.g.*, WILLIAM J. TURNIER & GRAYSON M.P. MCCOUCH, MATERIALS ON FAMILY WEALTH MANAGEMENT 91 (2005) ("Studies indicated that a majority of individuals die intestate . . . .").

9. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984) ("The law of wills and the rules of descent no longer govern succession to most of the property of most decedents.").

10. Reid K. Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877 (2012).

individuals for whom the decedent intended a testamentary gift.[11] While the default rules of heirship generally capture majoritarian preferences, intestacy yields the wrong outcome for nontraditional families in which the decedent's intended beneficiaries are not related by blood, marriage, or adoption.[12] The 2010 Census reported a large and growing minority of Americans living in nontraditional family households, many of whom are opposite-sex, unmarried partners.[13] Since intestacy rules embody traditional notions of family life, they fail to implement probable intent when the decedent's closest relations fall outside presumptive norms of kinship.

Unintended intestacy is particularly problematic when the decedent owns real property at death because intestacy often leads to property fractionation, a phenomenon that came to prominence in *Hodel v. Irving*, decided by the Supreme Court in 1987.[14] In *Hodel*, Native American landowners challenged the Indian Land Consolidation Act of 1983, a federal law that abolished the power to transmit jointly-owned fractional land interests at death on tribal reservations.[15] Instead of passing by will or intestacy, this property would escheat to the tribe.[16]

Congress enacted the Land Consolidation Act after a long and troubled history of tribal land allotments. In 1889, Congress allotted large plots of tribal land to individual Native American owners, in part to encourage assimilation from nomadic life to agrarian settlement. Some Native Americans received 320 acres; others received 160 acres. To prevent "improvident disposition" to white settlers, the legislation required allotted lands be held in trust.[17] Upon the death of the original allottee, title would descend by intestacy to the decedent's statutory heirs. Most decedents had multiple heirs, so as allotted land passed from one generation to the next, multiple heirs would acquire title as tenants in common.[18]

11. *See* Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 465-68 (2010).

12. Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 206-08 (2001); *see* Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 31-54 (2010) (mentioning legal approaches to address the issue of nontraditional families).

13. U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2011, at tbl.FG10, *available at* http://www.census.gov/population/www/socdemo/hh-fam/cps2011.html.

14. Hodel v. Irving, 481 U.S. 704 (1987).

15. *Id.* at 707 (citing 28 U.S.C. §§ 2202, 2206, 2209 (2006)).

16. *Id.*

17. *Id.*

18. Tenancy in common is a form of communal ownership that treats possessory and economic rights differently. With respect to possession, each tenant has the right

Property fractionation refers to the conveyance of title to multiple tenants in common, each holding a fractional economic interest and an undivided right to use and possess the whole parcel.

For the Native American allottees, generations of intestate distribution resulted in parcels owned by dozens, and in some cases, hundreds of co-tenants.[19] This form of communal ownership is highly inefficient because coordination among co-owners is impractical and the transaction costs of a partition sale are high. Economists describe this problem as the Tragedy of the Anticommons, wherein the lack of cooperation among co-owners causes underuse of the property, which, in turn, impairs economic value.[20]

Congress attempted to solve the problem by requiring that small fractional economic interests escheat to the tribe at death. Over time, escheat would consolidate the fractional interests, reduce concurrent ownership, and eventually vest the tribe with sole title to the allotted lands. But this solution deprived current fractional owners the power to transmit their interests by will or intestacy. The Supreme Court held this deprivation violated the Fifth Amendment Takings Clause because the power to control property at death is a valuable right, so it cannot be taken away without just compensation.[21] *Hodel* now stands for the proposition that testamentary freedom is protected as a constitutional right.

The problem of property fractionation persists outside the allotted land context, manifesting adverse socioeconomic effects from even a single generation of property succession. Consider the following illustration:

Facts:

A New Jersey intestate decedent (age 80) leaves an estate worth $100,000. He is survived by his wife (age 80) and two children from a prior marriage (ages 40 and 45). The sole asset in the estate is the decedent's residence, where the widow continues to reside. Assume there are no debts or probate expenses. Assume further that, had

to enter, occupy, and use the entire premises. *See* Swartzbaugh v. Sampson, 54 P.2d 73, 75 (1936) ("Each tenant owns an equal interest in all of the fee, and each has an equal right to possession of the whole."). Economically, however, each tenant's share is based on her proportionate contribution toward the property's acquisition. A tenancy in common created by an intestate distribution entitles all heirs to possession, but upon sale of the property, proceeds would be divided according to each heir's intestate share.

19. *Hodel*, 481 U.S. at 707.

20. B. James Deaton, *Intestate Succession and Heir Property: Implications for Future Research on the Persistence of Poverty in Central Appalachia*, 41 J. ECON. ISSUES 927, 935 (2009).

21. *Hodel*, 481 U.S. at 717.

the decedent executed a will, he would have left the residence to his widow for life, and upon her death, outright to his children.

Result:

Intestate distribution would render the widow and children co-owners of the house immediately upon the decedent's death. The children would have the right to enter, occupy, and use the property. If the property were partitioned by judicial order and sold, proceeds would be allocated by shares determined by intestacy. The widow would receive 75%; the two children would each receive 12.5%.[22]

Given the widow-stepchild relationship, the decedent's heirs will inevitably find this arrangement unsatisfactory in both the short- and long-term. In the short-term, the parties will disagree over how to use or occupy the house. The widow, who already lives in the house, will want to continue residing there. Since her stepchildren have a right to enter and occupy the premises, she will want to buy out their shares to acquire sole title. Although she could do so by taking out a mortgage, this would only be feasible if she were able to afford the monthly payments. An 80-year old widow on a fixed income without other assets is unlikely to qualify for financing. The stepchildren, who do not reside in the house, will prefer to terminate the tenancy, partition the estate, and sell the property for cash. The widow, however, will oppose a partition sale if her share of the proceeds is inadequate to cover suitable alternative housing. In the long-term, the problems associated with the current arrangement will amplify when the property interests fractionate. The widow's heirs or beneficiaries are unlikely to be the stepchildren, so the number of co-owners will increase and further complicate the problem of coordinating shared ownership. Co-ownership inherently creates this sort of friction, and absent amicable coordination, resolution becomes expensive and time-consuming. The parties may be unaware that delaying probate and partition exacerbates the costs associated with property fractionation. Of course, the competing

22. When a decedent is survived by a surviving spouse and descendants who do not belong to the surviving spouse, the surviving spouse receives the first 25%, but not less than $50,000 nor more than $200,000, plus one-half of the balance of the intestate estate. N.J. STAT. ANN. § 3B:5-3 (West 2009). The rest passes to the decedent's surviving descendants by representation. N.J. STAT. ANN. § 3B:5-4 (West Supp. 2011). The family exemption statute applies only to personal property. N.J. STAT. ANN. § 3B:16-5. Here, if the decedent's residence is worth $100,000, then the surviving spouse receives $75,000: $50,000 (the first 25%, but not less than $50,000 nor more than $200,000) + $25,000 (one-half the balance of the intestate estate). The two surviving children split the remaining $25,000. This allocation assumes the decedent's residence is the only asset in the estate and there are no creditor claims or administrative expenses.

interests of uncooperative co-tenants could be resolved in court, but the cost of litigation would quickly erode the value of the asset in dispute. The entire problem could have been avoided by the execution of a will.

Property fractionation and unintended intestacy are likely most prevalent in poor and lower middle class populations where intestacy rates are high and the decedent's largest asset is typically the personal residence.[23] This raises serious questions of fairness given that intestate decedents disproportionately belong to historically disadvantaged groups, such as minorities, the poor, women, and individuals with low levels of education.[24] Researchers have documented the problem in poor rural populations, but less attention has been paid to poor urban populations. This is unfortunate because the adverse socioeconomic effects of unintended intestacy, such as property fractionation, may contribute to and perpetuate the problem of poverty in the United States.[25] Empirical evidence of unintended intestacy and property fractionation in poor urban populations would underscore the need for estate planning or, possibly, a systematic approach for helping individuals opt out of intestacy.

Newark, New Jersey, would be the perfect laboratory to study the existence and ramifications of unintended intestacy and property fractionation in a population sample of poor, urban decedents. In Newark, the median household income of $35,659 lags substantially behind the national average of $51,914 and the state average of $69,811.[26] Likewise, Newark's poverty rate of 25% significantly exceeds the national rate of 13.8% and the state rate of 9.1%.[27] Newark has a low rate of homeownership, 25.3%, but a relatively high median value of owner-occupied housing units, $287,800.[28]

23. Deaton, *supra* note 20, at 930; *see* Strand, *supra* note 11, at 460 ("[F]or the three middle quintiles of Americans—those who lie between the top 20% and the bottom 20% in wealth—the principal residence is between one-half and two-thirds of total net worth.").

24. Heather K. Way, *Informal Homeownership in the United States and the Law*, 29 ST. LOUIS U. PUB. L. REV. 113, 159 (2009).

25. *Id.* at 152.

26. U.S. CENSUS BUREAU, STATE & COUNTY QUICK FACTS, http://quickfacts.census.gov/qfd/states/34/3451000.html (last updated Jan. 12, 2012) [hereinafter NEWARK, N.J. CENSUS INFO]; U.S. Census Bureau, State & County Quick Facts, http://quickfacts.census.goq/qfd/states/00000.html (last updated Jan. 12, 2012) [hereinafter NAT'L CENSUS INFO]; CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010, at 13 (2011), http://www.census.gov/prod/2011pubs/p60-239.pdf.

27. NEWARK, N.J. CENSUS INFO, *supra* note 26; NAT'L CENSUS INFO, *supra* note 26; DENAVAS-WALT, *supra* note 26, at 16.

28. NEWARK, N.J. CENSUS INFO, *supra* note 26.

Given Newark's demographics, the rate of unintended intestacy is likely high and a significant portion of those intestate estates are likely to contain valuable real property. This suggests that the problem of property fractionation could be quite prevalent in Newark.

Empirical research could reveal whether property fractionation is, in fact, a problem in urban poor populations, and identification of the problem could lead to potential solutions. A moderately-sized sample of probate files would be necessary to conduct an empirical study of intestacy and property fractionation. A sample of probate files would allow for (1) an estimation of the rate of probate administration (versus unprobated estates); (2) a rough approximation of the intestacy rate; (3) data measuring the delay between the decedent's death and probate administration; (4) identification of partition requests as part of the probate administration; and (5) study of contested probate administrations. This data would help shed light on the problem of property fractionation and legal issues that arise from unintended intestacy.

Unfortunately, however, a Newark intestacy study will have to wait. Probate files are a matter of public record available for inspection and duplication, but a state statute allows the Surrogate's Court to impose a fee of $5.00 per page for every public record produced.[29] By contrast, the New Jersey Open Public Records Act requires that all other public records on file with the state be produced for $0.05 per page.[30] Given current research funding levels, a duplication fee of $5.00 per page would render the research project cost prohibitive. No exceptions are made, even for academic research conducted by another arm of state government. The Surrogate's Court duplication fee was challenged as unconstitutional under the New Jersey Constitution, and while the Appellate Division expressed approval for the petitioner's argument, the case was dismissed on other grounds.[31]

On a positive note, the Essex County Surrogate and personnel have been extremely cooperative, courteous, professional, and generous with their time. Several discussions with court personnel yielded fascinating anecdotal information about local inheritance patterns. For example, roughly half of all probated wills are holographic.[32] By contrast, inheritance scholars believe that

29. N.J. STAT. ANN. § 22A:2-30 (West Supp. 2011).

30. New Jersey Open Public Records Act (OPRA), N.J. STAT. ANN. §§ 47:1A-1 to 47:1A-13 (West Supp. 2011).

31. *See* Goldsmith v. Camden Cnty. Surrogate's Office, 975 A.2d 459, 463-64 (N.J. Super. Ct. App. Div. 2009).

32. Interview with Tara M. Wilson, Superior Court Clerk, Surrogate's Court of

holographic wills are relatively uncommon.[33] This single fact alone raises a host of questions: Why are so many wills probated in Essex County holographic? Are holographic wills well-drafted or rife with mistakes, ambiguities, and omissions, as inheritance law scholars and practitioners often claim? Do holographic wills disproportionately belong to Newark decedents rather than suburban decedents from other parts of Essex County? Are holographic wills an antidote for property fractionation?

Most people think of estate planning and testamentary freedom as issues for the rich and middle class, but there is much to learn about inheritance patterns in lower economic populations. For individuals near or below the poverty line, the unexpected loss of an anticipated inheritance by an intended beneficiary can cause devastating social and economic consequences. This is especially true for intended beneficiaries forced to vacate the decedent's home. Comprehending inheritance patterns among the urban poor would bring us one step closer toward understanding the complex problem of poverty. The scant amount of existing empirical research is, by no means, a reflection of the importance of intestacy scholarship.

Essex Cnty., in Newark, N.J. (Mar. 9, 2012).

33. LAWRENCE FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 65 (2009) (citation omitted) (noting that a 1964 study of wills in San Bernardino County, California, revealed that 10% of wills were holographic).