Injecting Class into Trusts and Estates

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Naomi Cahn & Amy Ziettlow, *"Making Things Fair": An Empirical Study of How People Approach the Wealth Transmission System*, 22 **Elder L. J.** 325 (2015).

Trusts and estates scholarship typically focuses on the rich. This is not surprising, as the field primarily concerns itself with wealth transmission, and the wealthy are the ones who have wealth to transmit. In *Making Things Fair*, Professor Naomi Cahn and Amy Ziettlow inject class into the field by examining how lower-income individuals understand the wealth transmission process. This is a valuable and much-needed intervention, both for its empirical methodology and its focus on the lived experiences of lower-income Americans.

This article contributes on three fronts. The first contribution is empirical. The investigators recruited study participants by searching Baton Rouge newspaper obituaries, from which they compiled the names of children and step-children of recently deceased individuals under the age of 70 within a 7-month period in 2011. Of these 2,700 individuals, they gathered reliable contact information for 1,500 of them, and invited these to participate in the study by snail mail, email, and telephone. Their final sample size was sixty-three, appropriate to a qualitative and exploratory study of this type. The study used semi-structured interviews to delve into family dynamics, the dying process, and wealth transmission.

This qualitative methodology allows the authors to probe into how people experience the wealth transmission process, and the data serve to confirm two maxims of trusts and estates scholarship and practice: advance planning is good, and the law must keep up with changing family structures. On these two points, it appears that there is little difference between lower-income and upper-income families. Other themes emerge, however, that are less emphasized in the scholarship. For instance, for many families money is not necessarily the sole or primary driver of the post-death property division process. Objects that have sentimental worth because of the memories they hold, such as an old jacket or truck, may become centrally important in spite of their lack of economic value. This type of insight provides a nice contrast with the attention-grabbing estate battles that appear in the news headlines. Too often those stories focus on quarrels by distant relatives over large estates, such as those of the reclusive copper heiress Huguette Clark or the anonymous street photographer Vivian Maier.

The most important empirical finding, however, is how absent the law is from the property distribution process for lower-income Americans. As a matter of knowledge, people do not know the law, even though they might think they do. As a matter of planning, people do not take advantage of willmaking, the primary way in which the law allows people to sort out their affairs in advance. Even as a matter of actual property distribution, people often settle things informally without any active use of the law.

The authors, however, do not stop at reporting their empirical findings. The article's second contribution is theoretical, attempting to understand more abstractly the role of law at death. Cahn and Ziettlow posit four possibilities, drawing on existing literature on the functions of law. First, the law could be seemingly irrelevant, just as it was in Robert Ellickson's famous study of communal norms among sheep ranchers. Second, the law could just be a series of default rules with legal override mechanisms, implemented by the judiciary. Third, the law might serve a channeling function, reinforcing social

norms. Fourth, the law could be a strategic resource, deployed as needed in situations of conflict. Cahn and Ziettlow found evidence for all of these understandings of the law in their data. As each family represented a separate "microcosmic community of norms," the law was used differently by its constituent members based on disparate needs and goals.

The article's third contribution is in the grab-bag of legal reforms it suggests. The authors note that in their interviews they did not see avoidance of planning due to fear of death or the complexities of preparing a will. Instead, study participants simply seemed ignorant of the importance of planning. Thus, they argue for making planning easier by presenting more opportunities for it, accompanied by information to help individuals through the process. The primarily example provided is statutory form wills. These would be offered at the various points in time when people interact with the government (tax time, renewing a driver's license, registering to vote) or experience crucial life events (marriage/divorce, birth of children).

In addition to this soft manipulation of choice architecture, Cahn and Ziettlow suggest a host of changes in substantive inheritance doctrines, based on the factual scenarios they encountered in their interviews. For example, they endorse functional parenthood for inheritance purposes. This is to address non-adopted step-children, who they see as deserving some form of inheritance despite being outside children. In addition, they would weaken the presumption of revocation upon divorce for probate and nonprobate assets, perhaps limiting it only to stale provisions that are dated ten years prior to divorce or death. This speaks to the situation they found in several interviews of ex-spouses reentering the picture during the dying process, providing caregiving services and supporting an adult child. The authors reason that the decedent may want to thank such ex-spouses for this work, despite the divorce.

Lastly, the authors would enact reforms to protect nonprobate assets that might be particularly important after death but also particularly vulnerable to loss. They would require greater and recurring disclosures about the nature of life insurance, protections against lapse of said policies, and more stringent protections against using life insurance as the basis for a loan. For other nonprobate assets, such as retirement accounts, the authors focus on having clear and standardized beneficiary forms, which might list beneficiaries by relationship rather than by name, to allow for flexible updating once family changes occur.

Because of its multiple contributions, *Making Things Fair* is valuable on several fronts. The empirical contribution diversifies trusts and estates scholarship, which lacks a robust empirical tradition. At the same time, it helpfully highlights the blind spot of class in the field. The theoretical contribution is more modest, providing a useful compilation of legal theories and applying them to the situation of death in an empirically informed way. The law reform ideas are intriguing, and many of them may be worth pursuing. Some of the reforms, however, may need a stronger empirical basis than this study provides before they are adopted. This, of course, only points to the need for more empirical scholarship! Thus, this article has succeeded in beginning a conversation about what we need to know before we can make things fair.

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