On the Way To and From Marriage

Author : Solangel Maldonado

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Adam J. Hirsch, *Inheritance on the Fringes of Marriage*, 2018 **U. Ill. L. Rev.** 235.

Imagine that you are engaged to be married but die shortly before the wedding. You do not have a will. Should your fiancé be entitled to a share of your estate?

Imagine instead that shortly after your engagement, you execute a will giving your fiancé half of your estate. You end the relationship before walking down the aisle but never change your will. You are later killed in an accident. Should your ex-fiancé take under the will?

Imagine that you married your fiancé but later filed for divorce. You die while the divorce is still pending, and you do not have a will. Should your divorcing spouse be entitled to a share of your estate? What if you executed a will after you married, and it gives your entire estate to your spouse? If you did not update the will after filing for divorce, should your divorcing spouse take under the will?

What if you and your spouse permanently separated but never filed for divorce, and then you are killed in an accident? Should your permanently separated spouse be entitled to a share of your estate?

The legal answers to these questions hinge on marriage. A fiancé is not an intestate heir and the doctrine of implied revocation of bequests upon divorce does not apply to broken engagements or spouses who never divorced. In the majority of states, a divorcing or permanently separated spouse has the same rights as a spouse who has not filed for divorce and is not separated from her spouse. Should the law, however, draw a line between the almost married and those who are married and between the almost divorced (or de facto divorced) and those who are legally divorced? Does the law adequately reflect the donative intent of individuals on their way to marriage and on their way from it?

Professor Adam J. Hirsch raises these scenarios in his article, *Inheritance on the Fringes of Marriage*, in which he surveys the testamentary preferences of engaged individuals, divorcing spouses, and permanently separated spouses. While I do not agree with all of his policy proposals, his findings are fascinating and challenge us to think about how the law could be reformed to reflect the predominant preferences of individuals on the fringes of marriage.

First, the overwhelming majority (79.5%) of the 334 engaged individuals he surveyed reported that if they died before their wedding day, they would want their fiancé to receive at least half of their estate. Many (36.2%) wanted their fiancé to take it all. While the results varied, depending on whether the respondent had children or not, the difference was modest. Eighty-two percent of engaged individuals with descendants as compared to 77.8% of those without descendants preferred to give at least half of their estate to their fiancé. This modest difference (less than five percentage points) might seem counterintuitive until one considers, as Professor Hirsch acknowledges, that some of the respondents with descendants may have had children in common with their fiancé — a factor that the study did not control for. As such, these respondents likely expected that their fiancé would take care of their children.

Although the differences between engaged individuals with children and those without may not be as

significant as one might expect, the gender differences were substantial. Professor Hirsch's findings suggest that men are either more generous or more in love with their fiancés than are women. Almost 91% of male respondents as compared to 75% of female respondents reported that they would want their fiancé to receive at least half of their estate if they die before the wedding. Although the majority of respondents prefer that their fiancé take at least half of their estate, the study suggests that wealth, as measured by whether one has a will or not, affects one's preferences. Slightly fewer intestate respondents (77.3%), whom studies have shown tend to be less affluent than individuals with a will, expressed such a preference as compared to 79.3% of respondents with a will. Respondents with living trusts, who tend to be even more affluent, were most likely (81.5%) to want their fiancé to take at least half of their estate.

This data suggests that the law's failure to recognize a fiancé as an intestate heir is at odds with the donative intent of the majority of engaged individuals. Professor Hirsch proposes—and I agree—that lawmakers should create a share for the surviving fiancé of an intestate decedent and a similar share for the pretermitted fiancé of a testator or settlor who executed a will or living trust before the engagement. Admittedly, while the existence of a marriage is often easy to verify as there is usually an official document to prove it, the same is not true of engagements. Due to the evidentiary challenges of proving an engagement that the decedent's family and friends were not aware of and courts' reluctance to investigate the decedent's relationship "status" with the claimant, Professor Hirsch wisely proposes limiting the surviving fiancé's share to cases in which the couple had announced their engagement.

Cases involving testamentary bequests to a fiancé followed by a broken engagement present difficult questions and unclear answers. Given the small numbers of individuals who have made bequests to a fiancé and then broken up before the wedding day, Professor Hirsch did not empirically study the preferences of testators or settlors in these situations, but he argues that the law that applies in these cases is troubling. If a testator or settlor dies without revoking a bequest to an ex-fiancé, the ex is entitled to take the bequest. Professor Hirsch argues that broken engagements are traumatic or, at minimum, distracting experiences, and testators or settlors may forget to update their estate plan after the break-up. He suggests that lawmakers consider extending the doctrine of implied revocation of bequests upon divorce to broken engagements. I, however, am not sure I agree. In the absence of empirical evidence of the preferences of testators and settlors in these situations, I find it difficult to support extension of a doctrine that may be problematic even when applied to divorcing individuals (as shown below). As Professor Hirsch acknowledges, some testators or settlors may not want to revoke a bequest to a fiancé even after they breakup and their wishes will likely depend on the reasons for the breakup, the level of acrimony, if any, and their relationship after the breakup.

Professor Hirsch's empirical study of divorcing spouses—those who have filed for divorce but do not yet have a divorce decree—is particularly illuminating. He polled 333 individuals in the middle of a divorce and found that 40.8% wished to leave at least half of their estate to their divorcing spouse if they died while the divorce was pending. Another 21.3% wished to leave *something* (but less than half of their estate) to their divorcing spouse, but only 37.9% wished to disinherit their divorcing spouse completely. Respondents' preferences, however, differed significantly based on whether they were intestate or had a will. Only 35.2% of intestate respondents wished to leave at least half of their estate to their divorcing spouse, while 46% of those with a will preferred to do the same (including some who wished to leave their entire estate) to their divorcing spouse. The gender divide was also significant. Divorcing men were much more likely than divorcing women, 50% v. 35%, to want to leave at least half of their estate to their divorcing spouse. The presence of children, however, had little effect on the preferences of divorcing spouses—41.2% of divorcing respondents with children wished to leave at least half of their assets to their spouse as compared to 37.8% of those without children.

Professor Hirsch and I disagree on the reforms that this data supports. He concludes that "the data

suggest that dialing back divorce to the time of the petition would accord with majority preferences both as concerns rules governing intestate inheritance and implied revocation of bequests." (P. 260.) I am less willing to divest divorcing spouses of their rights given that only 37.9% of divorcing spouses wish to disinherit their spouse completely and respondents with a will were even less likely to want to do so. Professor Hirsch acknowledges that the "data offer less than overwhelming support for shifting these lines, and the gender divide gives added caution." (P. 260.) Thus, he recommends that lawmakers allow extrinsic evidence to rebut proposed presumption of implied revocation of bequests upon filing for divorce. I agree that extrinsic evidence would allow courts to better assess the decedent's wishes but, in my view, a presumption that filing for divorce revokes a spouse's rights places an unjustifiably high burden on a surviving spouse for several reasons. First, the data suggests that most respondents want their divorcing spouse to take *some* share of their estate, and a significant minority, 40.8%, want their divorcing spouse to take at least half. Second, while we do not know how many respondents want their divorcing spouse to take at least one-third of their estate (the forced share in the majority of common law states), there are strong public policy reasons not to deprive divorcing spouses of their current rights. Although the wishes of a decedent are paramount vis-à-vis most individuals, they matter less vis-à-vis a spouse. As Professor Hirsch acknowledges, the legal justifications for granting a surviving spouse a forced share are based on a theory of partnership or contribution and the state's interest in allocating the costs of dependency. The law should require more compelling reasons than the data provides before requiring divorcing spouses to battle a presumption of implied revocation.

Professor Hirsch's survey of permanently separated spouses yields similarly enlightening results. He polled 333 permanently separated individuals and found that 42.2% would want their permanently separated spouse to have at least half of their estate. Another 17.2% wished to leave *something* (but less than half of their estate) to their permanently separated spouse. Thus, almost 60% of permanently separated respondents wish to leave something to their permanently separated spouse. However, as with engaged individuals and divorcing spouses, respondents' preferences differ significantly by gender and whether they have a will, but are virtually unaffected by the presence of children. The greatest difference was between intestate individuals and those with a living trust. While 72.4% of intestate respondents prefer that their permanently separated spouse take less than half of their estate (including those who want their spouse to take nothing), the majority of respondents with a living trust have opposite preferences. The majority of settlors, 53.3%, want their permanently separated spouse to have at least half of their estate.

Lawmakers should carefully read Professor Hirsch's article as it illustrates the importance of empirical research on the preferences of individuals in a legal twilight zone. Researchers should explore why individuals may want a divorcing or permanently separated spouse to take half or more of their estate. We should also explore whether individuals' preferences vary by race. Gender and wealth seemed to affect respondents' preferences. It is possible that race might too. The answers to these questions surely are as varied as the individuals in these relationships, but they make us question our assumptions about the point at which marriage begins and ends and alert us that the points at which the law draws these lines may be far removed from those that matter to the individuals it seeks to serve.

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