

Using Empirical Studies as a Basis for Updating Intestacy Laws

Author : Sergio Pareja

Date : March 15, 2018

Danaya C. Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 43 **ACTEC L.J.** 341 (2017).

The principal goal of any intestacy statute is to determine the probable intent of individuals who die without a will. Presumably, that means determining what most people who die without a will would want their wills to say if they were to have executed a will before dying. This is a particularly challenging endeavor, given that intent changes over time and may not be consistently the same throughout a large, multicultural country.

In their excellent article, [Professor Wright](#) and Ms. Sterner analyze 493 wills that were probated in Escambia and Alachua Counties, Florida, in 2013. They do this, the authors say, “[i]n light of the fact that marriage is a waning institution and a majority of children are currently being raised in nontraditional families—defined as blended, single-parent, or same-sex.”

Part I of the article reviews the history of empirical studies regarding testamentary intent. It notes that the two primary methods of doing this kind of empirical study are (1) phone surveys of living people and (2) an analysis of probate records in certain areas of the country. The article rightly notes that both of these methods have advantages and disadvantage. For example, because most people do not prepare wills until they are older, probate records may not give us an accurate picture of testamentary intent with respect to younger decedents. The article also identifies key empirical studies in this field, beginning with Richard Powell and Charles Looker’s 1930 study and ending with David Horton’s 2015 study.

In Part II of their article, Professor Wright and Ms. Sterner turn to their empirical study, which analyzed all wills that were recorded in the official records of two counties in Florida during the 2013 calendar year. In their study, they looked at such things as multiple marriages, the presence of stepchildren, and the use of pourover wills. They also noted the time between the execution of the will and their study to see if it made a difference if wills were executed closer to the time of death. 2013 was selected because it was recent but also ensured that the probate process was likely to be complete by the time of their study.

The two counties selected for the study were meant to be culturally, economically, and demographically diverse. Alachua County is the county that includes Gainseville, home to the University of Florida. It is a county that is predominantly Democrat. Escambia County is home to Pensacola, one of the largest military training sites in the Navy. It is predominantly Republican. Both counties are roughly two-thirds White (non-Latino), one-fifth African American, and about five percent Latino. Other races and ethnicities account for a very small portion of the population of both counties.

For each estate, the authors gathered data from at least three documents: (1) the Petition for Administration, (2) the Death Certificate, and (3) the Will (including any codicils). From those documents, they were able to gather data regarding date of death, gender, race, marital status, date of will execution, children, size of probate estate, courts costs, relationship between the decedent and the personal representative, testamentary dispositions, whether a trust existed, and the relationship between the trustee and the decedent. Most of this data is provided in table form in the article.

Testamentary dispositions were broken into specific and residuary dispositions and broken down further if second or

third spouses or stepchildren were involved. The most common testamentary disposition was to leave everything equally to the decedent's children (35 percent of the cases). Second most common was everything to a spouse if alive and then to the children if the spouse failed to survive the decedent (29 percent of the cases). While wills for single marriage families tended to align with the state's intestacy statute, wills of people in more than one marriage with children from a prior marriage did not conform as closely with the intestacy statute.

Some interesting trends were identified in the study. First, in the case of multiple marriages, men were far more likely to leave something to their wives than women were likely to leave something to their husbands. Second, women were more likely to devise property to children, nieces, nephews, and grandchildren than men, who were more likely to devise property just to their children. Third, White decedents were far more likely to die testate and have their estates probated than decedents of color. While the White population of the two counties was about 65 percent, 91 percent of the testate estates involved White decedents. Fourth, where stepchildren were clearly identified, the decedent overwhelmingly (82 percent) left something to the stepchildren. It also is worth mentioning that 100 percent of the estates involving stepchildren were estate of White decedents. That may tell us that intestacy statutes are not adequately addressing the needs of communities of color

In Part III, Professor Wright and Ms. Sterner compare their findings with common intestacy laws. That includes the Uniform Probate Code (UPC), which has been adopted by seventeen states. The authors note that more complex estate plans, including the use of trusts, typically occur when the family situation is complicated. They note that this would tend to benefit White and wealthy populations who have greater access to attorneys. They are particularly critical of intestate schemes, such as the UPC, that preferences collateral blood relatives, including aunts, uncles, cousins, and even children of cousins, over stepchildren, who tend to fall last, if at all, before the property escheats to the state.

The authors propose some concrete changes to intestate schemes. For example, they suggest that the marital status of a child's parents should not determine a child's inheritance rights. They also argue that a state probate code's definition of parent and child should match the family code definition as long as it uses the "best interests of the living child" standard. Another possible change would be for the intestacy statute to give a surviving spouse who remarries only a life estate in property received from the first spouse, with the property ultimately passing to the first spouse's children.

Some of the conclusions raised by Professor Wright and Ms. Sterner have potential issues and need to be examined further. For example, it may be problematic to make inferences about intestacy statutes from examining wills. People who have wills may have different goals than people who do not have the time or money to draft wills. Furthermore, wills do not contain any information about non-testamentary dispositions such as joint tenancies. In addition, while fascinating, more research would need to be done with respect to stepchildren, given that there are potential problems with looking at wills to determine if a decedent had stepchildren.

Professor Wright and Ms. Sterner have written an excellent, thought-provoking piece. While their study is limited to only one year in two Florida counties, they need to start somewhere. More studies like this are needed throughout the United States to better understand probable testamentary intent. These studies could be used as a basis for state legislatures to begin updating their intestacy statutes to more accurately reflect the reality of probable intent. New statutes, if properly considered, should pay attention to gender, race, and class differences that surfaced in the authors' study.

Cite as: Sergio Pareja, *Using Empirical Studies as a Basis for Updating Intestacy Laws*, JOTWELL (March 15, 2018) (reviewing Danaya C. Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 43 *ACTEC L.J.* 341 (2017)), <https://trustest.jotwell.com/using-empirical-studies-as-a-basis-for-updating-intestacy-laws/>.