



---

GW Law Faculty Publications & Other Works

Faculty Scholarship

---

2015

# 'Making Things Fair': An Empirical Study of How People Approach the Wealth Transmission System

Naomi R. Cahn

*George Washington University Law School, [ncahn@law.gwu.edu](mailto:ncahn@law.gwu.edu)*

Follow this and additional works at: [http://scholarship.law.gwu.edu/faculty\\_publications](http://scholarship.law.gwu.edu/faculty_publications)

 Part of the [Law Commons](#)

---

## Recommended Citation

Elder Law Journal, Vol. 22, No. 325, 2015

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact [spagel@law.gwu.edu](mailto:spagel@law.gwu.edu).

**“MAKING THINGS FAIR”: AN EMPIRICAL  
STUDY OF HOW PEOPLE APPROACH THE  
WEALTH TRANSMISSION SYSTEM**

*Naomi Cahn  
Amy Zietlow*

*The wealth transmission process is of great concern to many senior citizens in the United States. The American wealth transmission process is designed to respect private ordering. It encourages planning as a means to formalize intent and ensure smoother property transfer at death. Most people do not plan, nor do they use, the formal probate system for distributing property, but there is little research on what the actual wealth transfer process looks like for the majority of Americans. This article challenges the contemporary trusts and estates canon by showing that the nuts and bolts of the inheritance process for many Americans takes place in a different universe outside of probate court, where the black-letter law is only a shadow, keepsakes and heirlooms assume outsized importance, and family dynamics drive outcomes. It is based on a first-ever empirical study of intergenerational care for Baby Boomers. This study shows that the formal laws of the inheritance system are largely irrelevant to how property is actually transferred at death. The contemporary trusts and estates canon focuses on the importance of planning for traditional forms of wealth in nuclear families, rather than wealth that has high emotional, but low financial, value. Alternative family structures and changing forms of wealth challenge this canon, uncovering serious shortcomings in existing means designed to encourage planning and minimize conflict. Instead, this study shows how the logic of “making things fair” has been structuring the way families navigated the distribution*

---

Naomi Cahn is the Harold H. Greene Professor of Law at George Washington University Law School.

Amy Zietlow is an affiliate scholar with the Institute for American Values where she led *Homeward Bound*, a foundation-funded study of Gen X caregiving and grieving. She is ordained in the mainline Evangelical Lutheran Church of America. For their comments, the authors would like to thank Dirk Hartog, David Horton, Alicia Kelly, Nina Kohn, Peggie Smith, Reid Kress Weisbord, and participants at the Law & Society 2014 Intergenerational Care panel; for research assistance, the authors would like to thank Jodi LeBolt. We are grateful to Elizabeth Marquardt for her role as co-investigator and for her support of this project.

process and accessed the law. Consequently, this article recommends that law reform should be guided by the needs of contemporary families, where not only is wealth defined broadly but family too, through ties that are both formal and functional. This means establishing default rules that maximize planning while also protecting familial relationships.

## I. Introduction

Within trusts and estates, there is widespread consensus over a determinate set of authorized and structuring principles,<sup>1</sup> concepts so basic to the field that they constitute a canon.<sup>2</sup> For instance, consider the canonical construct of formality, which dominated trusts and estates until the last third of the twentieth century. Wills were invalid unless the requisite number of witnesses signed them in the appropriate place.<sup>3</sup> A second canonical construct is dead hand control, which translates into strong respect for the intent of the donor.<sup>4</sup> When that intent is explicitly stated, the law defers to the donor's wishes; when that intent is unstated, the default rules of intestacy are supposed to reflect the preferences of the decedent, and that preference is for the family.<sup>5</sup> A third canon, "the socioeconomic class

---

1. Originally, the term canon referred to an ecclesiastically-based code of law, but it later came to mean any standard of judgment that is based upon an authoritative set of texts. See THE "CANON" OF ENGLISH LITERATURE, [http://faculty.goucher.edu/eng211/canon\\_of\\_english\\_literature.htm](http://faculty.goucher.edu/eng211/canon_of_english_literature.htm) (last visited Nov. 10, 2014).

2. J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 968 (1998) ("In our view, there is no better way to understand a discipline—its underlying assumptions, its current concerns and anxieties—than to study what its members think is canonical to that discipline"); David Fontana, *A Case for the Twenty-First Century Constitutional Canon: Schneiderman v. United States*, 35 CONN. L. REV. 35, 40 (2002) ("[T]he canon must include a contextualist or historicist element. In other words, the canon will not necessarily include the same materials throughout different periods of time"); see also Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381 (2011) ("[T]he constitutional canon [is] the set of decisions whose correctness participants in constitutional argument must always assume"); Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 830-32 (2004).

3. See generally Statute of Wills, 1540, 32 Hen. 8, c.1.

4. E.g., Naomi Cahn, *Probate Law Meets the Digital Age*, 67 VAND. L. REV. 1697 (2014); Adam J. Hirsch and William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 1 (1992).

5. E.g., UNIF. PROBATE CODE art. II, pt. I, general cmt. (2011), 8 U.L.A. pt. I, 34 (Supp. 2011); Susan Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 U. MICH. J.L. REFORM 787, 789-90 (2012); Marissa J. Holob, Note, *Respecting Commitment: A Proposal to Prevent Legal Barriers from Obstructing the Effectuation of Intestate Goals*, 85 CORNELL L. REV. 1492, 1502 (2000); Sarah Ratliff, Note, *Adult Adoption: Intestate Succession and Class Gifts under the Uniform Probate*

canon”—or the “wealth canon”—is rarely acknowledged but implicitly frames how many of us view trusts and estates as an examination and exploration of wealth transmission.<sup>6</sup> The theme is so pervasive that it is rarely even addressed explicitly. Poor families are generally not featured prominently in traditional trusts and estates pedagogy, scholarship, or practice, or even counted in the wealth transfer process.<sup>7</sup> Middle class families may appear somewhat more frequently, but class distinctions in the wealth transmission process are not acknowledged. Instead, trusts and estates jurisprudence and doctrine focus on issues like will formality and dead hand control without addressing socioeconomic context.

This Article provides a ground-breaking contribution to that scholarship by showing that the nuts and bolts of the inheritance process for many Americans takes place in a different universe, where the black-letter law is only a shadow, keepsakes and heirlooms assume outsized importance, and family dynamics drive outcomes. The stories and legal issues faced by the non-elite are not deemed to be a central, organizing part of our trusts and estates tradition; they are not present within the overarching and defining narrative that articulates the field’s core precepts. There are three reasons for this.

First, Americans rebel against the very idea of class; polls show that most Americans, regardless of whether they are part of the top or bottom one-third, still think of themselves as middle class.<sup>8</sup> Consequently, explicit consideration of the impact of class on trusts and estates depends on a recognition of class itself in American society.

Second, the typical trusts and estates client is a member of the elite.<sup>9</sup> Trusts and estates practitioners deal with clients who have

---

*Code*, 105 NW. U. L. REV. 1777, 1794 (2011). Family members themselves can intervene with the decedent’s probable intent. *See generally* *Marshall v. Marshall*, 547 U.S. 293 (2006); John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 366 (2013).

6. Gary, *supra* note 5.

7. For those who do not own a home, consumer goods, such as cars and furniture, may be the most significant assets. *See, e.g.*, Edward N. Wolff & Maury Gittleman, *Inheritances and the Distribution of Wealth Or Whatever Happened to the Great Inheritance Boom?*, 12 J. ECON. INEQ. 439, 443-44 (2014), available at <http://link.springer.com/content/pdf/10.1007%2Fs10888-013-9261-8.pdf> (explaining that their assessment of the inheritance process did not include consumer durables, such as cars or furniture).

8. *Id.*

9. *Id.*

enough wealth to justify paying for a lawyer.<sup>10</sup> Trusts and estates practice is oriented to serve the archetypal individual who needs financial planning: a person who is upper middle class—or wealthy—and is seeking to dispose of assets upon death (and can pay legal bills). The comparative scarcity of other types of clients means that trusts and estates lawyers have little reason to develop expertise in nontraditional topics.<sup>11</sup> Although the law of trusts and estates is relevant to people with few assets, these issues involve comparatively new aspects of wealth transmission, such as life insurance policies, and concern issues not directly related to drafting trusts or wills. We tend to teach and focus on the private law aspects of trusts and estates, relationships between drafters and beneficiaries,<sup>12</sup> rather than the public law of Medicaid and Medicare disputes.<sup>13</sup>

And third, the default rules that guide the wealth transfer process are based on the nuclear family, with two parents married to each other until parted by death.<sup>14</sup> The trends in non-marriage, divorce, and short-term cohabitating unions have led to a wide assortment of stepfamilies and kin networks, familial arrangements that are more typical of the non-elite.<sup>15</sup>

In this Article, we keep these canonical constructs in mind as we provide a novel assessment of how people handle wealth transmission<sup>16</sup> based on empirical data obtained directly through in-depth

---

10. *Id.*

11. *Id.*

12. See Lawrence W. Waggoner, *Why I Do Law Reform*, 45 U. MICH. J.L. REFORM 727, 730 (2012).

13. See Randy E. Barnett, *Foreword: Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J.L. & PUB. POL'Y 267, 270-71 (1986) ("Public law subjects would include constitutional law, criminal procedure, taxation, administrative law, and at least part of criminal law—each of which seeks to regulate the internal workings of government or the relationship between government and citizens. Private law subjects would include contract, torts, property, corporations, agency and partnership, trusts and estates, and remedies—subjects defining the enforceable duties that all individuals owe to one another.").

14. *Extended Family Issue: Financing Independent Living Arrangements*, CREATIVE WEALTH MAXIMIZATION STRATEGIES (Ashford Advisors, Atlanta, Ga.), Jan. 2012, at 1, 3, available at <http://www.ashfordadvisors.net/wp-content/uploads/2012/05/ashford-advisors-creative-wealth-maximization-strategies-january-2012-1.pdf>.

15. JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 19 (2014); PAUL TAYLOR, THE NEXT AMERICA: BOOMERS, MILLENNIALS, AND THE LOOMING GENERATIONAL SHOWDOWN 54 (2014).

16. In a companion article, we address planning for the caregiving process. Amy Zietlow & Naomi Cahn, *Honor Your Father, Mother, Stepmother, Stepfather, Mother's Partner...Reciprocity and Gender in 21st Century Elder Care and Law*, J. LAW & RELIGION (forthcoming 2015) (manuscript on file with authors).

interviews with those who have experienced the death of their parents.<sup>17</sup> First, in terms of the “socio-economic canon,” most of our respondents were solidly middle-class or poverty class; only a few could be considered wealthy. Second, with respect to “formality,” the majority of the deceased died intestate.<sup>18</sup> And third, when it came to “dead hand control,” our respondents expressed a desire to honor the intent of the deceased, but changes in family structure complicated the interpretations of that intent not just by the participants themselves but also by their surviving stepparent, parent, sibling, half-siblings and step siblings, thus impacting how they settled the estate. Our guiding questions focused on whether the canons reflect how people dispose of assets, what is broken, and how we can fix those problems.

Each of the sixty-two interviews was approximately two hours in length, and, through various questions, we learned how families dealt with property distribution. The canonical wisdom is that the default rules of intestacy reflect the preferences of the actual decedent; where the decedent would prefer another outcome, and then wills provide an opt-out solution to ensure dead hand control. The reality is that most people do not make wills, a result reflected in our interviews.<sup>19</sup> Instead, where possible, they rely on more informal means. For example, when one respondent’s father died after a car accident, he and his siblings deferred to his mother’s oral wishes, dividing property equitably, if not equally.<sup>20</sup>

So we were basically leaving it for mom to disburse as she would. There were a few things that we knew, ‘I’d like,’ and, ‘I’d like that.’ And in general, we all—if someone else—‘You know what? Yeah, you can have it. Go for it.’<sup>21</sup>

Such a result is not surprising; although intestacy law would only give a surviving spouse usufruct over one-half of the community

---

17. All names and identifying characteristics of study participants have been changed to protect the privacy of those interviewed.

18. As discussed *infra* Part III.B, seven respondents explicitly mentioned the existence of a will. Eleven respondents explicitly mention that their parent or stepparent died intestate. The remaining forty-four respondents did not mention the presence or absence of a will, but settled the estate without the guidance or conflict that the presence or absence of a formal will might provide.

19. See Richard Eisenberg, *Americans’ Ostrich Approach to Estate Planning*, FORBES (Apr. 9, 2014), <http://www.forbes.com/sites/nextavenue/2014/04/09/americans-ostrich-approach-to-estate-planning/>.

20. Interview with Respondent YM24, in Baton Rouge, La. (Nov. 29, 2011) (on file with author).

21. *Id.*

property with the descendants ultimately inheriting it,<sup>22</sup> such a detailed distribution scheme was not needed. Indeed, the family operated as though the surviving spouse was fully entitled to all of the property. Deference to their mother and to one another may have been what they believed to be morally right, or it may have been because they knew they had many more years together as a family,<sup>23</sup> or it may have been based on an implicit understanding of the law. Yet, in some families, not only was there little reference to the law, there appeared to be little knowledge of it.<sup>24</sup>

In other families, particularly where the decedent had remarried or had an established relationship with another adult, the law guided the inheritance process both procedurally and substantively.<sup>25</sup> Private arrangements were made with awareness, albeit imperfect knowledge, of the law.<sup>26</sup> Rather than a reaffirmation of family norms,<sup>27</sup> property distribution often served to highlight existing tensions. The types of conflicts reflect differing expectations about the decedent's intent between surviving family members and, even when there is a will, a challenge to that statement of the testator's intent. Finding out what property exists and coordinating succession with all the other

---

22. LA. CIV. CODE ANN. arts. §§ 544, 880, 890 (West 2014). A usufruct is a terminable interest in property. *Id.* at art. § 535 (West 2014).

23. See Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1230 (1998) ("[R]elational theory suggests that formal legal enforcement of all the terms . . . is inadvisable, because legal intervention risks undermining the parties' cooperative equilibrium, and ultimately subverts their efforts to sustain a lasting relationship. Thus, legal enforcement is limited to policing massive defections from the cooperative norm . . . . Law's domain is the area beyond the boundaries of social and relational norms"). On relational contracts, see Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1091 (1981).

24. Collection of Interviews conducted by Naomi Cahn & Amy Zietlow, in Baton Rouge, La. (Oct. 12, 2011-Mar. 12, 2012) (on file with author) [hereinafter Collection of Interviews].

25. For critiques of the biases of the existing inheritance system, see generally, Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199 (2001); Thomas P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55 (2004); Jeffrey N. Pennell, *The Joseph Trachtman Lecture—Estate Planning for the Next Generation(s) of Clients: It's Not Your Father's Buick, Anymore*, 34 ACTEC J. 2 (2008) (tying demographic trends to the need to change trusts and estates practice).

26. These families operate in the "shadow of the law." See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979); Barak Richman, *Norms and Law, Putting the Horse Before the Cart*, 62 DUKE L.J. 739 (2012) [hereinafter Richman, *Norms and Law*].

27. The traditional paradigm of inheritance law is not designed for alternative families. See, e.g., Frances H. Foster, *Individualized Justice in Disputes Over Dead Bodies*, 61 VAND. L. REV. 1351, 1352-61 (2008).

siblings, half-siblings, and the surviving second spouse is complicated, time-consuming, and fraught with conflict. Without the mediating presence of their biological parent, grieving adults cling to competing perceptions of the deceased's intent and are highly judgmental of any choices a step-parent makes or doesn't make concerning the parent's property—usually involving houses, cars/trucks, and businesses—and thus they feel comfortable seeking an attorney to help sort things out or “make things fair.”

A major finding concerned the significance of planning. Respondents reacted with appreciation whenever decedents had engaged in any type of advance planning, even though this planning rarely resulted in a formal will.<sup>28</sup> Regardless of whether they agreed with the decedent's choices, they acknowledged that formal statements of intent, ranging from disposition of bodily remains to money, provided important literal guidance and emotional understanding of the next steps.<sup>29</sup>

While scholars surmise that private ordering dominates the wealth transfer process, knowledge about that process remains largely unknown and thus is unable to guide reforms.<sup>30</sup> Based on the results of our study that illuminate the private ordering process, we argue for a new way of approaching wealth transmission that recognizes the diversity of twenty-first century families. Our conclusions challenge the canonical constructs of dead hand control, formality, and class, and ground those challenges in the actual needs and relationships of people who are impacted by existing laws. The wealth transmission process should be more accessible and responsive which requires

---

28. *Key Points about Advance Planning*, ABA, available at [http://www.americanbar.org/content/dam/aba/migrated/publiced/practical/keypoints\\_advanceplanning.pdf](http://www.americanbar.org/content/dam/aba/migrated/publiced/practical/keypoints_advanceplanning.pdf).

29. *Id.* (discussing the importance of advance planning in helping doctors and loved ones understand the decedent's intent). See, e.g., Interview with Respondent EM30, in Baton Rouge, La. (Jan. 17, 2012) (Respondent's mother had arranged a trade of flight lessons for burial services and a plot from a local mortuary. The Respondent was grateful for the advanced planning, but learned of it through an informal conversation with his mother.)

30. John H. Martin, *Reconfiguring Estate Settlement*, 94 MINN. L. REV. 42, 45 (2009). See, e.g. Interview with Respondent SF18, in Baton Rouge, La. (Nov. 12, 2011) (on file with author) (Respondent SF18 found informal notes from their mother after her death stating her intentions for the distribution of her life insurance policy. Although this respondent did not know she was legally bound in Louisiana to follow this “olographic” will, she followed it nonetheless as a way to honor the emotional reasoning of her mother.)



changing background rules to prompt planning and protection for caregivers.

## II. The Empirical Study in Context

The number of people over the age of sixty-five is at its highest number ever, and it will keep growing.<sup>31</sup> As the silver tsunami approaches, society faces increasing challenges to the caregiving and wealth transmission processes, due to the combination of longer life-spans, increasing health care choices and expenses,<sup>32</sup> and changing family structures. The percentage of older people who have divorced has doubled over the past forty years, and at least half of them have remarried.<sup>33</sup> When they die, family members from their first and second families share whatever assets they have accumulated. Indeed, Baby Boomers have higher rates of remarriage than earlier generations.<sup>34</sup> What will happen at the intersection of Baby Boomers, with their new forms of property and their new family structures, and traditional forms of caregiving and wealth transmission? These were the

---

31. JONATHAN VESPA, JAMIE M. LEWIS & ROSE M. KREIDER, U.S. CENSUS BUREAU, *AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2012* (2013), available at <https://www.census.gov/prod/2013pubs/p20-570.pdf>; *Older Americans Month: May 2014*, U.S. CENSUS BUREAU (Mar. 25 2014), [http://www.census.gov/newsroom/releases/archives/facts\\_for\\_features\\_special\\_editions/cb14-ff07.html](http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb14-ff07.html).

32. Medicare and Medicaid along with public and private retirement savings and insurance provide the primary sources of economic support for the older population. Although the poverty rate for the elderly is lower than for the rest of the population, a drumbeat of reports shows that the overall rate threatens to change, and that blacks and Hispanics experience higher levels than whites. *E.g.*, NARI RHEE, U.C. BERKELEY CTR. FOR LAB. RES. & EMP., *BLACK AND LATINO RETIREMENT (IN)SECURITY* (2012), available at [http://laborcenter.berkeley.edu/research/retirement\\_in\\_security2012.pdf](http://laborcenter.berkeley.edu/research/retirement_in_security2012.pdf); NARI RHEE, NAT'L INST. ON RETIREMENT SECURITY, *RACE AND RETIREMENT INSECURITY IN THE UNITED STATES* (2013), available at [http://www.nirsonline.org/storage/nirs/documents/Race%20and%20Retirement%20Insecurity/race\\_and\\_retirement\\_insecurity\\_final.pdf](http://www.nirsonline.org/storage/nirs/documents/Race%20and%20Retirement%20Insecurity/race_and_retirement_insecurity_final.pdf).

33. Susan L. Brown, *A "Gray Divorce" Boom*, L.A. TIMES, Mar. 31, 2013, <http://articles.latimes.com/2013/mar/31/opinion/la-oe-brown-gray-divorce-20130331>; SUSAN L. BROWN & I-FEN LIN, CTR. FOR FAM. & DEMOGRAPHIC RES., *DIVORCE IN MIDDLE AND LATER LIFE: NEW ESTIMATES FROM THE 2009 AMERICAN COMMUNITY SURVEY* (2009), available at <http://www.bgsu.edu/downloads/cas/file94173.pdf>; Susan Gregory Thomas, *The Gray Divorcés*, WALL ST. J., Mar. 3, 2012, <http://online.wsj.com/news/articles/SB10001424052970203753704577255230471480276>.

34. Emily M. Agree & Mary Elizabeth Hughes, *Demographic Trends and Later Life Families in the 21st Century*, in *HANDBOOK OF FAMILIES AND AGING* 9, 18, fig. 2.6 (2d ed., Rosemary Blieszner & Victoria Hilkevitch Bedford eds., 2012).

framing questions for the study. The study is the first one to examine intergenerational care for Baby Boomers.

### A. The Study

With the consultation of a board of scholarly advisors drawn from law, sociology, religion, and public policy, we chose a seven-month period in 2010-11 in the racially-diverse, mid-size American city of Baton Rouge, Louisiana.<sup>35</sup> At first glance, the idiosyncrasies of Louisiana law may seem like a stumbling block, but the location was chosen for several reasons. Procedurally, conducting the qualitative interviews in person was a top priority. Because one of the principal investigators was the Chief Operating Officer of a non-profit hospice organization in Baton Rouge, this regional proximity to decedents enabled eighty percent of the interviews to be conducted in person. Demographically, Louisiana presents some of the greatest challenges to private ordering in terms of high poverty rates, low education levels, and high out-of-wedlock birthrates.<sup>36</sup> Lastly, our intent was not to reform Louisiana law per se, but to analyze human behavior within the wealth transfer process. The specific legal framework was less important than investigating the parameters of legal knowledge, examining what people knew or did not know, and the legal procedures they accessed or did not access. Our goal was to understand the actual experiences of people who had undergone the wealth transmission process. Of course, our results may not reflect the experiences of those in other communities, but they do show how at least some people understand death and inheritance. Given broader-scale studies of how few people inherit significant assets and of the comparatively low usage of probate courts, our findings provide insight into how the majority of Americans experience wealth transmission.

We collected and read every obituary appearing in Baton Rouge's leading newspaper, *The Advocate*.<sup>37</sup> From that sample, we

---

35. Baton Rouge is the Louisiana state capitol and one of the fastest growing metropolitan areas in the United States. See *Metropolitan Areas Ranked by Population, 1990-2000*, U.S. CENSUS BUREAU, available at <http://www.census.gov/population/www/cen2000/briefs/phc=t3/tables/tab02.pdf>.

36. East Baton Rouge Parish Quick Facts, US CENSUS BUREAU STATISTICS, <http://quickfacts.census.gov/qfd/states/22/22033.html> (last visited Nov. 10, 2014).

37. THE ADVOCATE, <http://theadvocate.com/> (last visited Nov. 10, 2014).

made a list of every grown child or stepchild named in the obituary of a deceased person age seventy or younger. We compiled a list of more than 2,700 people whose Baby Boom generation parent had died approximately one year previously. Using publicly accessible databases, we then found reliable contact information for over 1,500 of these grown children and stepchildren survivors. We employed all available means of contact—regular mail, email, and telephone—to invite them to be participants in our study. From the random sample of over 1,500 persons, we completed sixty-three interviews with persons living around the country. The interviews, averaging two hours in length, were audio recorded and transcribed.

Although the focus of each interview was the caregiving and death process, we began by asking each participant about their childhood as a way of easing them into what we suspected would be quite difficult conversations. Later questions were more focused, delving into the moment when they realized their parents were sick, the intricacies of how possessions were distributed, and ending with any advice they would give to others.<sup>38</sup> The interviews were semi-structured, and the explanation of the wealth transfer process emerged naturally—and unevenly—in the narrative after the respondent described the funeral and burial process.

The breadth of the sample captured experiences from both within and outside of the probate process with people who died testate and those who died intestate. Obituaries are published by people throughout different socioeconomic, religious, and racial groups, some of whom have no estates that require formal or informal probate administration and so are not captured by using probate records alone. In using interviewing rather than a survey, our hope was to develop insight into people's actual experiences with the transmission of wealth. The open-ended questions and the consistency of interviewers (only two) allowed us to understand whether the legal processes, such as large probate and small estate settlement, respond to and support these families.<sup>39</sup> We also wanted to examine how the

---

38. Appendix A includes a summary of the list of questions.

39. For other examples of such methods, see, e.g., Angela Littwin, *Beyond Usury: A Study of Credit Card Use and Preference Among Low-Income Consumers*, 86 TEX. L. REV. 451, 454 (2008) (using interviews with fifty low-income women to understand the "risks and rewards of consumer credit for low-income families"); Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515 (2013).

changing demographics of Baby Boomer families—delayed marriage and childbirth, high rates of divorce<sup>40</sup>—affect these experiences. The warm-up questions about growing up were also designed to explore the intra-familial relationships of our respondents, establishing patterns of family norms and methods of conflict resolution.<sup>41</sup>

## B. Background law

Each state's probate code is different, notwithstanding the promulgation of the Uniform Probate Code in 1969.<sup>42</sup> Probate codes reflect colonial influences, and Louisiana's law is influenced by French civil law.<sup>43</sup> Louisiana is one of the nine American states with a community property system: like other community property states, when one spouse dies, the survivor is entitled to one-half of all property acquired during the marriage while all other property, including that acquired prior to marriage or by gift, bequest, or devise, remains the decedent's.<sup>44</sup> The inheritance laws of Louisiana differ from those in most other states in two respects: Louisiana is the only American state to provide a mandatory share to children (albeit only those twenty-

---

40. I-Fen Lin & Susan G. Brown, *The Gray Divorce Revolution: Rising Divorce among Middle-Aged and Older Adults, 1990-2010*, 67 J. GERONTOLOGY 731, 732 (2012); Judith A. Seltzer & Suzanne M. Bianchi, *Demographic Change and Parent-Child Relationships in Adulthood*, 39 ANN. REV. SOC. 275, 275 (2013).

41. For an analysis of the utility of qualitative interviews, see, e.g., Greene, *supra* note 39, at 524-30.

42. The Uniform Probate Code (UPC) has been subsequently amended, most recently in 2008. *Probate Code Summary*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/ActSummary.aspx?title=Probate%20Code> (last visited Nov. 10, 2014). While comparatively few states have enacted the UPC, the uniform law itself has had extensive influence on development of the law of trusts and estates. See generally Roger W. Anderson, *The Influence of the Uniform Probate Code in Non-adopting States*, 8 SEATTLE U. L. REV. 599 (1985).

43. See generally J.R. TRAHAN, AN ELEMENTARY TREATISE OF THE CIVIL LAW OF LOUISIANA, VOLUME 1, AN INTRODUCTION TO LOUISIANA'S CIVIL LAW TRADITION, available at [http://www.laed.uscourts.gov/200th/cle/civil\\_law\\_in\\_Louisiana.pdf](http://www.laed.uscourts.gov/200th/cle/civil_law_in_Louisiana.pdf) (introducing the reader to features of the Louisiana legal system).

44. See, e.g., Laura Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1227 (2005). By contrast, in common law property states, property belongs to the person in whose name it is titled, regardless of when or how it was acquired. An "elective share" protects a spouse omitted from a will. Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180, 2224-25 (2011) (noting an elective share in common law states); Kevin Noble Maillard, *The Color of Testamentary Freedom*, 62 SMU L. REV. 1783, 1788 (2009); Paula A. Monopoli, *Marriage, Property and [In]Equality: Remedying ERISA's Disparate Impact on Spousal Wealth*, 119 YALE L.J. 61, 63 (2009) (describing some of the inequities in wealth transmission law).

three and under)<sup>45</sup> and it is one of the few community property states that allows the surviving spouse an usufruct in the decedent's community property in the case of intestacy.<sup>46</sup> Children and their descendants inherit separate property and, once the surviving spouse dies, they also inherit the community property that was subject to the usufruct.<sup>47</sup> If there is no surviving spouse, then the children are entitled to an equal share of any remaining property.<sup>48</sup>

As in all other states, an individual must be legally recognized as a child of the person who has died.<sup>49</sup> For children born during a marriage, the marital presumption applies, and the husband and wife are the legal parents.<sup>50</sup> For nonmarital children, Louisiana law specifies that paternity can be established if the father has filed a voluntary acknowledgement, or if he has filed with a putative father registry.<sup>51</sup>

---

45. LA. CIV. CODE ANN. art. 1493 (2013); Thomas Gallanis & Josephine Gittler, *Family Caregiving and the Law of Succession: A Proposal*, 45 U. MICH. J.L. REFORM 761, 778 (2012); Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 145 (2008); Ray Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 616-18 (1997).

46. "If the deceased spouse is survived by descendants, the surviving spouse shall have a usufruct over the decedent's share of the community property to the extent that the decedent has not disposed of it by testament. This usufruct terminates when the surviving spouse dies or remarries, whichever happens first." LA. CIV. CODE ANN. art. 890 (2013). See Adam N. Matasar, Comment, *Usufruct Revisions: The Power to Dispose of Nonconsumables Now Expressly Includes Alienation, Lease, and Encumbrance; Has the Louisiana Legislature Fundamentally Altered the Nature of Usufruct*, 86 TUL. L. REV. 787, 788 (2012).

47. GOVERNOR'S OFFICE OF ELDERLY AFFAIRS, PROBATE & SUCCESSION IN LOUISIANA, available at <http://goea.louisiana.gov/assets/legalservicesfiles/probateandsuccession.pdf>.

48. See Matasar, *supra* note 46.

49. See generally *Lalli v. Lalli*, 439 U.S. 259 (1978) (upholding filiation requirement for child to inherit); *Trimble v. Gordon*, 430 U.S. 762 (1977) (finding equal protection violation for nonmarital children unable to inherit from their father); *Levy v. Louisiana*, 391 U.S. 68 (1968) (different treatment based on illegitimacy constituted denial of equal protection); Susan N. Gary, *The Parent-Child Relationship under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 648 (2002) (arguing that "intestacy's definition of the parent-child relationship . . . based solely on biology or adoption [is] inadequate for many families").

50. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). Louisiana does not recognize same-sex marriage. In states that do recognize same-sex marriage, the marital presumption similarly applies. E.g., *Gartner v. Iowa*, 830 N.W.2d 335, 335 (Iowa 2013); Nancy D. Polikoff, *A Mother Should Not Have To Adopt Her Own Child: Parentage Laws for Children in Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 247 (2009).

51. LA. CIV. CODE ANN. arts. 185, 186 (marriage), art. 196 (acknowledgment) (2013); LA. REV. STAT. ANN. § 9:400 (2013) (putative father registry); see Katherine Shaw Spaht, *Who's Your Momma, Who are Your Daddies? Louisiana's New Law of Filiation*, 67 LA. L. REV. 307, 307 (2007); see generally Camille M. Davidson, *Mother's Baby, Father's Maybe!—Intestate Succession: When Should a Child Born Out of Wedlock*

In the absence of these steps, a man can file a paternity action at any point during his lifetime.<sup>52</sup>

Given that our goal was to examine knowledge and application of the law among a socioeconomically-diverse group, the particular complexities of Louisiana law, while important to the specific rights of study participants, simply serve as examples of the type of background law that frames wealth transmission. For example, all states, including Louisiana, favor surviving family members in the closest degree of relationship to a decedent.<sup>53</sup> Consequently, the results from this particular sample when it comes to knowledge of the laws and interaction with the legal system would probably be similar in other comparable population samples.

As the next section discusses further, not all participants in the study understood what they might receive through inheritance, and levels of awareness differed by family structure and by income. All twenty-two of the children from single parent families understood that they were entitled to share their parent's property.<sup>54</sup> The task of "making things fair" in these families usually fell to one sibling, who then divided the estate (including debt) between the siblings, taking into consideration each sibling's financial ability, financial need, functional ties to the family and to the estate itself, and the expressed or presumed wishes of the deceased. Children in married parent families rarely discussed inheritance, typically deferring to their surviving parent, who they presumed would informally "make things fair" now or in their future inheritance.<sup>55</sup> They believed that claiming a portion of the deceased parent's estate would not "be fair" to the surviving parent or reflect the wishes of the deceased.<sup>56</sup> In families with remarried parents, inheritance was often a painful topic, and participants

---

*Have a Right to Inherit From or Through His or Her Biological Father*, 22 COLUM. J. GENDER & L. 531 (2011); Paula A. Monopoli, *Nonmarital Children and Post-Death Parentage: A Different Path for Inheritance Law?*, 48 SANTA CLARA L. REV. 857, 858 (2008).

52. LA. CIV. CODE ANN. art. 198 (2013).

53. *Id.* at art. 888 (2013). Louisiana uses a per stirpes system of representation; see, JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES*, 82-83 (9th ed. 2013). About one-third of the states follow the system of per stirpes. A little less than half of the states also follow a so-called modern per stirpes system of representation, with around a dozen following a per capita at each generation (1990 UPC) system of representation. All three systems favor surviving family members in the closest degree of relationship to a decedent. *Id.*

54. Collection of Interviews, *supra* note 24.

55. *Id.*

56. *Id.*

frequently misunderstood the law.<sup>57</sup> For them, “making things fair” served as the guiding logic for accessing the law in order to resolve intrafamilial conflict.<sup>58</sup>

### III. How inheritance worked

While trusts and estates scholarship and law reform efforts have recognized changes in wealth transmission<sup>59</sup> and have also acknowledged the need to respond to changing family structures,<sup>60</sup> much of the focus remains on those with money who are able to invoke the legal process. The primary means for studying the inheritance and probate process has been through access to court records including wills, through surveys, and through interviews with estate planners,<sup>61</sup> rather than through interviews with those who have experienced the process.<sup>62</sup> Moreover, studying wills and court cases provides only a partial perspective on how people plan for and experience the wealth transmission process. Indeed, the trusts and estates field has not undergone as much empirical work.<sup>63</sup> Through enhanc-

---

57. *Id.*

58. *Id.*

59. Much of this scholarship began with John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984).

60. *E.g.*, Gallanis *supra* note 25, at 55; Gallanis & Gittler *supra* note 45; Gary, *supra* note 5, at 788; Maillard, *supra* note 44.

61. *See, e.g.*, Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 41 (2009) (reporting on online survey of who has wills). The most recent study of the usage of statutory will forms dates to 1993. *See* Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 924-25 (2012). Professors Robert Sitkoff and Max Schanzenbach have engaged in extensive study of changes in trust law, relying, for example, on reports to federal banking authorities and the Internal Revenue Service. Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 387-88 (2005); *see* Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2465 (2006); Max M. Schanzenbach & Robert Sitkoff, *The Prudent Investor Rule and Trust Asset Allocation: An Empirical Analysis*, 35 ACTEC J. 314, 315-16 (2010).

62. There is one major exception in which the researchers both reviewed probate files and interviewed survivors. MARVIN B. SUSSMAN, JUDITH N. CATES & DAVID T. SMITH, *THE FAMILY AND INHERITANCE* 44-45 (1970). For further discussion and analysis of the current probate process, *see* David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. (forthcoming 2015).

63. *See* Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180, 2253 n. 287 (2011). For some of the few examples of empirical work on both historical and contemporary will practices, *see generally* Stephen Clowney,

ing our understandings of what actually happens, legal policymakers and other professionals can develop programs that more effectively account for the perspectives of those who need their help.

When addressing just how property was distributed, participants articulated quite different experiences. Two critical, albeit overlapping, factors fundamentally affected their perceptions. First, when there had been advance planning—of any type—respondents reacted with appreciation. Even when they disagreed with the proposed outcome, they acknowledged that formal planning, whether it affected disposition of bodily remains or money, provided important literal guidance and emotional understanding of the next steps.<sup>64</sup> As one respondent explained, with deep relief and gratitude, about the funeral and burial, “Oh we didn’t have to do anything. Everything was already done. We just had to show up.”<sup>65</sup> By contrast, when there was poor planning, such as statements of intention without formalized documentation, or when there was no planning, respondents were more likely to feel not just confusion but also, sometimes, conflict.<sup>66</sup> Another respondent’s mother died suddenly, and he and his sister were left to try to settle her estate.<sup>67</sup> He explained that she had money in a retirement fund but had failed to designate any beneficiaries:

---

*In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TRUSTS & EST. L.J. 27 (2008); Stephen D. Davis II & Alfred L. Brophy, “The Most Solemn Act of My Life”: Family, Property, Will, and Trust in the Antebellum South, 62 ALA. L. REV. 757 (2011); Alyssa A. DiRusso, *He Says, She Asks: Gender, Language, and the Law of Precatory Words in Wills*, 22 WIS. WOMEN’S L.J. 1 (2007); Mary Louise Fellows, E. Gary Spitko & Charles O. Strohm, *An Empirical Assessment of the Potential for Will Substitutes to Improve State Intestacy Statutes*, 85 IND. L.J. 409 (2010); Jason C. Kirklin, Note, *Measuring the Testator: An Empirical Study of Probate in Jacksonian America*, 72 OHIO ST. L.J. 479 (2011).

64. In the analogous context of end-of-life planning, patients who indicated a preference for the type of life-sustaining treatment they preferred appear likely to have their wishes carried out. See Erik K. Fromme et al., *Association Between Physician Orders for Life-Sustaining Treatment for Scope of Treatment and In-Hospital Death in Oregon*, 62 J. AM. GERIATRICS SOC. (forthcoming 2014).

65. Interview with Respondent YMSO, in Baton Rouge, La. (Apr. 10, 2012) (on file with author).

66. See, e.g., Interview with Respondent LF11, in Baton Rouge, La. (Oct. 24, 2011) (on file with author) (Respondent LF11 received small trinkets from her stepmother as an inheritance. This respondent’s deceased father had told her informally that he had set up a trust for her, which did not materialize after his death). Interview with Respondent VM47 in Hammond, La. (March 15, 2012) (on file with author) (respondent allowed a stepsister to remain in his deceased father’s house in order to honor informal statements made by his dad to that effect. However, other siblings disagreed with the choice and a year after the death, conflict remained between the siblings and stepsibling.)

67. Interview with Respondent UM46, by phone (Mar. 8, 2012).



[t]hat money has been sitting in her account for the past year and a half, frozen, until I am assigned the executor of her estate . . . I've had to get [an] attorney to assign me as executor of the estate, but we can't do that until we go to the probate court . . . every time I speak to the lawyer, [it] costs me money.<sup>68</sup>

Second, regardless of whether their parents had planned, their perceptions of the distribution process were integrally shaped by the parents' marital status. As we coded the results, we found four different categories that tracked the marital status of the parent figure who had died and that served to predict how children experienced wealth transmission. The four categories are:

1. The Married Parent Family, where the individual's only marriage ended by death (MPFs);
2. The Divorced and/or One Parent Family, where one or more marriages had ended in death or divorce (DOPFs);
3. The Remarried Parent Family, where there had been one or more divorces and the participant's legal parent had died (RPFs); and
4. The Stepparent Family, where there had been one or more divorces, and the participant's legal parent survived a spouse's death (SFs).

These family structures reflect changes in American families. In 1980, more than three-quarters of children lived with their married parents; today, that is true for less than two-thirds of all children.<sup>69</sup> Almost forty percent of all Baby Boomers have been divorced,<sup>70</sup> and that rate has increased by fifty percent over the past two decades.<sup>71</sup> In 2009, while many remained single, thirty percent of married people

---

68. *Id.*

69. *Family Structure and Children's Living Arrangements*, FORUM ON CHILD & FAM. STAT. (2013), <http://www.childstats.gov/americaschildren13/famsoc1.asp>.

70. *Baby Boomer Generation Fast Facts*, CNN LIBR. (Sept. 1, 2014, 4:09 PM), <http://www.cnn.com/2013/11/06/us/baby-boomer-generation-fast-facts/>.

71. Sheela Kennedy & Steven Ruggles, *Breaking Up Is Hard to Count: The Rise of Divorce in the United States, 1980–2010*, 51 *DEMOGRAPHY* 587 (2014); Natalie Angier, *The Changing American Family*, *N.Y. TIMES*, Nov. 25, 2013, <http://www.nytimes.com/2013/11/26/health/families.html?hpw&rref=science&r=0>; Pepper Schwartz, *Why are baby boomers so divorce-prone*, *CNN OPINION* (Dec. 9, 2013), <http://www.cnn.com/2013/12/09/opinion/schwartz-baby-boomer-divorce/> (stating that the author is "the love and relationship ambassador for the AARP").

over the age of fifty were in remarriages.<sup>72</sup> In 2011, “more than four in ten American adults ha[d] at least one step relative in their family.”<sup>73</sup>

Based on this study, the critical differences between families’ experiences turned on whether there was more than one set of familial norms at issue. Consequently, the experiences in married parent and one-parent families were similar and generally involved fewer resentments and conflicts, unless the single parent was involved in a long-term relationship.<sup>74</sup> By contrast, in the remarried and stepparent families, regardless of who had died, the conflicting family norms profoundly affected experiences and emotions surrounding wealth transmission.<sup>75</sup> As they discussed their parent’s death, there was significant evidence that respondents’ feelings about their parent’s marital situation affected their perspectives on the law.

It is to those actual experiences that this section now turns.

#### A. What they valued

As they talked about what their parent had left behind, participants identified differing categories of assets that they had inherited or wanted to inherit. Although wealth transmission laws focus on tangible assets, respondents thought of inheritance as going beyond financial assets to include personal property that often had little monetary worth, moral values, and psychological attributes.<sup>76</sup> Many respondents expressed similar sentiments to one whose father wanted to bequeath his gun collection to the son and his half-brother, “Dad, I don’t really want or have to have anything. I just want my time with you.”<sup>77</sup> Almost all of the participants mentioned an emotional inheritance, such as a personality characteristic they saw in themselves or their children.<sup>78</sup> More tangibly, for some, it was treasured photos or

---

72. Emanuella Grinberg, *Boomers who remarry learn from failed relationships*, CNN (Dec. 5, 2012, 7:50 PM), <http://www.cnn.com/2012/12/05/living/baby-boomers-second-families/>.

73. *A Portrait of Stepfamilies*, PEW RES. CENTER (Jan. 13, 2011), <http://www.pewsocialtrends.org/2011/01/13/a-portrait-of-stepfamilies/>.

74. Collection of Interviews, *supra* note 24.

75. *Id.*

76. *Id.*

77. Interview with Respondent VM47, in Hammond, La. (Mar. 15, 2012) (on file with author).

78. *Id.*

clothing. One respondent who received nothing formally in the will of her father surmised:

Well, I do have something of sentimental value. My daddy left a jacket at my house, one of his work jackets. It has patches of cement. It has holes in it and whatever, but I wear it. That's the only thing that I have of him outside of pictures, but I have that jacket and I'll have that jacket till the day I die. It's raggedy, but it's from my daddy.<sup>79</sup>

Sometimes, it was jewelry, a particularly important necklace or an unimportant watch. It might also include a truck or a car.<sup>80</sup>

The most valuable asset inherited was the house.<sup>81</sup> In the financial realm, participants frequently commented on life insurance proceeds, and occasionally on stocks, bonds, or retirement plan proceeds.<sup>82</sup> Even if they knew that a life insurance policy existed, which many did, they could not always find the policy or they later learned that the decedent had already borrowed against the policy.<sup>83</sup>

## B. The Distribution Process

For property left at death, the law specifies that disposition is subject to the decedent's intent expressed in a valid will or presumed

---

79. Interview with Respondent HF7, in Baton Rouge, La. (Oct. 26, 2011) (on file with author).

80. Interview with Respondent IM34, in Baton Rouge, La. (Mar. 2, 2012) (on file with author).

81. Collection of Interviews, *supra* note 24. This portrait mirrors national statistics on the most valuable nonfinancial assets held by American households. Although the most common nonfinancial asset is a car, the most valuable such asset is a house. FED. RESERVE, CHANGES IN U.S. FAMILY FINANCES FROM 2007 TO 2010: EVIDENCE FROM THE SURVEY OF CONSUMER FINANCES (2012), <http://www.federalreserve.gov/pubs/bulletin/2012/articles/scf/scf.htm>. See generally *A Quick Look At U.S. Households and Their Assets*, THE URBAN INST. (2008), [http://www.urban.org/UploadedPDF/901202\\_household\\_assets.pdf](http://www.urban.org/UploadedPDF/901202_household_assets.pdf); Among study participants, twenty percent of MP widows inherited and lived in the house a year after the death, fourteen percent of widowed stepparents lived in the house at that point, although ongoing conflict surrounded use and ownership of those homes, and none of the widowed significant others inherited or continued to live the house, even though all were cohabiting prior to the death. Collection of Interviews, *supra* note 24.

82. Collection of Interviews, *supra* note 24.

83. *Id.* Several of the deceased family members used the life insurance policy as a quick loan system or savings account. *Id.* Somewhat ironically, one respondent's family only borrowed against the policy to pay for other family burials. For more on the needs of low and moderate income people for quick loans, see Greene, *supra* note 39.

through the default laws of intestacy.<sup>84</sup> Family structure significantly impacted the existence of a will or other strong statement of intent, with the non-married parent families less likely to have such indications.<sup>85</sup>

Approximately twenty percent of all respondents mentioned the presence *or* absence of a will.<sup>86</sup> Most decedents in the study died intestate,<sup>87</sup> as is true more generally,<sup>88</sup> although the ten percent of study participants who mentioned the existence of a will represents a substantially lower number than national estimates on the number of people who die with a will.<sup>89</sup> All of the parents who died testate were in remarried or stepparent families.<sup>90</sup> Another ten percent of study participants noted that their parents did not have wills; each of the people who mentioned the absence of a will came from a remarried, step, or single parent family.<sup>91</sup> In none of the families of children with married parents were wills mentioned.<sup>92</sup> Participants only occasionally used legal terms, and they were more likely to do so outside of the married parent/solo parent families.<sup>93</sup> In those situations, there was a general understanding that Louisiana's system of community property meant that a surviving spouse inherited one-half of marital property, but only one person mentioned the technical term, "usufruct."<sup>94</sup> The scarcity of discussion of wills or more formal processes of inher-

---

84. See DUKEMINIER & SITKOFF, *supra* note 53.

85. Collection of Interviews, *supra* note 24.

86. *Id.*

87. *Id.*

88. See generally Reid Kress Weisbord, *The Connection between Unintentional Intestacy and Urban Poverty*, RUTGERS L. REV. COMMENTS. 1 (2012), [http://www.rutgerslawreview.com/wp-content/uploads/archive/commentaries/2012/Weisbord\\_TheConnectionBetweenUnintentionalIntestacyAndUrbanPoverty.pdf](http://www.rutgerslawreview.com/wp-content/uploads/archive/commentaries/2012/Weisbord_TheConnectionBetweenUnintentionalIntestacyAndUrbanPoverty.pdf). Reliable estimates on the number of Americans who die intestate are virtually impossible, and would require interviews with family members of each decedent. Even probate records would distort the rate overstating the number of people who died testate; a probate record is not opened for everyone who dies, and, logically, is more likely when there is a will to administer. For some of the problems in measuring rates of intestacy, see *Id.*

89. This may reflect the age or economics of the parents. *Id.*

90. Collection of Interviews, *supra* note 24.

91. *Id.*

92. *Id.*

93. *Id.*

94. Interview with Respondent VF47, in Baton Rouge, La. (Mar. 15, 2012) (on file with author). The respondent's father had remarried. He explained,

It's written up in the will that his wife, T-----everybody called her Tiger—that she has—I don't know how to say this properly, but it's usifer or useavidge—okay—of the place until either she gets remarried or she passes or moves, decides to move or whatever.

itance reflected not just a lack of familiarity with the applicable law but also the lack of planning by the parents.

In all families, there were often postmortem tensions as family members moved forward. The means of resolving those tensions, however, varied. In marital families, when friction was experienced, it was resolved privately, and, in their interviews one year later, respondents rarely expressed feelings of frustrated entitlement or ongoing bitterness.<sup>95</sup> By contrast, regardless of their awareness of legal documents, participants outside of married and single parent families typically experienced some form of friction with the surviving spouse and with half-siblings which led to a break in the filial relationship or required legal intervention.<sup>96</sup>

The lack of planning itself could cause bitterness.<sup>97</sup> This section explores what happened in families both with and without planning.

### 1. WILLS—OR NOT

Among the few participants who mentioned wills, two believed that they had been cut out of the deceased's wills; they could not be sure, however, because tensions continued to run high between them and their widowed stepmothers, with the daughters rarely speaking to the widows in the year since the death.<sup>98</sup> The other two wills involved usufruct issues, indicating a fairly sophisticated understanding of inheritance law.<sup>99</sup> One respondent's deceased father expressed to him and several of his siblings that usufruct of his home should be granted to their stepsister, who was out of work at the time and had moved in with him to help with caregiving duties.<sup>100</sup> After

---

95. Collection of Interviews, *supra* note 24.

96. *Id.*

97. One respondent explained how filial relationships are broken due to friction over wealth transfer. Interview with Respondent GF57, in Baton Rouge, La. (April 24, 2012) (on file with author). The respondent was raised by her stepfather from the age of two years. He never adopted her, but he was her in-home father, and she called him dad throughout her childhood. At her wedding, he was the one who walked her down the aisle. Yet she was angry that he had let the note on his house lapse, leading to its foreclosure. She resentfully explained, "Now I call him by his first name . . . he doesn't deserve the title of dad."

98. Interview with Respondent WF22, in Baton Rouge, La. (Nov. 21, 2011) (on file with author); Interview with LF11, Baton Rouge, La. (Oct. 24, 2011) (on file with author).

99. Interview with Respondent MM12, in Baton Rouge, La. (Mar. 15, 2012) (on file with author); Interview with Respondent VM47, *supra* note 66.

100. Interview with Respondent VM47, *supra* note 66.

the death, the grown children read the will and learned that he had not included that wish.<sup>101</sup> This respondent advocated for honoring the verbal wish of his dad and convinced the other siblings to allow the stepsister to remain in the house, but other family members disagreed.<sup>102</sup> Another respondent, a stepson, reported that his mother, the widow, had been granted usufruct of the deceased's home.<sup>103</sup> Payments remained on the property, which would ultimately be an asset of the deceased's grown children, and so the respondent advised his mother not to make payments on an asset that she would only be able to use during her lifetime.<sup>104</sup> In the year since the death, his mother had been removed from the home by his stepbrother and was now living with him.<sup>105</sup>

Or, consider what happened to one respondent from a "single" parent family;<sup>106</sup> her account shows how, even with an incomplete understanding of formal law, people act in accord with it. After her mother's death, this respondent was cleaning out her mother's house, and, as she explains: "I found a letter that my mom had written and signed concerning her wishes to be cremated and that she wanted her boyfriend to have 2,000 dollars from her 10,000-dollar life insurance policy."<sup>107</sup> Louisiana accepts holographic wills—"olographic testaments"<sup>108</sup>—but she describes it as, "more informal because actually, it was only signed by her and I don't even think anybody else signed it. But she did make four copies of it."<sup>109</sup> In addition to this will, a life insurance policy existed, but this respondent and her brothers didn't

---

101. *Id.*

102. *Id.*

103. Interview with Respondent MM12, *supra* note 99.

104. *Id.*

105. *Id.*

106. Interview with Respondent SF18, *supra* note 30.

107. *Id.*

108. LA. CIV. CODE ANN. art. 1575 (2013) defines an "olographic testament":  
Olographic testament. A. An olographic testament is one entirely written, dated, and signed in the handwriting of the testator. Although the date may appear anywhere in the testament, the testator must sign the testament at the end of the testament. If anything is written by the testator after his signature, the testament shall not be invalid and such writing may be considered by the court, in its discretion, as part of the testament. The olographic testament is subject to no other requirement as to form. The date is sufficiently indicated if the day, month, and year are reasonably ascertainable from information in the testament, as clarified by extrinsic evidence, if necessary. B. Additions and deletions on the testament may be given effect only if made by the hand of the testator.

109. Interview with Respondent SF18, *supra* note 30.

find it immediately so she paid for the funeral on a credit card.<sup>110</sup> Once the siblings found the policy, they learned that their mother had borrowed against it, leaving \$7,000 to be distributed between the three of them.<sup>111</sup> They then distributed the asset:

I told them [her brothers], you know, Mama's wishes were that William [her mother's longtime boyfriend] would have 2,000 dollars. So I just want to get covered for the funeral expenses and I will give William 2,000 dollars and then you all split the rest . . . I told 'em that's all I wanted because both of my brothers – one of 'em's in and out of school workin' at a restaurant and one of 'em's got five kids at home and he works at a restaurant, so they needed the money more than I did.<sup>112</sup>

For this respondent, it was fair to honor her mother's wishes for her boyfriend, despite the fact that she didn't realize she was legally bound to do so, and it was fair to excuse her brothers from giving to the boyfriend based on their current financial needs.<sup>113</sup>

Wills were not irrelevant to other families; several respondents noted the absence of a will. Two respondents, sisters, told of how their deceased single father had not prepared a will and thus the four siblings were left to settle distribution of his property without his guidance.<sup>114</sup> Each member took on a particular role. The son took the lead in coordinating all financial and legal terms.<sup>115</sup> One daughter, who was also one of the respondents and who had served as primary caregiver and surrogate decision-maker for her deceased father, remained on the decedent's property and helped with cleaning the home.<sup>116</sup> Another daughter, not a respondent, who had long been estranged from the family, showed up unexpectedly at the funeral services.<sup>117</sup> Because she was out of work, she decided to stay on the property as well and clean the out-buildings and land itself in order to prepare it for sale.<sup>118</sup> The third daughter, one of the two respondents, who lived several states away, chose to excuse herself from the pro-

---

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Interview with Respondent XF23, in Baton Rouge, La. (Nov. 22, 2011) (on file with author).

115. *Id.*

116. Interview with Respondent IF8, by phone (Jan. 10, 2012) (on file with author).

117. Interview with Respondent JF9, by phone (Jan. 10, 2012) (on file with author).

118. *Id.*

cess and claimed that she wanted no share in the rights or responsibilities of inheritance.<sup>119</sup>

Asset distribution became more complicated in remarried families where there was no will but there was collective memory of informally stated wishes. One respondent's father expressed one goal to accomplish before dying that concerned his second wife of more than thirty years.<sup>120</sup> He wanted to move her into a small condo closer to her sister so that she could care for a smaller property and be close to help as she aged as a widow.<sup>121</sup> He accomplished the condo purchase and move but died before settling all the paperwork involved with selling their previous home.<sup>122</sup> He asked his three daughters from his first marriage to honor their stepmother by relinquishing any rights to their previous home.<sup>123</sup> They verbally agreed to do so.<sup>124</sup> However, at the funeral services, fissures appeared in the stepfamily relationship.<sup>125</sup> When the stepmother sat in front with her grown children and pushed the three daughters of the deceased back several rows, hurt feelings emerged which erupted over the property.<sup>126</sup> While two of the sisters acquiesced and signed away their ownership rights to the property, the third sister refused, and was continuing to do so a year after the death.<sup>127</sup>

Despite conflict and failed planning, most respondents believed that families should try to make things fair.<sup>128</sup> The task of equitably dividing the estate involved multiple, nuanced understandings of a spouse or child's biological ties and formal and informal claims to the deceased's estate, the functional role played by each family member in instrumentally, financially, and/or emotionally caring for the deceased parent prior to death, and an interpretation of the deceased's expressed or understood wishes. For example, one respondent, who was not legally named as executor of the estate, explained the confusion and tension that arose when no will could be found and several

---

119. Interview with Respondent IF9, in Baton Rouge, La. (Nov. 5, 2011) (on file with author).

120. Interview with Respondent XF23, *supra* note 114.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. Collection of Interviews, *supra* note 24.



girlfriends of his father had to be dealt with along with six grown children from different mothers.<sup>129</sup> “I could only give my advice to split everything up. But as far as any will he had, we couldn’t find that. We’d probably never find that.”<sup>130</sup> Yet he also expressed bitterness, complaining that:

[t]hey probably tore that up because, like I said, the house he was living in was his house, and he left the woman there, so we—I don’t know. [There are] a lot of things we could have done to try to get the house and all the stuff that he left still there. We haven’t come to an agreement as to who should get what. And that’s been over a year. So we’re trying to work that out now. But yeah, I couldn’t take charge because my name wasn’t on anything to really take charge of as far as money wise.<sup>131</sup>

## 2. SPOUSES’ RIGHTS

In married parent families, there were few tensions between the surviving spouse and children when property was distributed. In both remarried and stepparent families, however, study participants often expressed anger that they were left out of final visits, burial arrangements, and wealth transmission.<sup>132</sup> Particularly when a biological parent had died, the stepfamily relationship quickly became strained; unlike in marital families, there were no legal ties to bind the unit, nor to serve as a background structure to interactions.<sup>133</sup> Typical is the experience of one respondent, who explained the situation between herself, her siblings, and their father’s wife:

We didn’t have anything to do with the planning of his burial . . . we didn’t have a choice in picking the casket, we didn’t

---

129. Interview with Respondent RM43, in Baton Rouge, La. (Mar. 1, 2012) (on file with author).

130. *Id.*

131. *Id.*

132. Collection of Interviews, *supra* note 24.

133. Stepparents are not legally recognized parents. See Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467, 1495-96 (2013) (discussing legal aspects of the stepparent-stepchild relationship); see also Terin Barbas Cremer, *Reforming Intestate Inheritance for Stepchildren and Stepparents*, 18 CARD. J.L. & GENDER 89, 89 (2011) (discussing inheritance rights in stepfamilies). Indeed, sociologists find that biological parents exert a mediating role in the stepparent relationship; after that parent’s death, contact between children and stepparents becomes more sporadic. Claire M. Noël-Miller, *Former Stepparents’ Contact with Their Stepchildren after Midlife*, 68 J. GERONTOLOGY 409, 410 (2013).

have a choice in where the service was gonna be. She picked everything.<sup>134</sup>

Conflicts at this point presaged later disagreements and dissatisfaction about the inheritance. Respondents felt territorial towards their parent's possessions and anger that they had no control over their disposition.<sup>135</sup>

In these families, when there was an absence of planning, children expressed their powerlessness. As generations of disappointed beneficiaries have learned, intent that has not been translated into the requisite formality is not legally binding, and such, expressions of testamentary disposition in this manner are not given effect.<sup>136</sup> For some of our respondents, the language surrounding the proposed inheritance was precatory, resulting only in a moral, rather than a legal, obligation.<sup>137</sup> One respondent explained that her father had always reassured her that she would be taken care of, and had left her:

what the lawyer said, like a pretend trust. It's called a trust, but they don't actually exist. In other words, if [his second wife] was a decent human being she could say, 'Okay. We're gonna take everything that was your dad's, property, business, assets, whatever, and I'll give you and your brother a fair—this amount, whatever.' 'Cause she doesn't have to and she's not gonna.'<sup>138</sup>

134. Interview with Respondent HF7, in Baton Rouge, La. (Oct. 26, 2011) (on file with author). For discussion of tensions over burial that result from the changing American family, see Foster, *supra* note 27, at 1401.

135. Interview with Respondent HF7, in Baton Rouge, La. (Oct. 26, 2011) (on file with author). As Respondent HF7 explained, her siblings began to express their dissatisfaction immediately after the funeral:

They pulled me in the bedroom and they said, 'I didn't like that casket he was in.' 'What are we gonna do about the house and all?' I'm like oh my God. 'What about the trucks in the yard? She don't need all of them vehicles.'

I'm like oh my God. I said, 'Y'all should just let it go. Let it go. Those are material things. If she wants you to have 'em, she'll give 'em to you, but I doubt if she will because she's that type of person. Just let it go because now that daddy's gone she's only gonna get half of the Social Security he was gettin' probably because she didn't work enough to get Social Security.'

*Id.*

136. See Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfer*, 51 YALE L.J. 1, 5 (1941); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 492 (1975).

137. See DiRusso, *supra* note 63; Deborah S. Gordon, *Reflecting on the Language of Death*, 34 SEATTLE U. L. REV. 379, 410-11 (2011); Daphna Hacker, *Soulless Wills*, 35 LAW & SOC. INQUIRY 957, 980-81 (2010) (suggesting the need to include more personal emotions in wills).

138. Interview with Respondent LF11, in Baton Rouge, La. (Oct. 24, 2011) (on file with author).

So-called precatory trusts are, as this respondent recognized, not legally enforceable.<sup>139</sup> The stepmother tried to give her and her brothers a few sentimental jewelry items in lieu of property or money, but they rejected them, angry that she had, literally and figuratively, locked them out of their father's inheritance.<sup>140</sup> These were not new tensions, but death exacerbated them. The children often seemed to feel left out by their parent's new partner, and they responded by displaying a strong sense of territoriality toward property.<sup>141</sup>

Yet planning also served to validate children's emotional connections to both of their parents. One respondent was surprised and pleased as he recounted that his father, who had remarried, had "left" money to his mother, the first wife.<sup>142</sup> At the same time, his father's actions did not undercut his feelings towards his stepmother; she was the one, rather than his father, from whom he sought any financial help.<sup>143</sup>

In this family, as in others, we saw that ex-spouses do not necessarily have an adversarial relationship, even following a contentious divorce. Nine out of the forty single or remarried parent deaths included the support or involvement of the ex-spouse.<sup>144</sup> Five ex-spouses played an active, hands-on role with both the grown child and the dying parent by sitting with the dying ex-spouse, regularly making food, and even playing a decision-making role after death; two were present at the time of death; and four played an active hands-on role with the grown child but a more tangential role with the dying ex-spouse.<sup>145</sup> These ex-spouses tended to be involved for the sake of their grown child, and none incurred any financial or legal rights or responsibilities on behalf of the dying or deceased ex-spouse.<sup>146</sup>

---

139. See DiRusso, *supra* note 63, at 8-20; Dawn Watkins, *The (Literal) Death of the Author and the Silencing of the Testator's Voice*, 24 *LAW & LITERATURE* 59, 65-66 (2012).

140. Interview with Respondent LF11, *supra* note 138.

141. Collection of Interviews, *supra* note 24.

142. Interview with Respondent BM53, in Baton Rouge, La. (Apr. 24, 2012) (on file with author). His father had, over the years, become friendly with the first wife.

143. *Id.*

144. Collection of Interviews, *supra* note 24.

145. *Id.*

146. *Id.*

## 3. CHILDREN LEFT OUTSIDE

In addition to tensions with surviving spouses, the participants often experienced conflicts with half-siblings. Of the sixty-two interviewees, almost half had full siblings, one-third had half-siblings, and one-fourth had step-siblings (with overlap within the categories).<sup>147</sup> In virtually every family, one of the siblings tended to move into the main mediator role, and often that same sibling acted as next of kin and primary caregiver during the deceased's illness or hospitalization; this person was often the one being interviewed.<sup>148</sup> Conversely, most interviewees label one surviving sibling as a "problem."<sup>149</sup> In other words, one sibling refuses to be in agreement with the others over property ownership, even to the point of contesting a will. The mediator sibling would like to revert to private ordering for the sake of civility and family harmony, but the private bonds and shared family norms between a stepparent and surviving stepchildren prove to be too weak, conflicted, or marked by suspicion to withstand the empathic compromises intrinsic to private ordering. One respondent explained that, after his father died, a stepsister with neither a legal nor a blood relationship claimed "to be his daughter, and signed off on the account and withdrew all the cash he had in that checking account," causing the legal siblings to become quite angry.<sup>150</sup>

Several of the respondents used the term "outside child" to refer to themselves or to half-siblings. While the term appears in Caribbean culture,<sup>151</sup> some scholars have used it to refer to any type of multi-partner fertility.<sup>152</sup> When they used the term, study participants

---

147. *Id.*

148. Since we only interviewed one family member, this assumption of the mediator role was based on the interviewee's report. Nonetheless, the consistency of this role between families suggests that this was a fairly common pattern of role assumption. *Id.*

149. Interview with Respondent VM46, in Baton Rouge, La. (Mar. 15, 2012) (on file with author).

150. *Id.*

151. *Outside Child*, URB. DICTIONARY (May 21, 2013), <http://www.urbandictionary.com/define.php?term=outside%20child>. Kingston's newspaper, the Jamaica Observer, frequently includes questions about "outside children" in advice columns. *E.g.*, RB Samuels, *Should I forgive him for the Outside Child?*, JAM. OBSERVER, Apr. 28, 2008, [http://www.jamaicaobserver.com/magazines/allwoman/135012\\_Should-I-forgive-him-for-the-outside-child](http://www.jamaicaobserver.com/magazines/allwoman/135012_Should-I-forgive-him-for-the-outside-child). See Kathryn Edin, Maria J. Kefalas & Joanna M. Reed, 66 J. MARRIAGE & FAM. 1007, 1012 (2004) (referencing the use of "outside child" in non-Caribbean culture).

152. *E.g.*, ROBERT B. MINCY & HILLARD POUNCY, INST. FOR AMERICAN VALUES, CTR. FOR MARRIAGE & FAM., BABY FATHERS AND AMERICAN FAMILY FORMATION:

might have meant a parent's nonmarital child or a child from another relationship. Many did not seem to understand that legally, so long as the parent has acknowledged the parent-child relationship, then a nonmarital child stands on an equal inheritance basis with a marital child.<sup>153</sup>

While participants' appreciation of the legal implications of being a marital or nonmarital child varied, their status as an "inside"<sup>154</sup> or "outside" child affected their relationships with the rest of the family. Those who identified as "outside" were less likely to seek an inheritance, regardless of their legal entitlement to do so, and seemed to feel some distance from the rest of the family.<sup>155</sup> One respondent explained that the house her father left is "ours . . . [But] my brother and I, the outside brother, we decided just to stay out of it. Let them handle whatever they want to handle."<sup>156</sup> Her sense of entitlement was based on her father's informal acknowledgement of their relationship, although he had never taken the requisite, formal legal steps to do so.<sup>157</sup> Another respondent, who had been raised by the man she called "dad" from the age of three, self-identified as an outside child, but did not join her siblings in taking steps to inherit some of her father's

---

LOW-INCOME, NEVER-MARRIED PARENTS IN LOUISIANA BEFORE KATRINA (2007), available at <https://docs.google.com/viewer?url=http://americanvalues.org/catalog/pdfs/babyfathers.pdf>.

153. See *Lalli v. Lalli*, 439 U.S. 259 (1978); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Succession of Brown*, 388 So.2d 1151 (La. 1980) (finding unconstitutional a Louisiana statute that distinguished between the inheritance rights of marital and nonmarital children); Paula Monopoli, *Toward Equality: Nonmarital Children and the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 995, 998 (2012). Louisiana was quite late—one of the last states to recognize the equal rights of nonmarital children in *Levy v. La.*, 391 U.S. 68 (1968).

154. Kathryn Edin, Maria J. Kefalas & Joanna M. Reed, *A Peek Inside the Black Box: What Marriage Means for Poor Unmarried Parents*, 66 J. MARRIAGE & FAM. 1007, 1013 (2004). The existence of a term for an "outside" child implies that an "inside" child also exists. *Id.*

155. No respondent actually used the term "inside."

156. Interview with Respondent HF7, in Baton Rouge, La. (Oct. 24, 2011) (on file with author).

157. *Id.* Notwithstanding her sense of entitlement to the property, she only met her father when she was in her mid-twenties. He verbally acknowledged his paternity, introduced her to his existing family members as his child, and let her live in his house for several years; she was invited to family reunions and she was told by cousins, aunts, and uncles that she exhibited the family mannerisms. On the other hand, in order for her to be legally entitled to inherit, she needed formal legal recognition as his child, a step he had never taken. See LA. CIV. CODE ANN. art 196 (2013).

property.<sup>158</sup> Indeed, in the absence of proof of an actual or equitable adoption, she had no legal claim to his property; in terms of “entitlement” as a child whom he had raised, however, her claims were morally equivalent to those of his other children.<sup>159</sup>

Inside children, however, felt entitled to inherit because of their status. As one respondent, who explicitly identified the outside children from his father’s three relationships (two marital, one not) explained, even though the insurance policy was in another brother’s name and even in the absence of a will, he thought his father’s property should be split evenly among all of the children.<sup>160</sup> Exacerbating the problems in these families between half-siblings were tensions with the stepparent and frustration with the decedent’s lack of explicit advance planning. Life insurance policies typically ask for a primary and a secondary beneficiary, without providing space for more than one or two names.<sup>161</sup> A policyholder may intend familial sharing, or believe that the proceeds will be distributed through an estate, without a complete understanding that the designee is under no legal compulsion to share the money realized.

### C. What is really going on

At a time of far-reaching reform to our inheritance system—an increasing number of non-probate transfers, enhanced protections for surviving spouses, and a simplification of the probate system—the actual laws have relatively minimal impact on most families. Trusts and estates law typically focuses, almost literally, on “wealth” transmission; those who have more wealth are most likely to use—and to need—sophisticated planning techniques. Yet the law remains relevant to those with less traditional forms of wealth, although our re-

---

158. Interview with Respondent DF29, in Baton Rouge, La. (Jan. 11, 2012) (on file with author). “I don’t know if you know, kind of like when people pass, families go wild. It happened with my grandmother and grandfather, but with A--, you know, his wife just got really bitter at the kids, wouldn’t give the kids like a trinket of their dad’s or anything like that. So actually, they’re preparing right now to do—what is it? Open up a succession. They’ve got an attorney and everything . . . Instead of giving his vehicles to one of the kids, his wife gave it to a cousin.” *Id.*

159. *Id.*

160. Interview with Respondent RM43, *supra* note 129.

161. See, e.g., *Life Insurance Change of Beneficiary*, METLIFE, <http://eforms.metlife.com/wcm8/PDFFiles/31163.pdf> (last visited Nov. 10, 2014).

spondents showed little accurate knowledge of how it might affect them. Even when they had some basic understanding, however, they did not appreciate the actual impact. For example, one respondent seemed to understand that his stepmother keeps community property until she dies, but he was then uncertain about the later results under Louisiana's usufruct statute.<sup>162</sup>

While probate procedures are based on the formal appointment of an executor to marshal and distribute assets, families varied as to how they arranged for asset disposition. In many families, there was little formality;<sup>163</sup> this may have been because there was little to divide or because of mutual understandings and norms within the family. As one respondent from a widowed, remarried family explained:

We went through some things and they all asked me before I took anything in the house, 'Would you mind if I?' 'No, y'all can have whatever you want,' and if I had something to say, you know, 'I don't know about that,' but for the most part, yeah, we all went through stuff together and 'You mind if I take it?' 'No, go ahead,' you know.<sup>164</sup>

Although there was a lawyer involved, he noted, "even the lawyer made the comment, she's like, 'Wow, I wish everybody was like, you know, agreeing and smooth going as y'all.' But you know, for the most part, everything; we agreed 100 percent on everything."<sup>165</sup> Given the size of the estates, little formal legal intervention was needed because the primary assets typically consisted of personal property. The lack of urgency to settle title or debts also meant that, in other families, there was a reluctance to handle post-death property issues at all. Respondents expressed an inability to "go through with it" and face the finality of death.<sup>166</sup>

---

162. Interview with Respondent BM53, in Baton Rouge, La. (Apr. 24, 2012) (on file with author).

163. Collection of Interviews, *supra* note 24.

164. Interview with Respondent YM50, in Baton Rouge, La. (Apr. 10, 2012) (on file with author).

165. *Id.*

166. Interview with Respondent PF15, in Baton Rouge, La. (Nov. 1, 2011) (on file with author).

#### IV. Reforming inheritance: What needs repair?

Inheritance involves not just managing the financial aspects of wealth transmission but also expanding our conception of wealth transmission to go beyond the mechanics of distribution. Framing the legal problems requires analyzing when the law became formally useful, and then making decisions on whether to increase or decrease the law's relevance.

##### A. Where is the law?<sup>167</sup>

The law is integral to death and its consequences. At a minimum, state law requires that a death certificate be filed for each person who dies.<sup>168</sup> Yet the role of the law varied within the respondents' families. Indeed, the study shows how both private and public ordering<sup>169</sup> mechanisms interact during inheritance. One conception of the role of the law at death centers on its seeming irrelevance, borrowing from Professor Robert Ellickson's famous work on Shasta County, where sheep ranchers developed communal norms outside of the law.<sup>170</sup> As Ellickson notes, "[r]egardless of the specific content of law, people tend to structure their affairs to their mutual advantage."<sup>171</sup> On this view, non-legal mechanisms, including "social disdain," serve to supplant formal legal sanctions,<sup>172</sup> and the expectation that neighbors

---

167. See Richman, *supra* note 26, at 744-47.

168. E.g., Jeffrey Boles, *Documenting Death: Public Access to Government Death Records and Attendant Privacy Concerns*, 22 CORNELL J.L. & PUB. POL'Y 237, 253 (2012). Insurance companies require a death certificate before the payment of life insurance benefits; banks need death certificates before transferring an account; and internet companies require death certificates to close accounts. *Id.* See, e.g., Cahn, *supra* note 4.

169. See Barak D. Richman, *Essay, Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2338-39 (2004) ("[P]ublic enforcement applies to all disputes. It employs a common body of [] law, and since it enjoys the backing of state-sponsored coercion, it can require all losing parties to comply with its legal rulings. Private ordering, in contrast, requires voluntary cooperation.").

170. ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); see Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 236-40 (2006); David Friedman, *Less Law Than Meets the Eye*, 90 MICH. L. REV. 1444, 1444 (1992).

171. Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 686 (1986).

172. Richman, *supra* note 26.



will be engaged in long-term civic relationships acts as an incentive for both good behavior and good will when property infractions inevitably happen. Applying that logic to the wealth transfer process, families that presume an ongoing relationship among members before and after the death of one member view actual knowledge of state-articulated inheritance law as not particularly important. Instead, surviving family members might develop their own set of alternative rules to structure the process with virtually no reliance either on the law or on state enforcement mechanisms of any agreed-upon outcomes. The family's internal norms provide the rules and the sanctions.<sup>173</sup> However, in families where an expectation of an ongoing relationship is not a given, which is what we found with stepparents and the non-marital partners of dying parents, then knowledge of the law becomes a tool in making things fair.

A second conception, by contrast, relies on legal default and override rules along with a judicial enforcement mechanism.<sup>174</sup> Within this system, these non-legal/extra-legal mechanisms have force not in spite of, but because of, the credibility of the publicly articulated formal legal rights.<sup>175</sup>

A third conception views the law as serving a "channeling function," reinforcing shared notions of appropriate behavior.<sup>176</sup> As Professor Carl Schneider argued about family law, it plays an intermediary role between the public mandates of criminal law and the deference to private ordering of contract law.<sup>177</sup> Accordingly, as ap-

---

173. Other studies have found that only a tiny percentage of decedents in any given area actually end up in probate. E.g., Horton, *supra* note 62, manuscript at 24 (finding a seven percent probate rate, with most probate estates involving single decedents). Notably, low probate court usage was true even long before the non-probate revolution. As the authors of one of the first such articles hypothesized, it was likely because the decedent's family divided the estate informally. Richard R. Powell & Charles Looker, *Decedents' Estates: Illumination From Probate And Tax Records*, 30 COLUM. L. REV. 919, 927-28 & n.10. (1930). For more such evidence, see Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 244 (1963); Edward H. Ward & J. H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393, 411.

174. See Mnookin & Kornhauser, *supra* note 26, at 950-77.

175. See Richman, *supra* note 26 at 744-45.

176. Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

177. *Id.* at 504 (describing the channeling function of family law as a means for promoting social institutions that does not primarily use legal coercion). Cf. June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185, 1200-12 (2013); Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channeling Function of Family Law*, 28 CARD. L. REV. 2133, 2133 (2007); Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 1-26 (2012) (exam-

plied to the inheritance process, the law articulates and reinforces mainstream norms, guiding family members towards socially-sanctioned outcomes.

Within a fourth and final conception, law serves as a strategic resource differentially available to the participants.<sup>178</sup> Pursuant to this approach, the law functions as a constraint and can be used when needed; that is, ordinary people are legal actors, even those with an incomplete understanding of the law. The law, on this understanding, becomes less of a foreign “object” and, instead, is more useful and personal.

In our study, the role of the law varied, with each family serving as a microcosmic community of norms. We found, as did Ellickson, that non-legal mechanisms structured interactions where families had developed strong internal and unified norms.<sup>179</sup> In these families, people acted in accordance with long-held expectations for what was appropriate, with neither recourse nor reference to the law. In those families where there was order without law, however, the law would not have imposed a system contrary to the expectations of family members. Indeed, application of the law would have resulted in the same outcomes achieved by non-legal mechanisms; the shadow laws are important in reifying what happens. Law served a channeling function, articulating and reinforcing conventional norms. Accordingly, although law was not formally relevant to the families, it would have validated their actions. In those families where there was disorder without the law, the law would have imposed a system contrary to what the family members resolved privately. In many families where the deceased was unmarried, the siblings often divided property inequitably based on a shared understanding of fairness determined by the amount of time and money sacrificed by a member to either care for the deceased or spent in settling the estate after the death.<sup>180</sup>

In other families, conflicts arose concerning the burial of the deceased, even when the deceased had given explicit instructions,

---

ining the relationship between the crime of seduction and the role of marriage as part of a system of sexual discipline).

178. HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 61-62 (1999); Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95, 95-151 (1974).

179. Collections of Interviews, *supra* note 24.

180. *Id.*

though not formally included in the will, to the contrary. One family did not accede to the expressed intent of the decedent in order to meet their widow's preferences.<sup>181</sup> Another respondent's family did not honor the deceased mother's expressed intent to have a closed casket for the sake of the widower's wishes.<sup>182</sup> One respondent's family did not honor the father's expressed intent that his ashes be scattered in a specific locale but allowed the widow to place his ashes on the mantle—contrary to his expressed wishes.<sup>183</sup> In all of these examples, the deceased was in his or her first and only marriage at the time of death. The internal norms of these families allowed for disorder without legal intervention. They resolved these conflicts privately. In contrast, the internal norms of single and remarried parent families were not strong enough to keep disorder from escalating and leading to legal intervention.

The basic principles of the inheritance system—respecting the decedent's intent and protecting the family—reflect a general consensus on what should happen to what is left behind.<sup>184</sup> A triple structure of laws furthers these principles, establishing a sound foundation for passing what has been left behind: default rules that apply in the absence of alternative statements of intent, opt-out rules that apply when there are alternative statements of intent, and override rules that protect the decedent, family members, and the public fisc, regardless of the decedent's intent.<sup>185</sup> For many people, the default intestacy system and small estate administration work as they should; property is distributed without conflict and with maximum efficiency to a predictable group of people.

---

181. Interview with Respondent NF39, in Baton Rouge, La. (Feb. 7, 2012) (on file with author).

182. Interview with Respondent IM34, in Baton Rouge, La. (Mar. 2, 2012) (on file with author).

183. Interview with Respondent YM 24, in Baton Rouge, La. (Nov. 29, 2011) (on file with author).

184. Carbone & Cahn, *supra* note 177.

185. *See generally id.*

**B. So what's wrong?**

The problem is that, while the law could be useful in allocating to people what is rightfully theirs, it is not, both jurisprudentially and in practice. Even Ellickson saw a role for law: the formal legal system becomes relevant when internal norms break down.<sup>186</sup> Indeed, we observed both “order without law” and “disorder requiring law.” It was when families were unconventional that the law was most critical as a guide and as an enforcement mechanism, and, ironically, in those cases it did not serve the families’ needs.<sup>187</sup> In those families, unfamiliarity with the law meant that the decedent had not planned; the substance of the law often differed from the expectations and needs of family members; and enforcement mechanisms were cumbersome.

First, planning mechanisms either did not exist or were inadequate. Life insurance policies were unavailable or had lapsed; there was no recognition that wills might be useful, regardless of wealth. Most people do not have an accurate understanding of the law, do not take steps to understand it, and then do not take the steps to set out their wishes. Second, the law does not necessarily reflect the fair, appropriate outcome for many of these families that fall outside of the conventional nuclear family norm. With the married parent family characterizing a minority of Americans today, and with increasing rates of divorce among Baby Boomers, the traditional inheritance system becomes correspondingly less useful.<sup>188</sup> Its definition of family and its definition of property are outdated.<sup>189</sup> Third, death is stressful; according to the widely used Holmes-Rahe Life Stress Inventory,<sup>190</sup> two of the top five most stressful events in an individual’s life relate to the death of a spouse or a close family member. Any tension will be magnified, and the absence of easily accessible, well-known procedures can exacerbate the situation.

Yet the law must apply in the context of devastating grief as well as in less dramatic moments. It is unlikely that probate courts will routinely offer grief counseling; that is the province of religious

---

186. Ellickson, *supra* note 170.

187. *Id.* at 271.

188. *Id.* at 265.

189. Consider that property includes not just treasured hard copies of photos, but treasured e-copies of photos. See Cahn, *supra* note 4.

190. Thomas Holmes & Richard Rahe, *The Social Readjustment Rating Scale*, 11 J. PSYCHOSOMATIC RES. 213 (1967).

communities and, increasingly, of hospice care,<sup>191</sup> entities that focus on the psychological and spiritual aspects of grief, not the financial distributions and their attendant emotions. Consequently, an increasing number of families face the potential for conflict and procedural and substantive inefficiencies as they manage the already-traumatic experience of the death of a close family member. It is difficult—and distasteful—for an individual to anticipate the potential for postmortem acrimony,<sup>192</sup> yet the inheritance of family property does “symbolize belongingness, love, and dedication, and at the same time exclusion and hierarchy.”<sup>193</sup>

The disconnections between the law and people’s lives are most obvious at particular junctures when the individual becomes unable to speak: when an individual is incapacitated or has died and estate assets must be distributed. At each of those points, however, unless the individual has spoken in advance, guidance as to intent must be gleaned from earlier statements and actions, which often are inconclusive, or are imputed through default rules.<sup>194</sup> Repeatedly, as they offered advice, respondents emphasized the absence of planning. Typical responses included: “I would say make sure that they take care of all the end arrangements before time. And they have a will,”<sup>195</sup> or “have the conversation.”<sup>196</sup> Or, they offered even more specific advice: “Have beneficiaries noted on your retirement accounts.”<sup>197</sup> The need for planning was pervasive, ranging from the lack of health care directives to missing designations on non-probate assets to the absence of wills.<sup>198</sup> The experiences of our study recipients are not unusual. Most Americans have not prepared an advance medical di-

---

191. Diane E. Hoffmann & Anita J. Tarzian, *Dying in America—An Examination of Policies That Deter Adequate End-of-Life Care in Nursing Homes*, 33 J.L. MED. & ETHICS 294, 294 (2005); Ryan A. Walsh, Note, *A Matter of Life, Death, and Children: The Patient Protection and Affordable Care Act Section 2302 and a Shifting Legal Paradigm*, 86 S. CAL. L. REV. 1119, 1130-31 (2013).

192. Some states allow for “living” or “antemortem” probate. See, e.g., Tate, *supra* note 45, at 191-93; Adam J. Hirsch, *Incomplete Wills*, 111 MICH. L. REV. 1423, 1460 n. 181 (2013). Of course, these are only available to people who have already drafted wills.

193. Shelly Krecizer-Levy, *Deliberative Accountability Rules in Inheritance Law: Promoting Accountable Estate Planning*, 45 U. MICH. J.L. REFORM 937, 945 (2012).

194. Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 623 (1988); Hirsch, *Incomplete Wills*, *supra* note 192, at 1427.

195. Interview with Respondent NF13, in Baton Rouge, La. (Oct. 13, 2011) (on file with author).

196. Interview with Respondent MM12, *supra* note 99.

197. Respondent UM46, *supra* note 68.

198. Collection of Interviews, *supra* note 24.

rective or a will, and many do not revisit their initial beneficiary designations.<sup>199</sup>

The solution involves jurisprudential integration of the planning process with the distribution process, and practical legal reforms to both.<sup>200</sup> Advance medical directives, governed by health law; non-probate beneficiary designations, governed by elder, employment, insurance, and wealth transmission laws; and wills, governed by probate law,<sup>201</sup> occupy distinct silos in the law. Considering them together doesn't mean distributing non-probate assets during probate,<sup>202</sup> nor requiring higher levels of formality for advance medical directives and retirement plans—although it may mean a will and advance medical directives for everyone. It requires fixes during the planning stage and at the point of distribution, focusing on those most likely not to have wills as well as on those who live outside of the traditional family structure. There are numerous possible ways to encourage (“nudge”)<sup>203</sup> individuals to plan, using both opt-in and opt-out systems.<sup>204</sup> Opt-out systems are more likely to result in the desired be-

---

199. E.g., Stewart Sterk & Melanie Leslie, *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession*, 89 N.Y.U. L. REV. 165, 165 (2014); Paula Span, *Why Do We Avoid Advance Directives?*, N.Y. TIMES, Apr. 20, 2009, [http://newoldage.blogs.nytimes.com/2009/04/20/why-do-we-avoid-advance-directives/?\\_php=true&\\_type=blogs&\\_r=0](http://newoldage.blogs.nytimes.com/2009/04/20/why-do-we-avoid-advance-directives/?_php=true&_type=blogs&_r=0).

200. See Sterk & Leslie, *supra* note 199. Exhortations to have “the conversation” are pervasive in popular culture. See, e.g., ROZ CHAST, *CAN'T WE TALK ABOUT SOMETHING MORE PLEASANT? A MEMOIR* (1st ed. 2014); TIM PROSCH, *THE OTHER TALK: A GUIDE TO TALKING WITH YOUR ADULT CHILDREN ABOUT THE REST OF YOUR LIFE* (1st ed. 2013); *About Us: Ellen Goodman*, THE CONVERSATION PROJECT, <http://theconversationproject.org/about/ellen-goodman/> (last visited Nov. 10, 2014).

201. For commentary on the potential convergence between non-probate and probate law, see John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109 (1974); Ira Mark Bloom, *Unifying the Rules for Wills and Revocable Trusts in the Federal Estate Tax Apportionment Arena: Suggestions for Reform*, 62 U. MIAMI L. REV. 767 (2008).

202. See Sterk & Leslie, *supra* note 199, at 185 (this would “throw out the baby with the bathwater”).

203. RICHARD H. THALER & CASS SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (Penguin Books 1st ed. 2008); Russell Korobkin, *Comparative Effectiveness Research as Choice Architecture: The Behavioral Law and Economics Solution to the Health Care Crisis*, 112 MICH. L. REV. 523, 527 (2014); Russell Korobkin, *Libertarian Welfarism*, 97 CALIF. L. REV. 1651, 1666-70 (2009) (arguing that public officials could encourage individuals to make welfare-maximizing choices rather than establishing more elaborate structures); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1159 (2003).

204. For a comparison of the utility of each, and a defense of opting-out plans, see Cass R. Sunstein, *Deciding by Default*, 162 U. PA. L. REV. 1, 1 (2013).

havior.<sup>205</sup> The fundamental goal is to ensure that the postmortem process responds to the changed American family. Providing numerous alternative and supporting methods throughout adulthood can help overcome the barriers to ascertaining and implementing family-protective strategies.

## V. Changing Plans

While wealth transmission depends on the law for actually effectuating a valid transfer, most people never take affirmative steps, including consulting with lawyers, to state their preferences.<sup>206</sup> Probate assets do not ever require any planning whatsoever; no system mandates that individuals make an explicit choice to opt out of the default rules of intestacy.<sup>207</sup> By contrast, in the non-probate world, where property is also distributed at death (albeit not through intestacy or by will), assets require some initial planning and people do state their preferences.<sup>208</sup> Retirement plans ask for a beneficiary, life insurance policies designate who will receive the proceeds, trusts require beneficiaries, etc.<sup>209</sup> Yet non-probate assets pose additional planning problems. While retirement beneficiaries are designated at hiring, they can become stale after decades-long employment, and these initial decisions may never be revisited.<sup>210</sup>

The probate and non-probate processes are similar: both transfer property at death, both are characterized by a comparable lack of planning, both dispose of valued assets, and both constitute parts of an estate plan. Consequently, any reforms should address both kinds of assets. In considering what reforms would be appropriate, lived experiences provide guidelines. As explored above, the threshold

---

205. Sunstein summarizes the three primary reasons for the effectiveness of opt-out default rules: "Inertia," "endorsement," and "Reference Point and Risk Aversion." *Id.* at 18-22.

206. Weisbord, *supra* note 88.

207. *See id.*

208. *See id.*

209. Even these are not foolproof means for sound planning and avoiding conflict. There can be a multi-year time lag between an initial signature on such a document and an individual's death, when the beneficiary designation becomes relevant. *See* Stewart E. Sterk & Melanie B. Leslie, *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession*, 89 N.Y.U. L. REV. 165, 165 (2014).

210. *See* Sterk & Leslie, *supra* note 199; Melanie B. Leslie & Stewart E. Sterk, *Revisiting the Revolution: Reintegrating the Wealth Transmission System* 56 B.C. L. REV. (forthcoming 2015).

question of just what these experiences counsel shows the need for more planning. This section provides additional support for that goal before turning to concrete suggestions on how to facilitate planning.

### A. Planning for more planning

The possibility of state encouragement for making choices on wealth transmission may seem overly interventionist, even paternalistic. Yet existing default rules themselves are an example of state “choice architecture,” because the rules influence and affect people’s choices;<sup>211</sup> this next step simply reminds people of the default rules and provides them with options for opting out.

Cass Sunstein suggests there are two forms of paternalism: “Some varieties respect people’s ends and try only to influence their choice of means; other varieties attempt to affect people’s choices of ends.”<sup>212</sup> Providing information about the importance of wills, beneficiary designations, or advance medical directives is an example of means paternalism: people can choose the default rules of intestacy or they can draft their own plans, but the state is not trying to affect which one is chosen nor the decisions on how to dispose of property.

Addressing the need for planning includes providing more easily accessible opportunities along with more education about the positive implications of formally establishing intended expectations. Beyond pragmatic suggestions for fostering such opportunities at moments when individuals must interact with the state, legal reform might also more explicitly address the tensions in remarried families by means other than formal distribution systems.<sup>213</sup>

The standard explanations for why people do not have wills focus on individuals’ fears of facing their own mortality, beliefs that

---

211. See Sunstein, *supra* note 204, at 5.

212. Cass Sunstein, *The Storrs Lecture: Behavioral Economics and Paternalism*, 122 YALE L.J. 1826, 1835-36 (2013). He further notes: “The objections to paternalism are weakest when it is soft and limited to means.” *Id.* at 1837.

213. The current Uniform Probate Code does recognize stepfamilies; for example, it gives a surviving spouse less when there are surviving children who are not shared, so that is a reform that should be adopted more widely. U.P.C. § 2-201; see generally Terin Barbas Cremer, *Reforming Intestate Inheritance for Stepchildren and Stepparents*, 18 CARD. J.L. & GENDER 89, 89 (2011); see Foster, *supra* note 25 (examining that the failure of inheritance law to adapt to new family structures); Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 717 (1984).



they have nothing of value, and their intimidation by the will-making process.<sup>214</sup> Based on our interviews, it appeared that the parents had engaged in relatively little formal end-of-life planning more generally on issues ranging from health care to wills to burial. This may have been partially due to their age and to their economic circumstances, but it also seemed to result from other factors, such as a lack of appreciation as to why such planning might be important to surviving family members, an expectation that everything would just work out, and a reluctance to make choices that might have consequences even if not known during the person's lifetime.<sup>215</sup> Contrary to conventional explanations, it did not appear to result from a fear of death or of the complexities of preparing a will.<sup>216</sup> Instead, the parents simply had not thought about it or just wanted to avoid conflict.<sup>217</sup>

Wills are private documents, expressions of wishes that are deeply personal, traditionally undertaken in lawyers' offices under strict and formalistic standards. Today, to draft a will, an individual can consult with a lawyer, follow a "do-it-yourself" plan, perhaps one available either online or in hard copy, or, in many states, use a statutory form will. But there is no official, public inducement to engage in planning for probate assets.<sup>218</sup>

---

214. See, e.g., Jenny Greenhough, *57% of Adults Don't Have a Will—Are You One of Them?*, EVERYDAY L. (Mar. 31, 2011), <http://blog.rocketlawyer.com/2011-wills-estate-planning-survey-95235>; Weisbord, *supra* note 61, at 887-890; Mary L. Fellows, Rita J. Simon & William Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 3 AM. B. FOUND. & RES. J. 319, 333 (1978). The 2011 survey found that age was correlated with having made a will; only about one-fifth of those over the age of 65 did not have a will compared to 92% of those under age 35. Greenbough, *supra* note 214.

215. Collection of Interviews, *supra* note 24.

216. *Id.*

217. Rocketlawyer, which encourages legal planning, found that most people simply "hadn't gotten around" to making a will, although it did not ask why. *Rocket Lawyer Delivers No Excuses Estate Planning for April "Make a Will" Month*, ROCKET LAW. (Apr. 8, 2014), <https://www.rocketlawyer.com/news/article-Make-a-Will-Month-2014.aspx>. For example, one respondent walked us through the conflicts she and her three siblings faced after the death of their father and how they informally resolved the issue based on a shared sense of equity and individual need: "I do not want to have a fight with anybody about stuff. And especially, and I say this respectfully, when you have two siblings who live below the poverty level. I told my dad over and over, "Don't leave things a mess." What did he do? He left things a mess. He didn't have a will." Interview with Respondent F9, by phone (Nov. 5, 2011) (on file with author).

218. See SUSAN N. GARY ET AL., *CONTEMPORARY APPROACHES TO TRUSTS AND ESTATES* 117-166 (2011).

The state might provide information about advance planning at certain key points. One set of options involves standard interactions with government officials. For example, the statutory form will could be appended to the state's annual income tax return.<sup>219</sup> Second, statutory form wills and other advance planning documents could also be made available when an individual renews a driver's license or registers to vote. The back of a driver's license<sup>220</sup> could even indicate whether an individual has filled out an advance medical directive, just as many states' licenses now do for organ donation.<sup>221</sup> A third critical opening occurs when people sign up for Medicare or Social Security or Medicaid; discussing these issues would be particularly appropriate because these are points at which an individual is thinking about her age and her health. Each of these interactions occurs at times when an individual is considering her financial role<sup>222</sup> or her obligations as a citizen.

A second key point is the family formation process itself. Getting married requires obtaining a state license.<sup>223</sup> Legal divorce requires filing in court and a subsequent court order.<sup>224</sup> Having a child

---

219. See Weisbord, *supra* note 61, at 920.

220. One critical element of the advanced care planning process is naming who will make medical decisions in the event of an individual's incapacity—adding the name of that person, the next of kin, to the drivers' licenses might be an interesting requirement for the next 20 years as our population grays. It would make life easier for emergency room personnel in an emergency. This name would be revisited every time you renew your license and thus could reflect remarriages, etc. An entire paper could address the changing role of the next of kin as a surrogate decision-maker for an incapacitated individual. We begin addressing this question in Amy Zietlow & Naomi Cahn, *Honor Your Father, Mother, Stepmother, Stepfather, Mother's Partner...Reciprocity and Gender in 21st Century Elder Care and Law*, J. LAW & RELIGION (forthcoming 2015) (manuscript on file with authors).

221. *E.g.*, N.Y. VEH. & TRAF. LAW § 504(1)(a) (2013). In Louisiana, the driver's license can include information about whether, for example, the applicant has received a hunting license; moreover, the applicant must be asked whether she would like to be an organ donor, and the state must provide information at the motor vehicle office about organ donation. LA. REV. STAT. ANN. § 32:410 (2012).

222. See Weisbord, *supra* note 61, at 922 (listing advantages of appending the standard form will to the state income tax form).

223. Common law marriages are an exception to this general rule; no state sanction is required at the time of the marriage. See DOUGLAS E. ABRAMS, NAOMI R. CAHN, CATHERINE J. ROSS & DAVID D. MEYER, *Chapter 3. Entering Marriage*, in CONTEMPORARY FAMILY LAW 76, 76-167 (3d ed. 2012).

224. Divorce itself causes numerous consequences in existing inheritance plans. Even if the testator fails to change her will after a divorce, most states have nonetheless enacted statutes that either automatically revoke, or declare presumptively invalid, testamentary provisions in favor of the ex-spouse. In some states, the automatic revocation applies to non-probate designations as well. See, *e.g.*,

leads to a birth certificate. Each of those moments provides an opportunity for the state to encourage planning based on the assumption that significant family changes should serve as an inducement for individuals to reconsider existing disposition plans. No such formal prompting exists. Consider that while pro se divorce packet filings ask litigants about property, they do not otherwise suggest that divorcing parties may need to take additional actions to ensure that divisions at divorce are implemented.<sup>225</sup>

As a less formal mechanism, family law attorneys who handle divorce should ensure that they counsel their clients on the impact of divorce on inheritance.<sup>226</sup> Similarly, estate planning attorneys should emphasize to their clients the importance of updating wills and beneficiary designations based on family changes.

## B. Substantive laws

In married parent families, the default rules give the surviving spouse much of the property, and that matches the family norm.<sup>227</sup> Moreover, the default rules and family expectations seem to match in single parent families, with children dividing the decedent's property.<sup>228</sup> In both stepparent and remarried families, however, default rules are a real challenge.

### 1. PROBATE ASSETS

Beyond encouraging individuals to consider whether they prefer the default rules to making specific dispositions through wills,

---

U.P.C. § 2-804(b)(2010); Waggoner, *supra* note 12; Sterk and Leslie, *supra* note 199, at 180.

225. See *infra* note 231 (discussing third party requirements to change beneficiary designations of nonprobate assets).

226. Family law is already a basis for a high number of malpractice claims. See 3 RONALD E. MALLIN, JEFFREY M. SMITH & ALLISON RHODES, *LEGAL MALPRACTICE* § 28.2 (2014). For speculation as to why, see, e.g., Barbara Glesner Fines, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 *UMKC L. REV.* 965, 981 (2007). State court judges see the largest disparity in representation in family law cases. Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 *STAN. L. REV.* 317, 331 (2011).

227. Lee-ford Tritt, *Technical Correction or Tactonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 *ALA. L. REV.* 273, 292 (2010).

228. UNIF. PROBATE CODE § 2-103 (1990)

choice architects can change the default rules themselves.<sup>229</sup> The default rules reflect policy choices, and the default rules that our research called into question relate to presumptions about establishing the legitimacy of “outside children” to inheritance and automatic revocation upon divorce.

(i) Outside children: Children are entitled to inherit based on their relational status.<sup>230</sup> Children born or adopted into a marriage are presumed to be the children of the spouses. Historically, the marital presumption was conclusive and virtually irrebuttable. Even today, a state may apply the marital presumption regardless of whether the husband was the biological father.<sup>231</sup> By the mid-twentieth century, nonmarital children could inherit from their mothers but not their fathers, because, in the days before reliable and accessible genetic testing, paternity was more difficult to prove than maternity.<sup>232</sup> Today, a nonmarital father can show a biological link or can also file a voluntary acknowledgement of paternity.<sup>233</sup> Behavior, short of that adequate to terminate parental rights, is generally irrelevant to determining status; a child might live with a person whom she considers to be her parent beginning at the age of three, but she will not be an heir of that person. The one circumstance in which behavior is adequate to establish paternity is when a father “holds out” a child as his own for a certain period of time; under the 2002 Uniform Parentage Act, this must occur for the first two years of the child’s life.<sup>234</sup>

For children raised by stepparents whom they consider to be their legal parents, the inability to inherit through intestacy<sup>235</sup> may not reflect actual familial expectations. Revisions might include returning to the Uniform Parentage Act’s prior presumptions,<sup>236</sup> which permitted outside children to establish paternity without blood tests based

---

229. See Sunstein, *supra* note 204, at 56.

230. *E.g.*, UNIF. PROBATE ACT § 201 (2002).

231. See *Michael H. v. Gerald D.*, 491 U.S. 110, 110 (1989); Carbone & Cahn, *supra* note 177.

232. *Michael H.*, 491 U.S. at 110.

233. Carbone & Cahn, *supra* note 177.

234. UNIF. PARENTAGE ACT § 204(a)(5) provides paternity if, “for the first two years of the child’s life, [the father] resided in the same household with the child and openly held out the child as his own.”

235. Under the Uniform Probate Code, stepchildren will inherit in the absence of other heirs. UNIF. PARENTAGE ACT § 2-104(b) (2008) (stepchildren take only if there is no surviving spouse, children, parents, siblings, children of siblings, first cousins, or children of first cousins).

236. See UNIF. PARENTAGE ACT § 4 (1973) (permitting a child to do so if the holding out occurred during the child’s minority).

on holding out for a substantial period of time.<sup>237</sup> This would ratify functional rather than solely legal (adoptive/marital) or biological relationships.

(ii) Revisit the presumption against earlier spouses inheriting: In many states, statutes specify that divorce revokes any disposition in a will to the ex-spouse.<sup>238</sup> State law may even apply such revocations to any relative of the ex-spouse, and states are increasingly expanding these “revocation upon divorce” provisions to include not just probate assets but also non-probate ones.<sup>239</sup> The presumptions are irrebuttable, and apply not just to bequests but also to provisions nominating ex-spouses and their relatives to serve in any capacity in handling the estate.<sup>240</sup> Courts enforce them resolutely, even when a previous spouse is explicitly named, or where there may be some ambiguity as to what the decedent intended.<sup>241</sup> The only situation in which these state laws are inapplicable, the Supreme Court has held, is when states seek to cover non-probate transfers that are authorized or regulated based on federal law.<sup>242</sup>

Yet the actions in many of the families we studied belied this presumption. In addition to ex-spouses receiving bequests, they also entered back into the caregiving equation to reduce the burden on their grown children. Those dying may want to say thank you<sup>243</sup> or

---

237. See, e.g., Monopoli, *supra* note 51.

238. The rest of the will remains intact. At common law, marriage revoked a woman’s premarital will; in some states, marriage revoked a man’s premarital will while in other states, marriage and the birth of issue acted as a revocation. See *In re Hulett’s Estate*, 69 N.W. 31, 34 (Minn. 1896); *Wills—Revocation by Marriage*, 34 HARV. L. REV. 95 (1920).

239. See Kristen Raymond, *Double Trouble- An Ex-Spouse’s Life Insurance Beneficiary Status and State Automatic Revocation Upon Divorce Statutes: Who Gets What?* 19 CONN. INS. L.J. 399, 400 (2013); UNIV. OF MICH. LAW & ECON. RES. PAPER SERIES, PAPER NO. 13-019, THE CREEPING FEDERALIZATION OF WEALTH TRANSFER LAW, 4 (2013) (30% of states include both probate and non-probate transfers in their revocation upon divorce statutes).

240. Federal law can preempt the state divorce revocation cases. See generally *Hillman v. Maretta*, 569 U.S. 1934 (2013); *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001).

241. In *Nichols v. Baer*, the ex-spouse was named in the decedent’s will; the court held that because of the strong public policy of protecting individuals who might forget to change their wills upon divorce, the bequest was revoked unless “there is ‘provided in’ the will or the [divorce] decree a statement to the contrary, that the decedent intended the bequest even though they were divorced.” 78 A.3d. 344, 353 (Md. 2013).

242. *Hillman*, 133 U.S. at 1943; *Egelhoff*, 532 U.S. at 141; see John H. Langbein, *Destructive Federal Preemption of State Wealth Transfer Law in Beneficiary Designation Cases: Hillman Doubles Down on Egelhoff*, 66 VAND. L. REV. (forthcoming 2014).

243. Tate, *supra* note 45, at 177-78 (2008) (reporting on studies showing how receipt of care influenced unequal probate transfers to children); see Alicia B. Kelly,

acknowledge the parental role played by the ex-spouse for their shared children, and there may even be a role for ex-spouses in intestacy provisions. It may be that revocation upon divorce presumptions should apply only to “stale” designations that are dated at least ten years prior to death or divorce. As a pragmatic matter, with ex-spouses becoming more of a norm, best practice may be to suggest to people making their wills that they consider including them.

(iii) Expressive Wills: In popular culture, “last wills and testaments” are formal, indeed formulaic, documents, more appropriate for the inhabitants of Downton Abbey than for those of Baton Rouge. A will’s purpose is to distribute property;<sup>244</sup> personal connections are recognized only to the extent that assets may be bequeathed to “my partner” or “my children,” and sentimental descriptions of property are rare.<sup>245</sup> Yet incorporating more individualized and personal language may encourage more people to use wills and might result in improved interpretation and fewer will contests.<sup>246</sup>

To be sure, there are good reasons to protect the formality of testamentary intent: ensuring that decisions with respect to final dispositions have actually been done with adequate contemplation and without others’ undue influence.<sup>247</sup> They are emblematic of the values inherent in the canon of formality of predictability and caution. Moreover, there is great value in forms that are simple, straightforward, and formal. They are easy to fill out. Indeed, if individuals are informed that will-writing can be the right occasion for sentiment and feeling, that could serve as yet another barrier; in addition to indicating their preferred dispositions, people must also confront emotions and the possibility of conflict.

---

*Better Equity for Elders: Basing Economic Relations Law on Sharing and Caring*, 21 TEMPLE POL. & CIV. RTS. L.J. 101 (2012).

244. See David Horton, *Testation and Speech*, 101 GEO. L.J. 161, 161 (2012).

245. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 181 (3d ed. 2005).

246. See Gordon, *Reflecting on the Language of Death*, *supra* note 137, at 384 (“Contrary to expectations, the case law supports the idea that directly infusing wills with individualized, expressive, and what some might call ‘extra’ language better insulates them against challenges.”).

247. Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 3 (1941); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975); For various analysis of formality, see, e.g., Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033 (1994); Karen J. Sneddon, *The Will as Personal Narrative*, 20 ELDER L.J. 355, 410 (2013).

Certainly, expressive wills will not serve the interest of all decedents. Yet telling stories can be an important source of comfort for families and can create cohesion. For the remarried families in our study that worked well together to “make things fair,” their level of interpersonal warmth, intentional inclusion of each other in their life stories, and their willingness to write a family story together—one that includes not only financial issues but also words of appreciation—was the primary difference setting them apart from stepfamilies that fractured, resulted in legal conflicts, or terminated relationships with one another.<sup>248</sup> Those who defined why they are a family became a family.

Using more personalized language also means that individuals may actually talk to their loved ones before death about their wishes. Moreover, as our respondents’ stories showed, what they valued in what they inherited was sentimental: a work shirt from Sears, a teddy bear made out of the shirts of a stepdad, a football shaped beer koozie that a parent used when they watched Monday night football.<sup>249</sup> They fought over asset distribution not because they really wanted the assets (and the socioeconomic status of most of our respondents indicated a need for assets) but because they felt that they were not being respected and honored in their role in the family and their relationship to the parent.

## 2. NON-PROBATE ASSETS

Like probate assets, non-probate assets are a form of wealth that is distributed at death. But the transfer of non-probate assets occurs outside of the decedent’s estate and is not governed by traditional probate law: the fields of contract, employment, banking and financial regulation, and real property supply the applicable laws. Non-probate assets constitute a significant form of wealth for Americans, although the forms of non-probate assets differ by class.<sup>250</sup> Only a few participants even mentioned trusts, and no parent died with one; by

---

248. Collection of Interviews, *supra* note 24.

249. *Id.*

250. See generally Langbein, *supra* note 59.

contrast, approximately one-third of high net worth individuals have trusts.<sup>251</sup>

Respondents did discuss a number of non-probate assets, with life insurance as the one that most frequently recurred.<sup>252</sup> For many Americans, pension plans provide a source of income during retirement and can support lifetime asset accumulation that forms the basis for inheritance; survivor benefits<sup>253</sup> constitute an additional financial source. When there were non-probate assets, study participants and their parents seemed to have an incomplete understanding of just how they worked.<sup>254</sup>

(i) Life insurance: In 2013, there were almost 300 million life insurance policies in the United States, with a total value of \$19 billion.<sup>255</sup> Seventy percent of Americans own some form of life insurance,<sup>256</sup> and it is a common employee benefit.<sup>257</sup> One quarter of our interviewees' parents or stepparents mentioned the presence or absence of life insurance.<sup>258</sup> For those respondents whose deceased parent had life insurance, most were small (\$5,000-\$10,000) policies obtained through

---

251. BANK OF AM. PRIV. WEALTH MGMT., U.S. TRUST 8 (2013), available at <http://www.ustrust.com/publish/content/application/pdf/GWMOL/UST-Highlights-Brochure-Insights-on-Wealth-and-Worth-2013.pdf>.

252. Collection of Interviews, *supra* note 24.

253. See 29 U.S.C. § 1055 (2012). ERISA's "Spousal Survivor Provisions" require covered pension benefit plans to provide spouses with specified survivor benefits, unless the participant (1) does not have a spouse; (2) has been married for less than a year; (3) is separated from or has been abandoned by the spouse; or (4) is unable to locate the spouse. Albert Feuer, *Who is Entitled to Survivor Benefits from ERISA Plans?*, 40 J. MARSHALL L. REV. 919, 955-56 (2007); Nancy Knauer, *Gay and Lesbian Elders: Estate Planning and End-of-Life Decisionmaking*, 12 FLA. COASTAL L. REV. 163, 203-05 (2011).

254. Collection of Interviews, *supra* note 24.

255. AM. COUNCIL LIFE INSURERS, 7: *Life Insurance*, in LIFE INSURERS FACT BOOK 66 tbl 7.1 (2013), available at [https://www.acli.com/Tools/Industry%20Facts/Life%20Insurers%20Fact%20Book/Documents/FB13%20Chapter%207\\_LL.pdf](https://www.acli.com/Tools/Industry%20Facts/Life%20Insurers%20Fact%20Book/Documents/FB13%20Chapter%207_LL.pdf).

There are two basic types of life insurance: "term" and "whole" or "universal." Term life insurance (as its name suggests) expires after a certain period of time, and, if the insured is still alive, the individual must renew the policy, potentially at a different rate. Whole life insurance is continuous. See generally *A Consumer's Guide to Buying Life Insurance* #3, VERMONT.GOV (2013), <http://www.dfr.vermont.gov/insurance/insurance-consumer/consumers-guide-buying-individual-life-insurance#3>. Insurance may be available as part of a group (such as through an employer), or by individual purchase. *Id.*

256. AM. COUNCIL LIFE INSURERS, *supra* note 255, at 63.

257. Indeed, many new federal employees are automatically covered, and must opt out of coverage; the federal program is the largest group life insurance program in the world. *Life Insurance*, OPM.GOV, <http://www.opm.gov/healthcare-insurance/life-insurance/> (last visited Nov. 10, 2014).

258. Collection of Interviews, *supra* note 24.



their employer.<sup>259</sup> Beyond employer plans, people invest in life insurance to protect their survivors against financial hardship.<sup>260</sup> Yet we repeatedly heard stories that parents had let their life insurance policies lapse.<sup>261</sup> Lapsed life insurance (or none at all) generally resulted in no financial support for survivors as they struggled to pay for funerals; instead, they often tried to allocate responsibilities between family members. Where one person stepped in to provide payment, that person typically was able to control funeral arrangements, which, in turn, could cause resentment.

The role of insurance in ensuring the payment of burial expenses and providing a temporary financial cushion for survivors results in its serving protective and channeling functions.<sup>262</sup> In protecting against risk and privatizing support costs, it plays a quasi-governmental role,<sup>263</sup> which can justify further regulation and consumer protection. Moreover, it channels individuals into the desirable behavior of considering the costs of their own burial and the needs of their survivors. Nonetheless, the lapse rate for individual life insurance policies is high. Almost one-quarter of whole life insurance policies lapse within the first two years of purchase,<sup>264</sup> and approximately three-quarters of all policies sold to seniors at age sixty-five or older will not ever pay a claim.<sup>265</sup>

A series of potential reforms would improve life insurance knowledge and usage. First, one set of changes would focus on consumer disclosure. Disclosure should occur at the time of initial purchase and should be ongoing, with companies sending out periodic updates. Most people underestimate the amount of life insurance they need, and often do not understand the options available to

---

259. *See id.*

260. *See, e.g., id.; Five Reasons Plus One to Buy Life Insurance*, N.Y. LIFE, <http://www.newyorklife.com/products/five-reasons-to-buy-life-insurance> (last visited Nov. 10, 2014) (Reason number 1 is: "Life insurance is about love and life and taking care of loved ones.").

261. Collection of Interviews, *supra* note 24.

262. *See* Kenneth Abraham, *Four Conceptions of Insurance*, 161 U. PENN. L. REV. 653, 683-84 (2013); *see generally* Schneider, *supra* note 176 (discussing the channeling function in family law).

263. *See* Abraham, *supra* note 262, at 686.

264. Nick DiUlio, *The dangers of letting your life insurance lapse*, INSWEB.COM (Jan. 9, 2013), <http://www.insweb.com/news-features/life-insurance-lapse.html>.

265. Daniel Gottlieb & Kent Smetters, *Lapse-Based Insurance* 4 (Nov. 17, 2013), <http://www.princeton.edu/economics/seminar-present-week-schedule/lapse-based-insurance.pdf>.

them.<sup>266</sup> Several states have begun to ensure improved knowledge of options such as converting potentially lapsing insurance policies to other forms of pay-outs.<sup>267</sup>

Second are reforms that would change just how policies lapse. Like other states laws, Louisiana law provides for a thirty-day grace period before a policy will lapse because of nonpayment,<sup>268</sup> and then allows for reinstatement for a period of up to one year thereafter. The generous protections for the insured could be expanded, for example, by ensuring that notice of lapse is provided to family members or beneficiaries.<sup>269</sup> To prove that adequate notice had been sent, companies could be required to use certified or registered mail, as at least one state has considered.<sup>270</sup>

Third are more stringent protections against using a life insurance policy as the basis for a loan. Two respondents in our study mentioned that the parent or other family members have “borrowed against the policy” and so there was less money or none left when they needed the funds.<sup>271</sup>

(ii): Other non-probate assets: While study participants rarely mentioned additional types of non-probate assets, they are significant sources of wealth for other Americans: retirement accounts, joint banking accounts and other forms of joint tenancy, as well as Social Security benefits, constitute a large proportion of individuals’ net worth.<sup>272</sup> The issues here center on planning, updating initial designa-

---

266. See, e.g., Sandra Block, *Cash from your Life Insurance*, KIPLINGER (Jan. 2013), <http://www.kiplinger.com/article/insurance/T034-C000-S002-cash-from-your-life-insurance.html>.

267. E.g., CAL. INS. CODE §§ 10509.930 et seq. (West 2013); see Chris Orestis, *Three States Pass Life Insurance Policy Conversion Study Bills*, PRODUCERS ESOURCE <http://www.producersesource.com/insurance-news/three-states-pass-life-insurance-policy-conversion-study-bills/> (last visited Nov. 10, 2014). The National Council of Life Insurance Legislators has proposed a Model Life Insurance Consumer Disclosure Act. William Scott Page, *The Life Insurance Industry’s Big Secret*, THE HUFFINGTON POST (Oct. 4, 2012, 4:03 PM EDT), [http://www.huffingtonpost.com/wm-scott-page/the-life-insurance-indust\\_b\\_1937246.html](http://www.huffingtonpost.com/wm-scott-page/the-life-insurance-indust_b_1937246.html).

268. LA. REV. STAT. ANN. § 22:149 A.(1) (2012).

269. See, e.g., CA. INS. CODE § 10113.71 (West 2013); ME. REV. STAT. ANN. tit. 24, § 2556 (West 2013) (notification prior to lapse or termination).

270. Virginia considered such legislation for notice of lapse of long-term care insurance. Paula Span, *The Policy Lapsed, But No One Knew*, N.Y. TIMES, Jan. 31, 2014, [http://newoldage.blogs.nytimes.com/2014/01/31/the-policy-lapsed-but-no-one-knew/?\\_php=true&\\_type=blogs&\\_php=true&\\_type=blogs&\\_r=1](http://newoldage.blogs.nytimes.com/2014/01/31/the-policy-lapsed-but-no-one-knew/?_php=true&_type=blogs&_php=true&_type=blogs&_r=1).

271. Interview with Respondent SF18, *supra* note 30; Interview with Respondent QF16, in Irvine, Ca. (Oct. 21, 2011) (on file with author).

272. See e.g., Langbein, *supra* note 59; Stuart Sterk & Melanie Leslie, *supra* note 199.

tions, and ensuring knowledge of these assets afterwards by the survivors. The same flaws we observed in knowledge about life insurance appear here. The few participants who mentioned these assets were confused about the steps they needed to take to obtain them.<sup>273</sup>

To facilitate planning, account holders could be given a standardized, and clear, beneficiary designation form that might, for example, list proceed recipients based on relationship (children, spouse) rather than name.<sup>274</sup> Thus, when changes in family relationships occur, ranging from remarriage to the birth of children, the beneficiary designations would be sufficiently flexible to cover new family members. To ensure that the account holders consider whether changes in family structure might also result in revisions to allocations, such as favoring children from a first marriage over a second spouse, they could be reminded to update their forms when they apply for a marriage license, file divorce papers, or even apply for renewal of a driver's license.<sup>275</sup>

## VI. Conclusion

As an increasing number of Americans confront aging and death, their children will need to confront what their parents have left behind. Further, inheritance law needs to adapt to the reality of an America with more citizens likely to live in non-traditional families.<sup>276</sup> Empirical data concerning the wealth transfer process and how the non-elite settle their estates is rare.<sup>277</sup> Consequently, the study provides critical insights into how people living in new family forms actually experience inheritance law, how it affects and structures their relationships—and how they challenge the traditional trusts and estates canon.

---

273. For example, Respondent DM55, interviewed Apr. 14, 2012, knew his deceased father had life insurance policies through several different employers, but he had to search through his father's house, home office desk, church office desk, and file cabinets and his parents' safety deposit box to track them down. Interview with Respondent DM55, in Baton Rouge, La. (Apr. 14, 2012) (on file with author).

274. See Sterk & Leslie, *supra* note 199, at 45.

275. See Weisbord, *supra* note 61, at 920-21; see also Sterk & Leslie, *supra* note 199, at 48-49 (suggesting that account custodians send out periodic reminders about the potential need to change the form).

276. VESPA et al., *supra* note 31; DAPHNE LOFQUIST ET AL., U.S. CENSUS BUREAU, c2010BR-14, HOUSEHOLDS FAMILIES: 2010, at 1-6 (2012).

277. Weisbord, *supra* note 88.

Using empirical data, this study moves law reformers towards an improved understanding of how families from various socioeconomic groups are affected by the two different sets of laws that control inheritance: those directing property transmission and those affecting nonprobate assets. We found, first, that most people do not make plans on how to transmit property, whether real or personal, at death. They neither draft a will nor update nonprobate beneficiary designations. Second, the study shows how the lack of planning leads to emotional conflicts within a family without its own coherent norms. Finally, the failure to plan has stringent financial consequences; for example, while the lapse of term life insurance policies is assumed to be common, this study helps to explicate the qualitative effects of lapse.

Yet law itself played various roles, depending on family form. Inheritance law rarely figured explicitly in structuring what actually happens within certain family forms, where there is an expectation of ongoing and relatively harmonious relationships.<sup>278</sup> While various laws affecting wealth transmission do provide a framework, they typically have little direct relevance, as Robert Ellickson would predict, in those families where the internal norms cohere most strongly, where there is an expectation of a continuing relationship, or where there is only one set of norms.<sup>279</sup> For those families, default rules echo, rather than guide, behavior. The touchstone of American inheritance law, dead hand control, is less aspirational than is the goal of familial harmony. Indeed, the decedent's intent is reinterpreted, or even ignored, based on family norms.

In other families, inheritance law plays a more significant role. In those families where the internal norms conflicted or simply were not shared, or when there was no expectation of further interactions, the law worked both to incite and to resolve conflicts, setting conditions in which courts might become necessary to reconcile emotional connections with physical possessions. In these families, the decedent's intent becomes the aspirational guide, albeit with varying interpretations of what that intent might be.

Ultimately, the differing roles of inheritance law in the differing families is appropriate; where there are strong norms that protect

---

278. Robert Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226 (2006).

279. *Id.*

individual family members and the family's integrity, then the law is a background structure that respects private decision-making. In other families, however, the law might play several different roles. By serving an organizing, arbitral, and expressive function,<sup>280</sup> it could facilitate, as survivors navigate overwhelming, stressful, and complicated processes, and it could serve an aspirational function, functioning as a tool that helped individuals express what they believed was right.

The nonprobate process worked less well in all families, with, for example, poorly understood insurance and retirement policies. Families would have benefitted from increased safeguards throughout the nonprobate process, such as ensuring improved policies for life insurance policies and creating better practices for stale beneficiary designations.

Getting the default and override rules just right—and fair—requires reconstructing the pathways to planning. Plus, getting the law right means ensuring its invisibility where families were able to resolve caregiving and wealth transmission through their own norms. But getting the law right also means ensuring that it provides appropriate guidance, structuring, and support when families don't know how to make things fair.

---

280. See Schneider, *supra* note 176; McClain, *supra* note 177.

## APPENDIX A: SUMMARY OF INTERVIEW QUESTIONS:

- the drawing of their family when they were a child;
- describing their home and family rituals as a child;
- the story of divorce/remarriage/cohabitation, if applicable;
- describing their church/faith home growing up;
- the time before, during, and immediately after the death of their parent or parent figure;
- describing the funeral and burial;
- sorting through the belongings of their parent and the inheritance;
- and lastly, coping in the past year, how private and public rituals have changed, what spiritual beliefs have been helpful, and their reflections on the commandment “Honor your mother and father.”

## APPENDIX B: INTERVIEWEE DEMOGRAPHICS:

## Gender

Female	38
Male	24
	<hr/>
	62

## Race

African American	24
Caucasian	35
Hispanic	3
	<hr/>
	62

Economic Class  
of Deceased Parent\*

Wealth	1
Middle Class	24
Lower Middle	12
Poverty	19
	<hr/>
	56

NUMBER 2

MAKING THINGS FAIR

379

## Marital Status

## of Parent\*

1st/Only Marriage	21
Single	23
Remarried	12
	<hr/>
	56

## Birth Order

Oldest	19
Middle	16
Youngest	13
Only	6
Adopted	1
	<hr/>
	55



Economic Class of Interviewee	
Wealth	2
Middle Class	30
Lower Middle	14
Poverty	16
	<hr/>
	62

\* The numbers in the “economic class of deceased parent” and “marital status of parent” tables reflect a total of 56 to account for the 6 sets of siblings we interviewed. A full study methodology is on file with the authors and also will be included in *Homeward Bound: Filial Responsibility in the 21<sup>st</sup> Century* by Amy Zietlow and Naomi Cahn, slated for publication by Oxford University Press in 2016.