AALS talk
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Trusts and Estates Section

The Demographics of Dying

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A few years ago I wrote an article on the inheritance penalty facing children from non-traditional families. After studying the effects of most probate code's privileging of biology and adoption in determining the inheritance of children, I found that doctrines like equitable estoppel and second parent adoptions are either ineffective or underutilized in providing inheritance rights for many deserving children. And with the fact that more than 50% of children today are being raised in non-traditional families, the disconnect between probate code priorities and decedents' preferences is likely to grow unless laws are changed to permit a more flexible definition of family.

After I published that article, I decided that before I could recommend changes to probate codes, I should undertake an empirical analysis of how people today in non-traditional relationships actually seem to want to leave their property at death. I was particularly curious about how real decedents actually treat second or third spouses and how they treat step-children because I assumed that the intestacy codes of most states would not provide the kind of flexibility that decedents with these relationships would most likely prefer. This seemed especially important since most of the changes to state probate codes in the last decades of the 20th century were based on empirical studies done in the 1970s.

So I devised a plan to look at hundreds of wills being probated today in different parts of the country to see how decedents actually left their property. I began with Alachua County, Florida, where the University of Florida is located, and analyzed 293 wills reflecting every will probated in that county in 2013. I chose 2013 because that was recent enough to reflect more non-traditional families, but far enough back that most of the estates would be closed. I then looked at 200 wills in Escambia County, Florida, on the far-western edge of the Panhandle, where Pensacola and the military bases are located. With nearly 500 wills in my dataset, I extracted a relatively small set of those estates that involved multiple marriages and step-children. My ability to do so was generally dependent on some indication in the wills and petitions for administration suggesting the decedent came from a non-traditional family structure, so I am quite aware that I have most likely undercounted those estates. Nonetheless, I was able to draw some tentative conclusions about the differences in estate plans between those in multiple marriages and those with step-children, compared to those who appeared to come from single marriage families. The data from that part of the study has been published in the ACTEC Law Journal (shout out and thank you to Bridget Crawford and my co-panelist, David Horton) for editing and commenting on that piece. I won't go into the details here except to say that it was a preliminary report of initial data and that I plan to continue to amass a much larger database to confirm some of my conclusions across a wider field and demographic.

The part of the project I want to talk about today, however, looks at the 293 Alachua County testate estates and compares them to the 115 intestate estates from

the same period to see what, if anything, we can conclude about estate planning opportunities and preferences from analysis across these two datasets. Not surprisingly, the demographics of the two groups are quite different, so I want to talk about that first, and then get this audience's thoughts about where fruitful lines of inquiry are likely to lie.

As any of us could probably hypothesize, the differences between intestate and testate decedents are significant. Intestate decedents are more likely to be persons of color, male, younger, and have less wealth than testate decedents who are more likely to be older, white, female, and wealthier. So one part of this study helps us identify the population that might be most in need of estate planning resources, and we can direct resources in that direction if we understand the need. But it's not enough just to identify the populations most likely to die intestate; we need to determine if the default intestacy rules are adequately addressing their needs and, if not, devise ways to reform the statutes to better protect their interests and preserve their wealth.

So let me first get into the data. Looking first at marital status of the testate and intestate decedents, you see that 60% of testate decedents are widowed and 21% are married. Of intestate decedents, only 28% are widowed and 28% are married. Logic would suggest that there would be roughly the same number of married as widowed decedents, which was true among intestate decedents but quite the contrary among testate decedents. The never married and the divorced populations are also quite different between the two groups. Comparing the two sets, the chart here shows real numbers, so since there are nearly 3 times more testate decedents than intestate decedents, the differences in demographics seem more pronounced. But you can easily see that among intestate decedents the percentages of each status are roughly equal, while that is clearly not the case of the testate decedents.

Two important factors should be noted. First, these represent all estates opened in Alachua County in 2013, which shows that decedents whose estates were probated were three times more likely to die testate than intestate. Thus, although many studies and statistics have shown that a majority of people do not have wills, of those whose estates are probated, nearly 3/4ths had wills.

Second, the number of widowed decedents does not correspond to the number of married decedents, and yet for every widow or widower in this study who died, there should be a married decedent. Yet, in total numbers, there were 205 widowed decedents in 2013 and only 93 married decedents whose estates were probated. So what has happened to the married decedents who died first to create all of these widows and widowers? Not surprisingly, a large number of their estates, the first of the couple to die, were not probated at all, roughly 55%. And I think most of us would view this as a sign of success – that the non-probate revolution is working to the extent that there is no need to probate the estate of the first spouse to die because the couple's property was held primarily in joint tenancies or PODs or perhaps in revocable trusts so that probate was not necessary.

But that also means that almost a quarter of the decedents in this study died, married, and owning individually-titled probate property (93 out of 404 = 23% of all decedents). We can take this two different ways. On the one hand, probate laws should recognize marriage as a partnership and facilitate commingling of wealth between the couple, so that the death of the first spouse should cause little disruption and only at the

death of the second do we need to have major administration. On that theory, all of the married decedents are a failure in some way. On the other hand, in a multiple marriage society, the existence of married individuals owning individually-titled property suggests that they are not commingling their property as much as might have been the case 30, 40, or 50 years ago. The relatively high rate of married decedents may also indicate that many of them are not in their first marriages and therefore have diverse allegiances that might complicate their estate planning. We might imagine, therefore, that married decedents who wrote wills would be likely to spread their wealth among children and their spouse, or their spouse and others, but in fact the vast majority of married decedents primarily benefitted their spouse, which is in line with probate code priorities.

Next we can compare the decedents in relation to children. Eighty-five percent of testate decedents had children, while only 66% of intestate decedents had children. We might look to this finding as evidence that people with children are more likely to have a will or an estate plan; whoo hoo – success. But then of course, more than half of all intestate decedents have children and, when we look at the age pattern of the decedents, we find that the intestate decedents with children are more likely to have had underage children than those who died testate.

Thus, if we look at the decedents by age, we see that the vast majority, 82%, were in their 70s or older. These people are most likely to have children who are certainly grown, and could be even grandparents themselves. On the other hand, the intestate decedents were most likely to be in their fifties and sixties which, at least for the younger 30% of decedents in their 20s, 30s and 40s, would have children who were likely still underage.

The age of decedents is probably not unsurprising, as those who die later often had time to prepare for death, their children were most likely grown, and they planned how they wanted their estates to pass at death. The median age of those dying testate was 84. Those who died intestate died younger, with a median age of 65, and for many of the younger decedents, they died unexpectedly which is indicated by the high prevalence of wrongful death proceeds as the primary asset in the estate. Moreover, of all decedents under age 50, 80% died intestate.

Gender is also highly relevant in this data. Fifty-seven percent of testate decedents are female, while 58% of intestate decedents are male. Of decedents who died intestate, men outnumber women in all age groups except the two oldest, age 80 and above, and among 20 year olds. As a percentage of population, men are more likely to die intestate than women, and women are more likely to die testate. But the large numbers of widowed women skews these numbers because it appears that much of their estate planning was done as a couple, and the women, because of the simple fact of longer life expectancies, were likely to be the survivors.

That brings us to race and ethnicity. As you can see from this chart, 93% of testate decedents were white, in a county that is only 64% white, while only 4% of testate decedents were Black, in a county that is 20% Black. Not surprisingly, those numbers shift when we look at intestate decedents. 60% are white and 32% are Black. Also problematic is the fact that although 9% of the population is Hispanic, on average only 3% of the decedents, both testate and intestate, are Hispanic. This suggests that this demographic group is not represented at all proportionally in the probate records.

The total number of deaths that occurred in Alachua County in 2013 was 1,799.[1] Thus, only about a quarter (23%) of residents dying in 2013 appear to have had their estates probated at all. But among the Black population, that percentage is 14%, among the Asian population, that percentage is only 9%, and among the Hispanic population, that percentage is only 6%. So not only are minority populations not executing wills, they are far less likely to have their estates probated at all. And somehow I suspect that this deficiency is not because they have availed themselves of the numerous probate avoidance mechanisms that we teach about in our T&E classes.

I should add of course that among the 77% of decedents in the county whose estates were not probated, a significant percentage might have had wills, trusts, or other estate mechanisms executed to allow them to avoid probate. Or their property may not have needed court-supervision. But assuming there is a kind of 1 in 4 ratio of intestate to testate, or unplanned to planned deaths, that means over 400 decedents likely had no plan in place, and I suspect that number is much higher.

Finally, to conclude, I have just 1 more chart, and that is a breakdown of the testate dispositions that decedents actually made. This chart shows the dispositions that were made by the 293 testate decedents – with the largest percentage of decedents leaving everything to their children (31%). They left their property to their spouse, and then their children if the spouse predeceased in 25% of cases, and very rarely did they seem to split their property between their spouse and children, which was what I would have predicted in the case of subsequent marriages. Thus, in 57% of cases, decedents left all of their estates to their spouse and/or children, which would generally accord with intestate priorities. But in 27% they rolled their property into a trust, and in 16% of cases they devised their estates to their children, but included others, or they left it all to others. This means that in 43% of testate estates, the property was left in ways that utilized prior estate planning mechanisms, like the revocable trust, or they left it in their wills to people who generally did not have intestate priorities. If we can assume that these 43% of decedents had intentions and preference that did not accord with intestacy laws, it would suggest that a large percentage of intestate decedents had their property pass in ways that would likely not reflect their true intentions. Of course, it is difficult to determine this for sure, but assuming 40% of testate decedents have preferences that diverge from intestate patterns, we can extrapolate that perhaps 40% of the intestate decedents had property pass in ways they would not have wished. I realize that we can't know much about how the property in the trusts actually passed, and it might have passed just as it would under intestacy, but it is also quite possible that the trusts spread the wealth more diffusely. And the mere existence of a revocable trust suggests that people are doing more complex estate planning because there is a need to do so, either because of their family relationships or the nature of their property. In either case, many intestate decedents would probably have benefitted from estate planning in some way or other.

So I will leave it there and I look forward to your comments, questions, and advice on how to expand this project and what kind of data I should look for to answer the questions on how, if at all, intestacy laws could be better drafted to meet the needs of a larger percentage of the population, or how we can reach underserved populations with estate planning resources.

[1] http://www.flhealthcharts.com/FLQUERY/Death/DeathCount.aspx.