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## **What Happened to Grandma's House: The Real Property Implications of Dying Intestate**

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# What Happened to Grandma’s House: The Real Property Implications of Dying Intestate

Danaya C. Wright\*

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## INTRODUCTION

In Jane Austen’s novel *Sense and Sensibility*, Mr. Henry Dashwood leaves his entire estate to his son, John, and on his deathbed, he elicits a promise that John will provide comfortably for his stepmother and his three half-sisters, Elinor, Marianne, and Margaret. In the flush of his new wealth, John thinks he should settle £1000 on each of his sisters. But as soon as John mentions it to his wife, Fanny, she convinces him, through impeccable logic, that Mr. Dashwood certainly didn’t intend

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\* Copyright © 2020 Danaya C. Wright. Clarence J. TeSelle Professor of Law, University of Florida, Levin College of Law. I want to thank the ACTEC Foundation for its generous support of this research and for sponsoring the ACTEC Conference at the University of California, Davis, School of Law. I also want to thank the many inspiring scholars at that conference upon whose work I greatly depend, including Naomi Cahn, David Horton, Reid Weisbord, Bridget Crawford, Alyssa DiRusso, Jeffrey Pennell, Adam Hirsch, Gary Spitko, Adam Hofri-Winogradow, Russell James, Alberto Lopez, Alexander Boni-Saenz, Emily Poppe, and the amazing crew of the UC Davis Law Review. I also want to thank Carla Spivak whose dedication to critical trusts and estates scholarship is inspiring, and to Laura Rosenbury, Lee-ford Tritt, Grayson McCouch, and Dennis Calfee of U.F. Law School, and finally Rachel Feldman, Sophia Serrao, and Alex Coe for their dedicated research assistance.

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that John would actually give his half-sisters any money; surely all the money he inherited was necessary to provide comfortably for their own son Harry. Better, John would be doing his father's bidding by helping them move to a small house, sending some fish and game when the season was right, and perhaps making a little present of furniture now and then. With his wife's help, John Dashwood saved himself £3000 per year and any guilt from failing to honor his father's deathbed wishes. As Fanny explained,

Altogether, they will have five hundred a-year amongst them, and what on earth can four women want for more than that?— They will live so cheap! Their housekeeping will be nothing at all. They will have no carriage, no horses, and hardly any servants; they will keep no company, and can have no expenses of any kind! Only conceive how comfortable they will be! Five hundred a year! I am sure I cannot imagine how they will spend half of it; and as to your giving them more, it is quite absurd to think of it. They will be much more able to give *you* something.<sup>1</sup>

Unfortunately for the girls, on his deathbed Mr. Dashwood had placed too much faith in John's oral promise to care for them. Next, the widow and her three daughters are walking out the gates of the only home they had known for their new life of poverty just as John, Fanny, and Harry are driving their carriages into the family estate. The dynamics of wealth have changed very little since Jane Austen's day, as the wealthy are able to pass on their wealth to build more wealth, while those with little wealth scrimp and save for a lifetime only to see their meager inheritances often lost through transfers to the next generation.<sup>2</sup>

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<sup>1</sup> JANE AUSTEN, *SENSE AND SENSIBILITY* 18-19 (Little, Brown & Co. 1910) (1811).

<sup>2</sup> See William R. Emmons et al., *The Financial Returns from College Across Generations: Large but Unequal*, in *DEMOGRAPHICS OF WEALTH (2018 SERIES)* 1, 5 (2018) (identifying the "head-start effect" and noting that "[w]hatever a family head's education level, being non-Hispanic white, being over 40 and/or having college-educated parents typically boosts income and wealth compared to families without these demographic characteristics (singly or in combination). The median college graduate family with all of the most advantageous inherited demographics — white, aged 40-61, college grad parents — had three times as much income and six times as much wealth as the median family overall"); Ray Boshara, *Born on 3rd Base? The Effects of Head Starts and College on Family Wealth*, FED. RES. BANK ST. LOUIS (Apr. 17, 2018), <https://www.stlouisfed.org/on-the-economy/2018/april/3rd-base-effect-head-starts-college-family-wealth> [<https://perma.cc/Z83W-QLMR>]; Laura Feiveson & John Sabelhaus, *How Does Intergenerational Wealth Transmission Affect Wealth Concentration?*, FED. RES. SYS.: FEDS NOTES (June 1, 2018), <https://www.federalreserve.gov/econres/notes/feds-notes/how-does-intergenerational-wealth-transmission-affect-wealth-concentration-20180601.htm> [<https://perma.cc/G9N8-2DVN>] (exploring how the

We all know that those with wealth are better situated to maintain and grow that wealth than those without.<sup>3</sup> The adage that *it takes money to make money* is more true today than in nearly a century.<sup>4</sup> We also know that the tax and probate laws help those with wealth keep it by giving breaks on transfer taxes, capital gains taxes, and even mortgage deductions that the person of modest means can hardly imagine.<sup>5</sup> A major tool for growing wealth in high-wealth families is careful estate planning that protects assets from dissipation by spendthrift beneficiaries and channels control over wealth to those who will focus on maintenance rather than utilization.<sup>6</sup> Much of the high-wealth exceptionalism, as Professor Allison Tait refers to it, is a result of favorable laws allowing wealthy families to manage their wealth through a completely independent financial system, far away from the prying eyes of the tax commissioner, the securities regulator, and even

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bulk of inheritances and inter vivos gifts flow to families that already have substantial resources).

<sup>3</sup> See, e.g., THOMAS M. SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* 4-5 (Oxford Univ. Press 2004) (arguing that wealth and inheritance play a role in economic inequality); Thomas W. Mitchell, *Growing Inequality and Racial Economic Gaps*, 56 HOW. L.J. 849, 850-52 (2013) (arguing that changes to public policy must be made to reduce economic inequality); Beverly Moran & Stephanie M. Wildman, *Race and Wealth Disparity: The Role of Law and the Legal System*, 34 FORDHAM URB. L.J. 1219, 1219-21 (2007) (discussing how the U.S. legal system creates and maintains wealth disparity based on race); Daria Roithmayr, *Them That Has, Gets*, 27 MISS. C.L. REV. 373, 374-75 (2008) (discussing how “positive feedback loops” in social institutions play a role in racial and economic inequality).

<sup>4</sup> See Carla Spivack, *Broken Links: A Critique of Formal Equality in Inheritance Law*, 2019 WIS. L. REV. 191, 194-96 (2019); Raj Chetty et al., *Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States* 1-5 (Nat'l Bureau of Econ. Research, Working Paper No. 19843, 2014), <https://www.nber.org/papers/w19843> [<https://perma.cc/6MEK-CXKV>]; V. Joseph Hotz et al., *The Role of Parental Wealth and Income in Financing Children's College Attendance and its Consequences* 1-5 (Nat'l Bureau of Econ. Research, Working Paper No. 25144, 2018), <https://www.nber.org/papers/w25144> [<https://perma.cc/5U6L-RNWW>]; Boshara, *supra* note 2.

<sup>5</sup> Felix B. Chang, *Asymmetries in the Generation and Transmission of Wealth*, 79 OHIO ST. L.J. 73, 81-86 (2018); see Naomi Cahn, *Dismantling the Trusts and Estates Canon*, 2019 WIS. L. REV. 165, 175-76 (2019) [hereinafter *Dismantling Trusts*] (explaining how trusts and estates law is generally focused on advancing the interests of the wealthy).

<sup>6</sup> Chang, *supra* note 5, at 76-77, 99-100; see also Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q.J. ECON. 519, 563-65 (2016); Daniel J. Amato, Note, *The Good, the Bad, and the Ugly: The Political Economy and Unintended Consequences of Perpetual Trusts*, 86 S. CAL. L. REV. 637, 646 (2013); Feiveson & Sabelhaus, *supra* note 2.

the courts as they establish family foundations, family offices, and family constitutions solely to maintain and grow their wealth.<sup>7</sup>

But for the rest of us in the 99%,<sup>8</sup> we generally work hard most of our lives trying to raise our kids, put them through college, get them established, and then hopefully save enough for a modest retirement. And for well over 50% of the population, these goals are completely unattainable. Counting debt, the net wealth of the bottom 50% is \$0.<sup>9</sup> Most people will die with no or such small estates, which are likely to be so fractionated when they pass at death, that the heirs or beneficiaries take inheritances that are perhaps able to pay off some credit card debt, but are certainly not enough to make a down payment on a house or put a child through college. Unfortunately for the bottom half of the population, the probate and succession laws are not set up to help maintain and grow wealth, but in fact contribute to dissipation and loss of wealth at each generation.<sup>10</sup>

Studies have shown that intergenerational wealth transmission significantly affects wealth concentration and the growing wealth gap.<sup>11</sup> Of the two million households that received an inheritance or a substantial inter vivos gift each year, roughly half are small, under \$50,000, while transfers of \$1 million or more account for only 2% of the transfers. Yet, those 2% of inheritances over \$1 million comprise 40% of total wealth transferred.<sup>12</sup> As scholars continue to examine the role of inheritance in the alarming wealth gap, few are focusing on how the laws of intestacy might exacerbate the gap by leading to greater wealth loss for the bottom half.<sup>13</sup> In this study, I explore what happens to the family home, usually the largest single-value asset of those in the bottom 90%. The data, from 225 testate and intestate estates, are

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<sup>7</sup> Allison Anna Tait, *The Law of High-Wealth Exceptionalism*, 71 ALA. L. REV. (forthcoming 2020) (manuscript at 5) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3406070](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3406070) [<https://perma.cc/KU62-RD4N>]).

<sup>8</sup> It is actually the 99.9%, as the top 0.1% controls significant amounts of wealth. Between 1986 and 2012, almost half of U.S. wealth accumulation benefitted the top 0.1%. Saez & Zucman, *supra* note 6, at 521.

<sup>9</sup> *Wealth Distribution in the United States in 2016*, STATISTA, <http://www.statista.com/statistics/203961/wealth-distribution-for-the-us/> (last visited Jan. 30, 2020) [<https://perma.cc/P8CG-DV8Z>].

<sup>10</sup> See Spivack, *supra* note 4, at 202-07; Chang, *supra* note 5, at 94-98.

<sup>11</sup> See, e.g., Chang, *supra* note 5, at 83-86; Laurence J. Kotlikoff & Lawrence H. Summers, *The Role of Intergenerational Transfers in Aggregate Capital Accumulation*, 89 J. POL. ECON. 706, 730 (1981).

<sup>12</sup> Feiveson & Sabelhaus, *supra* note 2.

<sup>13</sup> See Spivack, *supra* note 4, at 194-95 (discussing the link between inheritance laws and inequality).

sobering, as the lower-value homes of the intestate decedents are significantly more likely to be sold at below fair market value or lost to foreclosure or tax sale. And if they aren't, they are likely to be partitioned into smaller shares for recipients who seem less able to leverage their inheritances into building their own wealth. Through an analysis of the real property assets of these decedents, we can see in vivid detail how wealth is lost for some families and how it is gained for others.

#### I. THE WEALTH GAP, INHERITANCE, AND REAL PROPERTY

Even as the income gap between different demographics has narrowed, the wealth gap has grown in ways that are quite alarming. In the United States, over 75% of wealth is controlled by the top 10% of the population.<sup>14</sup> The top 0.1% controls 22% of average wealth.<sup>15</sup> The wealth of the typical Black or Latino family is between 10-20% of the wealth of a typical white family.<sup>16</sup> The 2008 recession hit Black and Latino family households much harder than white families. Between 2005 and 2009, median white household net worth declined by 16% while Black and Hispanic households declined by 53% and 66% respectively.<sup>17</sup> The gender wealth gap is also notable as women receive lower wages, take a greater hit to their earning potential by taking time off to care for children, parents, and spouses, and may be more risk averse in their investment strategies.<sup>18</sup> Some scholars estimate that U.S. wealth would decline by as much as 51% if inter-generational

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<sup>14</sup> Saez & Zucman, *supra* note 6, at 552; *see also* Erez Aloni, *The Marital Wealth Gap*, 93 WASH. L. REV. 1, 9-11 (2018).

<sup>15</sup> Saez & Zucman, *supra* note 6, at 552.

<sup>16</sup> Roithmayr, *supra* note 3, at 381-82; *see also* Rakesh Kochhar & Anthony Cilluffo, *How Wealth Inequality has Changed in the U.S. Since the Great Recession, by Race, Ethnicity and Income*, PEW RES. CTR. (Nov. 1, 2017), <https://www.pewresearch.org/fact-tank/2017/11/01/how-wealth-inequality-has-changed-in-the-u-s-since-the-great-recession-by-race-ethnicity-and-income/> [<https://perma.cc/NVU8-2JE2>]; Rakesh Kochhar & Anthony Cilluffo, *Key Findings on the Rise in Income Inequality Within America's Racial and Ethnic Groups*, PEW RES. CTR. (July 12, 2018), <https://www.pewresearch.org/fact-tank/2018/07/12/key-findings-on-the-rise-in-income-inequality-within-americas-racial-and-ethnic-groups/> [<https://perma.cc/7M32-YTAA>].

<sup>17</sup> Mitchell, *supra* note 3, at 859-60.

<sup>18</sup> Reshma Kapadia, *The Stubborn Wealth Gap Between Men and Women*, BARRON'S (Apr. 18, 2018), <https://www.barrons.com/articles/the-stubborn-wealth-gap-between-men-and-women-1524099601> [<https://perma.cc/77DD-SSHU>]; *see* Gwendolyn Griffith, *The Evolution of Women's Wealth: Implications for Wealth Planners*, ESTATE PLANNING CLIENT STRATEGIES (2014), 2014 WL 4160088, at \*7.

inheritances were eliminated.<sup>19</sup> And although there are many reasons for the wealth gap, from income inequality, racism, housing segregation, and tax policy, to risk-averse tendencies and lack of education about how to protect and grow wealth, intergenerational wealth transfers permissible by succession laws certainly contribute to the divide.<sup>20</sup> While trust law enables some to shelter wealth from consumption and taxes, intestacy law contributes to dissipation through fractionation and administrative costs.<sup>21</sup> And time exacerbates the wealth gap if parental wealth and behavior create positive feedback loops for white or male wealth, and negative feedback loops for Black and Hispanic or female wealth.

Scholars have argued that two of the main factors in the widening wealth gap are the effects of intergenerational wealth transfers through inheritance and homeownership.<sup>22</sup> As Lynnise Phillips Pantin explains:

Fifty years after the Civil Rights Movement, the wealth gap is widening. The enormous growth is due in large part to the effects of intergenerational wealth transfers and homeownership. Wealth and real property, unlike income, accumulates in value and may be passed from generation to generation. Wealth transfers between generations contribute to the modern wealth gap because wealthy parents and grandparents can pass their wealth on to children and grandchildren through inheritance. Black families have lower wealth levels than White families. In a joint report, the Institute for Policy Studies and the Corporation for Economic Development, found that over the last thirty years the average wealth of White families had grown by eighty-four percent, 1.2 times the rate of growth for the Latino population and three times the rate of growth for the Black population. Twenty percent of wealth can be attributed to formal and informal gifts

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<sup>19</sup> See Feiveson & Sabelhaus, *supra* note 2 (estimating that intergenerational transfers account for 26% of total wealth and then applying a real interest rate of 5%). See generally Kotlikoff & Summers, *supra* note 11, at 730 (“Intergenerational transfers appear to be the major element determining wealth accumulation in the United States.”).

<sup>20</sup> See Feiveson & Sabelhaus, *supra* note 2; see also Cahn, *supra* note 5, at 175-78; Chang, *supra* note 5, at 75; Spivack, *supra* note 4, at 194-95.

<sup>21</sup> See, e.g., Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 494-95 (2010); Amato, *supra* note 6, at 638-41.

<sup>22</sup> A college education is also a key indicator of wealth accumulation. See *The Rising Cost of Not Going to College*, PEW RES. CTR. (Feb. 11, 2014), <https://www.pewsocialtrends.org/2014/02/11/the-rising-cost-of-not-going-to-college/> [https://perma.cc/BD9E-74VN].

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from family members. Moreover, wealthier parents have access to better communities, better schools, and richer social networks, which can lead in turn to their children building more wealth than children lacking these advantages. White Americans are more likely to receive an inheritance than Black Americans.

Despite the collapse of the housing market during the Great Recession, homeownership is still the greatest source of wealth in the United States. Black homeownership lags behind White homeownership. Only forty-one percent of Black Americans own their homes, compared with seventy-one percent of White Americans. Black Americans not only build less wealth through a low rate of homeownership, but home values in segregated communities of color are lower than in those of White communities, resulting in Black homeowners earning a smaller return on their investment. Further, because they are less likely to inherit money or receive financial assistance from their families, it takes Black people longer to buy homes, and they also have smaller down payments than their White counterparts.<sup>23</sup>

While there are many ways we could address the widening wealth gap through tax, trust law, housing, zoning, education, and other policies — and we should do so — we should also examine whether our probate and succession laws are exacerbating the problem and, if so, whether they are amenable to change. For many people of modest wealth, death and tax time are the only moments when they interact with a legal system that could potentially assist them in protecting their wealth. In fact, if probate courts were more like family-law courts, assisting with enforcement of child support payments and ensuring that the best interests of children are protected, the probate process could be an opportunity to do wealth planning that protects and salvages wealth from generation to generation rather than a risky period when it could just as easily be lost as not.

In early modern England, the ecclesiastical courts managed probate of non-real property and, with the help of accountants and apparitors, ecclesiastical judges would preside over the succession of property with an eye toward avoiding the “utter undoing and spoyling of many

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<sup>23</sup> Lynnise E. Phillips Pantin, *The Wealth Gap and the Racial Disparities in the Startup Ecosystem*, 62 ST. LOUIS U. L.J. 419, 436-37 (2018) (internal quotation marks omitted).

fatherlesse, and friendlesse children.”<sup>24</sup> The process was much more hands-on by neighbors and court officials to ensure that the widow and the children would be as comfortable as possible.<sup>25</sup> In today’s probate avoidance world, however, succession of property can be entirely in the shadows with no judicial oversight and no accounting, as all property can be set up to pass through non-probate will substitutes. This secrecy leaves many heirs to wonder if they are entitled to an inheritance, and often they do not even know to ask.<sup>26</sup>

As we have moved to a more private process for property succession, a privacy sought out by the wealthy and exploited by people who want to keep those family skeletons in the closet, those who are most vulnerable to wealth dissipation are often forced into court-supervised probate with little likelihood of a good outcome. Without self-interested heirs and devisees willing to do the work of property administration, wealth can be easily lost or converted, and deserving beneficiaries are left with a distaste for the probate system that is exacerbated from generation to generation.<sup>27</sup> Moreover, distaste for the probate system can also lead to skepticism or downright hostility to lawyers and the seemingly needless cost of estate planning. But lack of planning leaves many at the bottom of the economic spectrum forced into probate and application of the default rules of intestacy.

Although intestate distribution schemes are intended to replicate the most likely intentions of decedents, they use a very broad brush to distribute property in families that may have unique needs and circumstances.<sup>28</sup> Intestacy is not a good estate plan for a variety of reasons, not least of which is the likelihood of fractionation, partition, or sale that results from intestate properties passing to multiple heirs.<sup>29</sup>

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<sup>24</sup> AMY LOUISE ERICKSON, *WOMEN AND PROPERTY IN EARLY MODERN ENGLAND* 37 (1993) (quoting HENRY SWINBURNE, *A TREATISE OF TESTAMENTS AND LAST WILLS* (1590)).

<sup>25</sup> See *id.* at 33, 35-36.

<sup>26</sup> See Naomi Cahn & Amy Zietlow, “Making Things Fair”: *An Empirical Study of How People Approach the Wealth Transmission System*, 22 *ELDER L.J.* 325, 328-30 (2015).

<sup>27</sup> See *id.* at 331-32 (arguing that the private ordering of the wealth transfer process should evolve to reflect the needs of diverse twenty-first century families).

<sup>28</sup> In a study of nearly 500 wills, most deviated from the default rules of intestate succession by leaving children unequal shares. See Danaya C. Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 42 *ACTEC L.J.* 341, 368, 377 (2017).

<sup>29</sup> See Spivack, *supra* note 4, at 202-07; see also *Partition of Heirs Property Act*, UNIF. LAW COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=50724584-e808-4255-bc5d-8ea4e588371d> (last visited Feb. 1, 2020) [<https://perma.cc/K52A-7XL2>] (listing status of state legislation related to the Uniform Partition of Heirs Property Act).

Lack of estate planning leaves property vulnerable during a perhaps lengthy period of incapacity, and probate involves administrative costs and delays in settling property or retitling it. These delays can lead to deterioration, loss of real property through tax sales and foreclosures, and the disappearance of movable property. Intestacy also cannot be fine-tuned to provide for the neediest heirs or those who helped out in old age by providing unequal shares or by giving different whole items of property to different heirs. And, of course, if a decedent has not created an estate plan, she cannot name a preferred personal representative who will be fair and efficient in administering the estate.<sup>30</sup>

There is no question that planning for the succession of one's property can help avoid the potential for wealth dissipation by putting it into a trust, imposing limits on access for spendthrift descendants, and using mechanisms that avoid the costs and delays of probate.<sup>31</sup> For the very wealthy, a trust also can help minimize transfer taxes.<sup>32</sup> But even for the rest of us, avoiding probate alone can help preserve wealth by titling property so that it passes quickly and easily to the beneficiary, without delays that can lead to its deterioration.<sup>33</sup> And planning ahead so that assets don't have to be sold quickly in order to pay fractional shares can also help. Although parents rarely want to treat their children unequally, it may be better for their estates if they give the house to one child, rather than split the assets equally in a way that is going to require

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<sup>30</sup> The majority of people appoint family members to be personal representatives of their estates. See Reid Kress Weisbord, *Fiduciary Authority and Liability in Probate Estates: An Empirical Analysis*, 53 UC DAVIS L. REV. 2561, 2589 (2020). The vast majority accept the appointment. See *id.* at 2590. The ability to choose the family member who will be the most responsible is vitally important if there are heirs or beneficiaries who will procrastinate and not administer the estate in a timely manner, or who will do so unevenly, and provide grounds for will challenges. See *id.* at 2589 ("The appointment of an estate fiduciary is arguably the most important administrative term in a will because . . . the position comes with great power and responsibility.").

<sup>31</sup> See Cahn, *Dismantling Trusts*, *supra* note 5, at 187-88; Amato, *supra* note 6, at 666-70.

<sup>32</sup> See Wendy C. Gerzog, *Solutions to the Sexist QTIP Provisions*, 35 REAL PROP. PROB. & TR. J. 97, 125 (2000); see also Thomas Piketty, *Property, Inequality, and Taxation: Reflections on Capital in the Twenty-First Century*, 68 TAX L. REV. 631, 631 (2015) (discussing optimal tax policy to combat wealth inequality).

<sup>33</sup> Probate can be entirely avoided through the relatively simple use of transfer-on-death beneficiary designations in life insurance, securities and bank accounts, and even for real property. See Danaya C. Wright, *Beneficiary Deeds for Real Estate: Transfer-on-Death, Lady Bird, and Enhanced Life Estate Deeds*, in POWELL ON REAL PROPERTY (M.A. Wolf, ed.) (forthcoming 2020) (manuscript at 4) (on file with the author) [hereinafter *Beneficiary Deeds*].

partition and/or sale.<sup>34</sup> Where the family home is the largest single asset, people struggle with how to pass it to the next generation, usually accepting that it will be sold and the proceeds split equally. And this may be the best result for some families, especially if the kids are grown, have kids of their own, live afar, and already own their own homes. For those in the solid middle class, an inheritance from the sale of grandma's house can easily be put into savings to be used for the grandkids' college or to make a down payment on a home for a child moving into an expensive housing market.

For those not in the middle class, however, grandma's house might be put to better use if it was retained and rented out to generate an income stream.<sup>35</sup> Or perhaps a child or grandchild who lives nearby could use it and thereby not have to pay rent. But property, especially real property, that passes through intestacy risks being fractionated and sold, often yielding a fairly small inheritance for heirs who could really use the boost of wealth at this point in their lives.<sup>36</sup> For those who are struggling to get by, an inheritance may keep the creditors at bay, but it rarely provides enough to put away, invest, or save in order to begin building wealth, and when it is dissipated needlessly through the probate process, it is even less likely to provide that necessary nest egg.<sup>37</sup> All this is to say that people do not go into the probate process equally

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<sup>34</sup> See Spivack, *supra* note 4, at 204-07; see also Thomas W. Mitchell et al., *Forced Sale Risk: Class, Race, and the "Double Discount,"* 37 FLA. ST. U. L. REV. 589, 591 (2010).

<sup>35</sup> Of course, grandma cannot require that her successors not alienate the home, as that would be an unlawful restraint on alienation. But she could put it into a trust with an instruction that the house be used to generate income or provide a residence for family members as long as doing so is in the best interests of some subset of beneficiaries. That is certainly what wealthy families do, like the Kennedy and Bush families. See Jay Root, *George P. Bush's Secret Mansion Is Financed by an Undisclosed Loan from Texas Donor's Bank*, TEX. TRIB. (Feb. 16, 2018, 12:00 AM), <https://www.texastribune.org/2018/02/16/george-p-bushs-secret-mansion-financed-undisclosed-loan-texas-donor/> [<https://perma.cc/4DVC-96DJ>]; Carl O'Donnell, *How The \$1 Billion Kennedy Family Fortune Defies Death And Taxes*, FORBES (Jul. 8, 2014, 9:45 AM), <https://www.forbes.com/sites/carlodonnell/2014/07/08/how-the-1-billion-kennedy-family-fortune-defies-death-and-taxes-3/#728d3d284e4a> [<https://perma.cc/LA6N-6VFN>].

<sup>36</sup> See Feiveson & Sabelhaus, *supra* note 2, at tbl.1. As noted in the discussion of Table 4 *infra*, the median real property inheritance for intestate heirs was less than one-third (\$30,000) the real property inheritance for testate heirs (\$100,000), which confirms Feiveson and Sabelhaus's findings that most inheritances are less than \$50,000. With intestate decedents being nearly twenty years younger than their testate counterparts, their heirs are going to be younger, and younger adults are less likely than older adults to have earned significant wealth.

<sup>37</sup> Feiveson and Sabelhaus show that 56% of inherited wealth passes to recipients who are already in the top 10% of the population by wealth, while only 8% of inherited wealth passes to those in the bottom half. *Id.* at fig.5.

and they generally come out even more unequally. Thus, if we want to lessen the wealth gap, one focus should be on strategies to preserve wealth from generation to generation for lower-wealth families. Perhaps changes to the laws of intestacy as well as the probate process can also help.

If studies are accurate that inheritances constitute as much as 50% of U.S. wealth, and that the family home is the largest single asset of most decedents, then examining what happens to the family home at the death of the homeowner can identify vectors of influence to reduce the dissipation of wealth that often occurs at death. To better understand how the rich get richer and the poor get poorer, I undertook an empirical study of testate and intestate estates probated in Alachua County, Florida, during the year 2013. And besides examining how the property was disposed of by the decedent and to whom,<sup>38</sup> I also examined the real property records to see the value and the subsequent disposition of the home by the heirs and beneficiaries. Not surprisingly, the results showed that the testate estates had homes of significantly greater value that were likely to be retained or sold at or near the fair market value. The intestate estates had homes of far less value and were too frequently lost to tax sales or foreclosure or, if sold, were sold for well below the fair market value. This evidence suggests that we should look at possible legal and policy changes to help interrupt the downward wealth cycle for the families of poorer decedents by focusing on ways to protect real property assets.

## II. METHODOLOGY

I began this study by collecting the death certificates, probate petitions, and wills and codicils of every person whose estate was probated in the year 2013 in Alachua County, Florida. Although 1,799 people died in the county in that year,<sup>39</sup> only 408 estates were probated, for a roughly 23% probate rate.<sup>40</sup> For the other 1,391 people, we can never know exactly how much property they had or what happened to it. Hopefully, most of it passed through non-probate mechanisms, such

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<sup>38</sup> See Wright & Sterner, *supra* note 28, at 358-70.

<sup>39</sup> *Leading Causes of Death — 2013*, FLA. DEP'T HEALTH, <http://www.flhealthcharts.com/ChartsReports/rdPage.aspx?rdReport=ChartsProfiles.LeadngCausesOfDeathProfile> (last visited Feb. 1, 2020) [<https://perma.cc/YN4R-X9QY>].

<sup>40</sup> These were all cases filed for probate in Alachua County during 2013. Of course, many of the cases filed for probate were of decedents who died in 2012 or even earlier. But the number of cases filed each year and the number of deaths are consistent enough to conclude that on average only about 25% of decedents leave wealth that requires probate.

as revocable trusts, joint tenancies, and transfer-on-death (“TOD”) or payable-on-death (“POD”) designations to the intended beneficiaries. Half of the decedents likely owned only tangible personal property that would have been distributed to next of kin by family and no probate process would have been necessary.<sup>41</sup> Some of those people will have been out-of-state residents and their estates will have been probated in their county of domicile. But 408 people were domiciled in Alachua County at death and they owned some form of property titled solely in their own name that required court-supervised probate to facilitate its transfer to the appropriate taker. For many, this was a piece of real estate, most often the family home. For others, it was simply a bank account, a securities account without a beneficiary designation, and, in some cases, wrongful death proceeds. Although a dollar amount is provided by the personal representative for most estates being probated, that number was often significantly undervalued, as property that passes through a non-probate will substitute, and most tangible personal property, need not be probated at all. Nevertheless, there were some significant differences between the assets and demographics of the intestate decedents and the testate decedents.

I have already reported on the dramatic wealth gap between the testate and intestate decedents.<sup>42</sup> In my earlier study of 115 intestate decedents and 293 testate decedents, I found the following distinctions:

- The median age of intestate decedents was sixty-five and the median age of testate decedents was eighty-four.
- The median size estate of intestate decedents was \$17,400 and the median size of testate decedents was \$67,000.<sup>43</sup>
- No intestate estate was over \$1 million, but at least seven testate estates were worth more than \$1 million.

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<sup>41</sup> See *Wealth Distribution in the United States in 2016*, *supra* note 9 (showing that the bottom 50% of the population owned 0% of wealth).

<sup>42</sup> See Danaya C. Wright, *Disrupting the Wealth Gap Cycles: An Empirical Study of Testacy and Wealth*, 2019 WIS. L. REV. 295, 298 (2019) [hereinafter *Disrupting*]; Danaya C. Wright, *The Demographics of Intergenerational Transmission of Wealth: An Empirical Study of Testacy and Intestacy on Family Property*, 88 UMKC L. REV. (forthcoming 2020) (manuscript at 5-6) (on file with author) [hereinafter *Demographics*].

<sup>43</sup> This number is particularly squishy, as wealth passing through non-probate will substitutes do not need to be listed in probate proceedings, and in many cases the value of the homestead does not require disclosure as Florida authorizes homestead protections for the descent of homes of unlimited value. See Wright, *Disrupting*, *supra* note 42, at 305-08.

- Ten percent of intestate estates were valued at less than \$500; no testate estate was valued that low.
- In a county in which whites comprise only 61% of the population, 93% of testate decedents were white and 60% of the intestate decedents were white.
- In a county in which Blacks comprise 20% of the population, 4% of the testate decedents were Black and 32% of the intestate decedents were Black.
- The mean wealth of white testate decedents was \$191,043 and the mean wealth of Black testate decedents was \$76,460.
- The mean wealth of white intestate decedents was \$59,954 and the mean wealth of Black intestate decedents was \$32,536.
- Testate decedents were 57% female and 43% male; intestate decedents were 42% female and 58% male.
- The mean wealth of testate male decedents was \$279,874 and the mean wealth of testate female decedents was \$112,421.
- The mean wealth of intestate male decedents was \$55,813 and the mean wealth of intestate female decedents was \$61,393.
- Married white testate men had more overall wealth, average wealth, and median wealth than any other category of decedents, married, single, divorced, or never married.

These statistics offer stark evidence that race, sex, marital status, and age correlate with higher and lower levels of wealth, and for somewhat obvious reasons. White men clearly have more wealth overall, on average, than white women or Black men or women.<sup>44</sup> Men have more wealth overall than women, notwithstanding that testate women comprised the largest single group of decedents in the data set.<sup>45</sup>

There were far more nuances to the data than I have summarized here.<sup>46</sup> The goal in my earlier work has been to identify as much information as I can about the identity and behavior of testate decedents and the identity and behavior of intestate decedents to identify the

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<sup>44</sup> See *id.* at 316-20.

<sup>45</sup> *Id.* at 316.

<sup>46</sup> This data is more fully explored in Wright, *Demographics*, *supra* note 42 (manuscript at 40-47).

population most in need of estate-planning services. Many of the intestate decedents died unexpectedly, through accidents or sudden medical emergencies. Three of my intestate decedents were under the age of ten, and ten intestate decedents were under the age of thirty-five. No testate decedents were under the age of thirty-five. Half of the testate decedents were over the age of eighty-five while only 16% of the intestate decedents were over the age of eighty-five. Collectively, the set of testate decedents were quite elderly (over age seventy-five), white, and more often female. The intestate decedents were much younger, with the majority in the forty-five to sixty-five age range, and more often male. And although a majority were white, there was a far greater percentage of Black decedents than are represented in the population as a whole. The intestate decedents also held far less wealth than the testate decedents, which is compounded by the likelihood that the testate decedents had significantly more unreported wealth passing through will substitutes than the intestate decedents.<sup>47</sup>

But why do these differences matter? Intestacy is the succession plan that we have assumed for centuries reflects the most likely intent of a majority of people. Under most intestacy rules, the surviving spouse is entitled to at least half and often the entirety of the decedent's estate.<sup>48</sup> What is left passes equally to the children and grandchildren.<sup>49</sup> If there is no surviving spouse or descendants, the estate passes to siblings, aunts and uncles, cousins, and then eventually to the state if there are no kin within the required degree of relationship.<sup>50</sup> And not surprisingly, I found that a majority of the testate decedents left their property (a) to their surviving spouse if he or she survived and, if not, then to the children equally or (b) to the children equally.<sup>51</sup> So we cannot assume that intestate dispositions are inherently undesirable if most testate decedents are following the same patterns.<sup>52</sup>

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<sup>47</sup> As discussed more fully below, many people will have wealth that passes through a non-probate will substitute, like a joint tenancy, a trust, life insurance, or an account with a beneficiary designation. This wealth need not be disclosed and, in general, the more wealthy decedents are likely to have had more undisclosed wealth pass through these mechanisms than the less wealthy decedents. See discussion *infra* Table 6.

<sup>48</sup> UNIF. PROB. CODE § 2-102 (amended 2010). Although many states have not adopted the Uniform Probate Code, it is representative of the vast majority of intestacy provisions in the different states, and I cite to it here rather than give a handful of random state statutes.

<sup>49</sup> *Id.* § 2-103.

<sup>50</sup> *Id.*; *id.* § 2-105.

<sup>51</sup> See Wright & Sterner, *supra* note 28, at 361-62.

<sup>52</sup> This is not to say that the intestate priorities represent probable intent beyond the spouse and descendants. See Mary Louise Fellows & E. Gary Spitko, *How Should*

Yet simply having the real property pass through court-supervised probate is certainly a burden if probate takes time and resources away from the heirs who cannot afford to hire a lawyer and the delay means the real property cannot be listed and sold, or that mortgage payments are not being made and the house enters foreclosure. Unfortunately for many heirs, the reason for having to go through court-supervised probate is because the decedent owned real property that was not held in a joint tenancy, a trust, or with a TOD designation that would allow it to pass outside probate to successors.<sup>53</sup> In my study, 96% of the intestate decedents whose homes were later sold by the heirs held real property that had to be probated, compared to 71% of the testate decedents whose homes were later sold and for which probate was necessary because of the presence of real property in the estate.<sup>54</sup> Had the decedents done some basic estate planning to permit their homes to pass smoothly to successors, roughly 50% of the intestate decedents could have avoided probate altogether, as the real property was the only asset being probated. On the other hand, only 9% of testate decedents listed only real property in their petitions as the cause for initiating probate.<sup>55</sup> The other 91% of the testate decedents had other assets that also required probate. Thus, providing a simple, non-probate mechanism to manage transfers of the decedents' homes to heirs could have a tremendous and disproportionate benefit for intestate and lower wealth individuals.

Moreover, just because testate decedents also leave their property in roughly equal shares to their children does not mean that the intestate rules cannot be improved upon. In particular, the problem of fractionation when there are multiple heirs means that many properties

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*Non-Probate Transfers Matter in Intestacy?*, 53 UC DAVIS L. REV. 2207, 2216 (2020). When decedents do not have descendants they leave their property in wildly different ways. See, e.g., Russell N. James III, *The Emerging Potential of Longitudinal Empirical Research in Estate Planning: Examples from Charitable Bequests*, 53 UC DAVIS L. REV. 2397, 2415 (2020) (documenting "that having children is associated with a significant decrease in the probability of having a charitable estate plan").

<sup>53</sup> A little over half of all states have a mechanism to allow for a beneficiary designation on real property, either through the Uniform Real Property Transfer on Death Act, their own TOD deed statutes, or through the use of enhanced life estates. See Wright, *Beneficiary Deeds*, *supra* note 33 (manuscript at 2-3).

<sup>54</sup> See discussion *infra* Table 6.

<sup>55</sup> These are the numbers only for the testate and intestate decedents who owned real property before death and which property was later sold by the heirs. More than half of the testate real property and almost half of the intestate real property was either retained by successors or foreclosed upon, and many of those did not require probate if the successor was the surviving spouse and the home was held in joint tenancy or tenancy by the entirety. See *infra* Table 6.

may have to be sold and the proceeds split to pay legacies for all the children.<sup>56</sup> When that happens, heirs who are less financially stable may be forced to sell immediately even though the market might not be right.<sup>57</sup> Less financially stable heirs are also less likely to be able to modernize the property in anticipation of a higher sales price than heirs who are more financially stable. Some heirs may insist on selling the property immediately, while others might want to rent the property and receive an income stream. But renting requires maintenance and supervision, which many heirs might not be able to provide, especially if they live afar. Studies show that sales as a result of forced partition yield well-below fair market value compared to homes sold voluntarily by the homeowner.<sup>58</sup> So if we assume that the heirs of the less-wealthy intestate decedents are likely to be less financially stable than the heirs of the wealthier testate decedents, the former are less likely to be able to leverage their inheritances to produce more wealth or to even retain what their parents may have worked so hard to acquire. Furthermore, when we examine the real property owned by the intestate decedents, we not surprisingly find that it was generally worth less, was located in less desirable neighborhoods, and was often sold at significantly below the fair market value.<sup>59</sup>

By examining the real property records of the testate and intestate decedents we can see vividly how the wealth cycle works for the wealthy and fails for the generally poorer intestate decedents. Although there were well-to-do intestate decedents and poor testate decedents, a close examination of their real property holdings and subsequent disposition tells a very enlightening story about the wealth gap and cycles of poverty.

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<sup>56</sup> The fractionation problems are legion. When real property is fractionated through intestacy, many families are unable to afford the expense to retitle the property and, over time, title issues compound. As a result, the Uniform Law Commission has promulgated the Uniform Partition of Heirs Property Act to deal with this problem. As of February 1, 2020, it has been adopted in fifteen states and the U.S. Virgin Islands. *Partition of Heirs Property Act*, UNIF. LAW COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=50724584-e808-4255-bc5d-8ea4e588371d> [<https://perma.cc/DA36-3FVK>]; see also Joan Flocks et al., *The Disproportionate Impact of Heirs' Property in Florida's Low-Income Communities of Color*, 92 FLA. B.J. 57, 57-58 (2018); Spivack, *supra* note 4, at 194-96.

<sup>57</sup> See Mitchell et al., *supra* note 34, at 608-09.

<sup>58</sup> *Id.*

<sup>59</sup> See *infra* Table 4.

## III. THE REAL PROPERTY DATA

In this initial study, I examined the estate records of all 115 intestate decedents and 110 testate decedents to determine how many of them owned real property at death or shortly before death and what became of the homes after the homeowner died. Although not all of the decedents had their homes pass through probate because many held them in joint tenancy, tenancy by the entirety, or in a trust, they had owned them at death and their interests passed to successors. And a sizable number of homes were retained by surviving spouses and/or heirs, but by no means a majority.<sup>60</sup> Even when a married couple owned a home, the survivor often sold it when the first spouse died. Thus, even if homes were held jointly so that the home itself did not have to pass through the probate process, many of these homes were disposed of shortly after the decedent's death and could be located through a property records search.<sup>61</sup>

When I found that a decedent had been on the title of real property, I examined the assessed value and the sales history from the point the decedent acquired the property until the present. I noted where the title was held in the name of the "heirs of XY," which indicated that the heirs had not taken the steps to retitle the property in their own names, so it essentially remained in the name of the decedent's estate. I noted those instances where the heirs had taken the trouble to transfer the title to their own names and then, in some instances, had quit claimed various shares to other heirs in an attempt to re-aggregate the property title in the name of one heir. I noted where the home had been held by the decedent and a spouse as joint tenants or tenants by the entirety, and the spouse continued to reside in the home. In one instance, the decedent had disposed of the property herself prior to death by transferring it to the persons who were also named as her will beneficiaries. But in the slight majority of situations, I found that the beneficiaries — either surviving spouse, children, parents, or even an

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<sup>60</sup> See *infra* Tables 2-3.

<sup>61</sup> Property records are available on the Alachua County Property Appraiser's Website. ALACHUA CTY. PROP. APPRAISER, <https://www.acpafl.org/> (last visited Mar. 21, 2020) [<https://perma.cc/LLE6-LR3B>]. Using addresses and names one can usually find the appropriate Tax ID Number. With that information, one can find recent sales data, and also navigate to the Clerk of the Court's records for recorded mortgages and to the Tax Collector's website for tax delinquencies. *County Clerk Web Access*, ALACHUA COUNTY, <http://isol.alachuaclerk.org/RealEstate/SearchEntry.aspx> (last visited Mar. 21, 2020) [<https://perma.cc/PU2L-MHCB>]; *Tax Collector*, ALACHUA COUNTY, <https://www.alachuacollector.com/> (last visited Mar. 21, 2020) [<https://perma.cc/6WVL-C2AU>].

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ex-wife — had sold the real property within a few years of the testator's death. I noted not only the sales price received from these sales, but also subsequent sales as my study spanned a period of volatile real property values and the home foreclosure crisis. And in a startling number of cases, banks and mortgage companies had been involved in subsequent transactions, some of which appeared to be foreclosures of homes that were under water, were unable to be sold by the beneficiaries and were simply released to the bank. In one case, a voluntary transfer was made to the bank by the surviving spouse to avoid foreclosure. In others, the bank forced a sale but ended up acquiring the property at significantly less than its fair market value.

In the cases of the foreclosures and tax sales, I also examined the public records of the tax assessor to determine how long there had been defaults on payment of taxes, and the county clerk's website to examine all mortgages filed against the properties. From these records I could usually surmise whether the home was foreclosed upon because it was underwater and could not be sold by the beneficiaries, or it was simply abandoned by the heirs and the bank sold it to pay what was, in some instances, a very small amount left on the mortgage. In these later instances, the heirs would have lost all equity in the home. A lengthy period of non-payment of property taxes could be attributed to financial woes or a lengthy period of incapacity on the part of the decedent, or neglect or financial instability on the part of the heirs after the decedent's death.

For all properties, I examined the popular real estate website Zillow to obtain a fair market value.<sup>62</sup> Because these were 2019 values, they were likely to overstate the value of a home that might have been sold in 2013 or 2014, when real estate prices were somewhat more depressed. Thus, to obtain a more accurate value, I determined a fair market value by averaging the current value provided on Zillow, with the 2018 Total Just Value provided by the property assessor's website. In all but one instance, the Zillow value was higher than the Total Just Value, and in most cases the latter value was roughly 80% of the Zillow value. By averaging the two numbers I obtained a value that seemed to be within range of the sales prices for many of the homes.

During the period of my study, however, the median sales prices of homes in Alachua County increased by more than 25% between 2013 and 2018, although most of that increase was in the years 2017 and 2018 as the effects of the recession finally began to lift. To better reflect

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<sup>62</sup> ZILLOW, <https://www.zillow.com/> (last visited Jan. 20, 2020) [<https://perma.cc/M89S-3LBC>].

the economic circumstances under which most heirs were making decisions about selling these homes, I adjusted the fair market value, obtained by averaging the Zillow value with the Total Just Value, by multiplying that value by a percentage that reflected the increase in median home values in the county identified by Zillow. Table 1 below shows the Zillow Home Value Index and the Median Sales Price. I adjusted my fair market values for each home sold by the inflation adjustment percentage for the year sold. For instance, if a home was sold in 2013 and my average fair market value was \$200,000, I multiplied that value by 0.71 to obtain an adjusted fair market value at the time of sale of \$142,000. On the other hand, if the home was not sold until 2017, and its average fair market value was \$200,000, I multiplied that value by 0.92 to obtain an adjusted fair market value at the time of sale of \$184,000.

Table 1. Inflation Adjustment Percentages

Date	Zillow Home Value Index <sup>63</sup>	Median Sales Price <sup>64</sup>	Inflation Adjustment Percentage <sup>65</sup>
January, 2012	\$139,000	\$123,000	72%
January, 2013	\$134,000	\$129,000	75%
January, 2014	\$144,000	\$120,000	70%
January, 2015	\$150,000	\$134,000	78%
January, 2016	\$157,000	\$146,000	85%
January, 2017	\$166,000	\$169,000	99%
January, 2018	\$180,000	\$171,000	100%

Moreover, it is very difficult to find a true fair market value for all of these homes as some were located in neighborhoods that rebounded

<sup>63</sup> Zillow Home Value Index for Alachua County, Florida. *Alachua County Home Prices & Values*, ZILLOW, <https://www.zillow.com/alachua-county-fl/home-values/> (last visited Jan. 20, 2020) [<https://perma.cc/URZ4-4BUU>]. The Zillow Home Value Index is an estimate valuation for a given geographic area.

<sup>64</sup> *Id.* In all years of my study except 2017, the median sales price was lower than the home value index, suggesting that lower end homes were selling better in Alachua County during those years than were predicted or than higher value homes.

<sup>65</sup> If a home was sold in 2014, for instance, I multiplied the fair market value of the home by 0.70 to determine how much below or above the fair market value the home was sold for.

from the recession more quickly than other neighborhoods.<sup>66</sup> Homes with special appeal or in preferred neighborhoods rebounded more quickly, but the real estate market in Alachua County has nearly reached its 2007 high. Thus, over time, some of the differences will have gradually evened out and, although none of these real estate values are perfect, they are reasonably close for a market that is notoriously uneven and difficult to gauge. And despite the tentative nature of the data, the results show pretty astounding differences between the testate and the intestate real properties that were sold.

#### A. Testate and Intestate Real Property Records

I examined the estates and property records of 110 testate decedents, of which twenty-nine held no apparent real property, forty-two held property that was later sold by surviving spouses and heirs, nineteen had held property that was retained by the spouse and continued to be utilized, thirteen had held property that was retained by the heirs, five held property that was transferred to a bank or mortgage company for value, and two had homes that were currently for sale.

Table 2. Testate Estates with Real Property

Testate Estates	Number	Percent of Total
No Real Property	29	26
Real Property	81	74
Disposition	Number	Percent of Total Owning Real Property
Sold	42	52
Retained by Spouse	19	23
Retained by Heirs	13	16
Foreclosure	5	6
For Sale	2	2

<sup>66</sup> See Anthony Clark, *Alachua County Zombie Subdivisions Slowly Coming Back to Life*, GAINESVILLE SUN (Mar. 12, 2016, 4:10 PM), <https://www.gainesville.com/article/LK/20160312/news/604145280/GS/> [<https://perma.cc/FC2N-MQ7L>]; see also Fan Zhang, *An Economic Impact Study of Historic Districts in Gainesville, Florida* (2016) (unpublished MURP thesis, University of Florida) (on file with George A. Smathers Libraries, University of Florida), <https://ufdc.ufl.edu/UFE0050755/00001> [<https://perma.cc/459L-XS2M>] (finding that homes in historic districts in Gainesville retained their value better during the recession and rebounded more quickly than similar homes outside historic districts).

Because of the importance of these real property assets for successors, I focused especially on subsequent sales or losses of the homes through foreclosure, because homes still retained by survivors were clearly being utilized. Slightly over half of the testate homes (forty-two of eighty-one) were sold at some point after the death of the decedent, some as quickly as the same year of death, and one as late as fourteen years later.<sup>67</sup> Most, however, were sold within five years of death, with the average time between death of the decedent and sale of the home being 3.3 years.<sup>68</sup> The median value of the testate home sales was \$142,749 with the lowest being \$5,800 and the highest being \$745,254.<sup>69</sup> This put them very close to the median home value for 2014, which is when many of these homes were sold. Only twelve homes (29%) were valued below \$100,000.

The intestate properties were quite different, however. Of the 115 intestate decedents whose estates were probated, forty-eight had no apparent real property. Of the remaining sixty-seven, twenty-nine held real property that was sold, eleven held property retained by the spouse, seventeen held property retained by the heirs, and ten had homes that were lost to tax sale and foreclosure.

Table 3. Intestate Estates with Real Property

Intestate Estates	Number	Percent of Total
No Real Property	48	42
Real Property	67	59
Disposition	Number	Percent of Total Owning
Sold	29 <sup>70</sup>	43
Retained by Spouse	11	16
Retained by Heirs	17	25
Foreclosure/Tax Sale	10	15

<sup>67</sup> It is likely that the probate was necessary because the heirs were finally deciding to sell the home and needed to clear the title. Presumably they were living in the home for the preceding fourteen years, or renting it and receiving an income stream.

<sup>68</sup> See *infra* Table 5.

<sup>69</sup> The average adjusted fair market value of the testate homes was \$194,924, which showed significant skewing toward the higher end.

<sup>70</sup> Of the twenty-nine intestate decedents who owned real property, I omitted three of them from my calculations because one owned a vacant lot, one owned commercial real estate, and one owned a duplex that was sold and torn down to build apartments, so the fair market value could not be easily determined.

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And most notable was the value of these homes. They ranged in value from \$3,500 (vacant lot) at the lowest to \$15,450 for the lowest value home to \$225,776 at the highest, with the median home value being \$74,508. Sixteen of these homes (62%) were valued at under \$100,000. The median home value of the intestate decedents was only 52% of the value of the median home value of the testate decedents. Of course, this is not particularly surprising, as people with more wealth are likely to have homes with higher values and are more likely to execute a will or engage in more robust estate planning than those with lower value property. But this is precisely where we should be concerned. To the extent lower- and working-class decedents were able to acquire real property, it is particularly important that that property not be lost as it passes from generation to generation where the importance of inheritances to building wealth is so crucial.

When we think about the role of the family home in family stability, building wealth, and providing a firm step into the middle class, we should look critically at what happens to it throughout the succession process. From the point the decedent homeowner becomes incapacitated and perhaps has to move to hospice or a nursing home, through the court-supervised probate process, getting the home retitled in the name of the heirs, and then their decision to sell or retain it, the home goes through a very vulnerable period. If the home is retained by a surviving spouse or descendants, or it is sold quickly for substantial value and the heirs receive a decent inheritance, we can feel that the process is working. But if the home is lost to foreclosure or tax sale because of the homeowner's lengthy period of incapacity, it is allowed to deteriorate and thus is sold for well below fair market value, or it is sold quickly to unload it by heirs who need to make a credit card payment, then there is a problem — a problem that is only exacerbated by the delays and costs of probate administration. And although I cannot get into the financial circumstances of every decedent and his or her heirs and devisees to understand the motives and pressures facing the survivors, I can analyze objectively what happened to the homes of these eighty-one testate and sixty-seven intestate decedents.<sup>71</sup>

Of the 148 homes owned by decedents, 60 (32 testate and 28 intestate (40% of total)) were still owned by the children, spouses, or siblings in

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<sup>71</sup> Ultimately, out of 225 probated estates, 148 owned real property (81 testate decedents and 67 intestate decedents). *See supra* Tables 2-3. In all but two instances, the real property was a home. The other two were commercial properties that were difficult to value. A small number of decedents also owned additional real property, including beach condos, neighboring lots, and agricultural lands. I did not generally analyze what happened to these other real property assets.

2019, at least six years after probate and for some decedents as long as a decade after their death. Forty percent of these homes, therefore, continued to be utilized by heirs and beneficiaries and inured to their benefit, including providing homes or an income stream and ultimately preserving the decedent's hard-earned equity. But sixty-eight homes (forty-two testate and twenty-six intestate (46% of total)) were sold and fifteen (five testate and ten intestate (10% of total)) were lost through foreclosure or tax sale, which were moments when wealth could be easily lost or leveraged depending on the unique characteristics of the property.

### B. Sales by Survivors

Of the forty-two testate homes and twenty-six intestate homes that were sold by the heirs or beneficiaries after the death of the homeowner, the sales prices tell a sobering story.

Table 4. Sales Prices as Compared to Fair Market Value (FMV)

Sale Percent	Testate	Percent of Whole	Intestate	Percent of Whole
25% FMV or less <sup>72</sup>	1	2%	1	4%
25%<FMV<50%	1	2%	3	11%
50%<FMV<75%	3	7%	6	22%
75%<FMV<100%	12	29%	6	22%
>100%	25	60%	11	41%

Even when the homes were not lost to tax sale or foreclosure, the homes of intestate decedents were nearly four times more likely to be sold at less than 50% of fair market value than the homes of the testate decedents and three times more likely to be sold at below 75% of fair market value. For instance, only one testate home but four intestate homes were sold at below 30% of fair market value. Three of the four intestate homes were valued below \$75,000, as was the one testate home, showing that lower value homes are more susceptible to a "succession discount." This succession discount is apparent when these homes on the low side of the market are at risk for being sold for significantly below the adjusted fair market value (one for 12% and one

<sup>72</sup> This represents the difference between the sales price and the adjusted fair market value at the time of sale for the twenty-six intestate homes and forty-two testate homes.

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for 20%!); they also consequently yielded relatively small inheritances for the heirs/beneficiaries.

On the other end of the economic spectrum, 89% of testate homes but only 63% of intestate homes were sold for 75% or higher of fair market value. Sliced a different way, only 44% of the intestate homes but 79% of testate homes were sold for 90% or higher of fair market value. The homes that sold for close to fair market value were mostly in the higher-value range, with the average home value of these higher-grossing testate homes being \$215,577 and the average value of the intestate homes being \$84,601.<sup>73</sup>

If we consider that lower home values and younger intestate heirs are a risky combination in which the heirs are likely to be less able to improve homes in order sell them at a fair price, or are in a hurry to sell because they are less financially secure, it is evident that the intestate heirs are less well-positioned to take advantage of their inheritances than their testate counterparts. The fact that over one-third of intestate homes but only 11% of testate are being sold for well below fair market value, and that the intestate homes are worth significantly less, suggests that the inheritances that these heirs and beneficiaries are likely to receive are going to be quite different. And that too is borne out by the data. I broke down each sale for each home by the number of heirs or devisees and found that the median real property inheritance from a testate decedent was \$120,000 with \$1,409 being the lowest and \$527,500 being the highest. On the other hand, the median real property inheritance from an intestate decedent was \$30,000, with \$300 being the lowest and \$224,900 being the highest. Once again, we are looking at testate beneficiaries receiving roughly four times as much wealth as intestate beneficiaries from the inheritances of real property. Certainly, the higher-end intestate estates generated significant wealth for the beneficiaries, but only four (14%) estates generated inheritances of over \$100,000 for beneficiaries. On the flip side, twenty-six (62%) of the forty-two testate estates generated inheritances of over \$100,000 per beneficiary. Add that to the fact that testate decedents are nearly twenty years older than intestate decedents, and it is a reasonable conclusion that the testate heirs are older and better situated financially to leverage their newly acquired wealth than their intestate counterparts.

Thus, in examining the sales data of the combined sixty-eight homes that were sold after the decedent's death, we see some pretty stark

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<sup>73</sup> The median value of the intestate homes sold at 90% or more of fair market value was \$69,333 (about \$5,000 lower than the median of all intestate homes being sold) and the median value of the testate homes sold at 90% or more of fair market value was \$175,075 (about \$335,000 higher than median of all testate homes being sold).

differences. The homes of intestate decedents were overall of lower value than those of testate decedents, they were more likely to be sold at below fair market value than those of testate decedents, and the intestate heirs took significantly smaller inheritances than their testate counterparts. There was a small difference in the average length of time between death and sale of testate and intestate homes, with testate being slightly longer at 3.3 years and intestate sales occurring on average 2.6 years after death. That small difference, however, could indicate greater ability of the testate heirs to hold onto the homes and fix them up prior to sale, or hold out for a higher offer than the intestate heirs. The difference is too small, however, to indicate significance although it is supportive of the larger trend seen here.

Table 5. Date of Home Sales

Year Sold	Testate	Intestate
2012	3	0
2013	8	11
2014	10	4
2015	5	5
2016	7	4
2017	4	1
2018	4	1
2019	1	0
Total	42	26
Average Time Between Death and Sale	3.3 years	2.6 years

The homes of the testate decedents also tended to be in neighborhoods with higher average home values while the homes of the intestate decedents were in neighborhoods with lower home values, or were located in rural areas of the county with less sales appeal. Factors such as housing segregation, zoning, and government investments in infrastructure all contribute to the complexity of housing values.<sup>74</sup> As local governments protect through zoning and real covenants the

<sup>74</sup> See Mitchell, *supra* note 3, at 852 (discussing the myriad ways in which zoning, housing segregation, and other factors affect home values); see also Sheila R. Foster, *The Limits of Mobility and the Persistence of Urban Inequality*, 127 YALE L.J.F. 480, 482-87 (2017).

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properties of certain owners and do not protect the property values of others, neighborhoods rise and fall with the decisions of city counselors who are not thinking about how their decisions might affect the life prospects of generations to come.

Of course, as this data show, there are correlations between wealth and rates of testacy and intestacy, but they do not show causation. And I certainly do not want to imply that dying testate causes decedents and heirs to have greater wealth or to be able to protect their wealth better than dying intestate. But the data suggest that dying intestate correlates with lower value homes and overall less wealth, which can be lost more easily when the property must go through the court-supervised probate process. In diving more deeply into the data on these sixty-eight homes that were sold, we also see that twenty-five out of twenty-six (96%) of the intestate probate petitions listed the real property as an asset of the estate requiring probate.<sup>75</sup> Only twenty-eight out of forty-two of the testate petitions (67%) probated the homes that I examined. This means that fully one-third of the testate decedents had titled their real property so that it passed directly to beneficiaries, most often through a joint tenancy or tenancy by the entirety. Some held the property in trust, and then the successor trustee subsequently sold the home after the trust settlor's death. Only one intestate decedent held her home as a joint tenant so that it did not need to pass through the probate process to have it titled in the names of the heirs.<sup>76</sup>

Moreover, twelve — or just under half of the estates of the intestate decedents where homes were sold — held no additional property besides the homestead requiring probate. This meant that these estates had to go through the delay and administrative cost of probate simply for the homes owned by these decedents. Fourteen of the twenty-seven intestate estates included additional non-homestead property, but much of it was of fairly low value. Four indicated that the additional non-homestead property was worth less than \$1,000, and four others indicated that the additional non-homestead property was worth less than \$10,000. Most of this property could have been distributed without probate, but was likely included because probate of the real

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<sup>75</sup> See *infra* Table 6.

<sup>76</sup> See *infra* Table 6. The fact that most intestate decedents had to probate the real estate — while only two-thirds of the testate decedents did — supports the conclusion that the median wealth of the testate decedents identified in the probate petitions significantly undervalues their total estates. At a bare minimum, for those decedents whose homes passed through a non-probate will substitute, the value of those homes are not reflected in the overall wealth figures I was able to capture from the probate records explored in earlier scholarship.

property was going forward anyway and creditors could be barred from claims on all probated property after conclusion of administration. Only six intestate decedents had additional non-homestead probated property worth \$20,000 or more.

The testate estates tell a very different story again. Although only twenty-eight of the forty-two testate estates (67%) included the homes in the probate petition, at least thirty-three of the forty-two (79%) had non-homestead property to be probated in addition to the home. Moreover, the total wealth of the testate non-real property was \$3,873,000 as against the total claimed value of the homestead property at \$2,244,300. Thus, if we combine the wealth of the testate decedents, we see that they probated a combined declared wealth of \$6,366,117, of which only 39% consisted of the real property homesteads. The remaining 61% of the testate wealth was in intangible and tangible personal property and some non-residential real property. Intestate decedents, on the other hand, probated a combined declared total wealth of \$2,031,072 of which 71% consisted of the homestead real property and only 29% of additional intangible and tangible personal property. The table below illustrates the complexity of the two groups of probated estates for a fuller picture of the wealth gap between testate and intestate decedents.

Table 6. Real and Personal Property Assets Being Probated

	Testate	Intestate
Number of Estates that Probated the Real Property	28/42 (67%)	25/26 (96%)
Total Claimed Value of Real Property in Probate Petition	\$2,493,405	\$1,448,340
Adjusted FMV of Same Real Property	\$2,771,191	\$1,491,751
Total Additional Non-homestead Property	\$3,872,712	\$582,732
Number of Estates with Additional Non-homestead Property	32/42 (76%)	14/26 (54%)
Average Non-homestead Property per Estate	\$121,022	\$41,623

The numbers in the last row of Table 6 *supra* are just one more piece in the rapidly emerging picture of the wealth gap cycle between the testate and intestate decedents. While both groups probated a significant amount of real property, the intestate decedents had far less

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additional property requiring probate than the testate decedents. So when we compound the effects of the lower value homes, the likelihood that they will be sold for lower than fair market value, the less additional property in these estates, and the slightly larger number of heirs who will divide the inheritances, we see that intestate heirs receive inheritances about one-fourth, on average, of what their testate counterparts receive. And since all but one intestate estate had to probate the real property, there was likely to be a greater delay and some cost associated with probate of the real property that did not affect the one-third of testate estates in which the real property passed automatically at death through a non-probate will substitute.

### C. Foreclosures and Tax Sales

Perhaps the most shocking results I found were the striking number of foreclosures and forfeitures in the records and again, not surprisingly, these were heavily concentrated in the intestate estates. These foreclosures and tax sales resulted in the home being taken over by the bank or mortgage company, and whatever equity the decedent might have had in the home was lost to the heirs entirely. But as with the home sales, not all foreclosures were the same.<sup>77</sup> There appeared to be two basic types of foreclosures. The first occurred when the decedent had bought the house relatively recently, say between 2000 and 2007, when home prices were relatively high, and when they died they had not had time to pay off a significant portion of the mortgage.<sup>78</sup> Some of these homes were bought in 2006 and 2007 and were clearly under water as a result of the rapid decline in home values brought on by the 2008 recession. These homes were like so many that fed the mortgage foreclosure crisis that heirs simply gave the homes back to the bank rather than try to hold onto them and continue to pay the high mortgages until their value rebounded or sell them at a loss. Some others involved homes that were purchased perhaps many years earlier, but had been refinanced in 2006 or 2007 or for which home equity loans had been obtained. Both of these scenarios involved homes with little or no equity and foreclosure was probably easier for the successors than managing the property or trying to sell it.

The other type of foreclosure is more problematic, however. These were situations in which it appeared the decedent had significant equity

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<sup>77</sup> See Mitchell et al., *supra* note 34, at 601-09.

<sup>78</sup> Others were bought earlier but the decedent had taken out home equity loans or reverse mortgages so that the amount of equity the decedent had in the home was quite small.

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in the home but had not completely paid off the mortgage. These foreclosures occurred most likely because the decedent suffered a lengthy period of incapacity and no one paid the mortgages or property taxes for a year or two. These homes tended to be of lower value, but the decedent still had significant equity in them and they were auctioned for the property taxes or the remainder of the mortgage which tended to be quite low. For these homes, the entire value was lost to the heirs because the decedent had owed very little or may have owned the home outright but simply failed to pay property taxes. And consistent with the sales data, the testate foreclosures tended to be of the first type and the intestate foreclosures tended to be of the second type.

Sadly, 15% (ten of sixty-seven properties) of the intestate homes were lost through tax sales and foreclosures, while only 6% (five of eighty-two properties) of the testate homes were lost. Despite the numbers, however, the types of foreclosure were quite different. By examining the bank's bid, the date and amount of the recorded mortgages, the value of the property, and the decedent's date of acquisition, we can begin to piece together the unique circumstances of each foreclosure. And even though the numbers are quite small, only fifteen homes in all, there are patterns that are consistent with the other findings of this study, that the real property of intestate decedents is more vulnerable to dissipation at the point of intergenerational transfer than the real property of testate decedents.

In five and possibly six of the ten homes owned by intestate decedents (F, G, I, L, N & possibly H), there appeared to be only low or modest amounts due on mortgages, and the banks acquired the homes on bids of roughly half the fair market value or quite less.<sup>79</sup> This indicated that the heirs lost anywhere from 40-100% of the equity that these decedents had built up in these homes. Only one in five of the testate foreclosures (B) seemed to indicate a similar substantial loss in equity, although the heirs in that case were real estate developers and seemed to be more

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<sup>79</sup> F involved a home valued at over \$250,000 with a mortgage of \$130,000. When foreclosed upon in 2014 after the unexpected death of the decedent, the bank bid a mere \$100 and resold it shortly thereafter for \$65,000. The home was quickly renovated and sold two years later for \$285,000. G was worth roughly \$75,000 but was foreclosed on in 2011 based on \$21,000 left on the mortgage. It was sold by the bank for \$26,000 the same year as the foreclosure, resulting in loss of significant assets to the three children. In L, the amount owed on the mortgage, based on the bank's bid, was roughly half the equity in the home (\$52,500 on a home valued at \$103,000) and in I the amount owed was a little more than half (\$41,000 on a home valued at \$73,900). And in one indeterminate intestate foreclosure (H), the mortgage was higher than the home was worth with \$224,000 in mortgages on a home valued at only \$180,000, but the bank's bid indicates that the decedent may have paid off half the mortgage before death.

knowledgeable and perhaps strategic in their decision to allow a foreclosure.<sup>80</sup> And it is notable that the only tax sale (N) involved a home that appeared to be completely paid off, but after the decedent's death the property taxes went unpaid in part because one of the decedent's children was in prison.<sup>81</sup> Those heirs lost all the decedent's equity in that home.

The underwater foreclosures fell differently. Four of the five testate foreclosures (A, C, D, E) appeared to be for homes that were purchased recently or had extensive outstanding mortgages, only one of which appears to have involved any loss of equity.<sup>82</sup> Four intestate foreclosures (J, K, M, O),<sup>83</sup> and possibly five (H), also involved high mortgages or

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<sup>80</sup> This home, B, had a fair market value of \$186,000, and the bank bid was only \$63,000. It was then purchased from the bank by a real estate broker in 2017 for \$156,000 and sold by her two years later for \$275,000. By walking away from this home, each of the three sons received about \$25,000 in tangible and intangible personal property from their father's estate at the time of probate, but gave up an additional \$200,000 in the lost opportunity to fix up and resell their parents' homestead. Curiously, one of the three sons appears to have been a real estate broker in the area, so it is likely that they understood what was going on with the foreclosure.

<sup>81</sup> The one tax sale involved a home owned by the decedent at her death in 2008. She had two children, a son and daughter, but the son was in prison at the time of her death. Following her death, her property taxes fell delinquent from 2009 to 2013 when the home was sold at tax sale for less than \$9,000. Her home had an assessed value of \$55,000 and a fair market value of \$88,500 and she had paid off her mortgage a decade earlier in 1998. The entire value of this home appears to have been lost to the heirs.

<sup>82</sup> Two testate foreclosures were bid upon by the bank for an amount that roughly equaled the fair market value (D and E). One had been acquired in 2007, and the other had been heavily mortgaged with a long line of home equity loans. And both were later sold by the bank for a value lower than the mortgage. And in another foreclosure (A), it appeared the mortgages nearly totaled the value of the home, and the bank bid only \$100, but based on the ten mortgages and lines of credit filed against the home, it is likely the decedent had very little equity. The fourth testate mortgage (C) was a complicated estate with significant debts in addition to a \$128,000 mortgage taken out in 2003. The bid by the bank at the foreclosure auction was \$75,100 which is probably what remained on the 2003 mortgage, even though the house was worth roughly \$200,000. The bank later sold the home for \$156,000. Thus, the heirs may have lost roughly \$75,000 in equity in the home by allowing the foreclosure.

<sup>83</sup> J's case is particularly problematic, as she bought her home in 2002 and paid the \$40,800 mortgage off entirely in 2008 by taking out an adjustable rate mortgage for \$118,500 which reflected roughly the entire value of the home at that time. When she died in 2011, she stopped making payments on the adjustable-rate mortgage and it was foreclosed upon in 2013, at which the mortgage company bid only \$49,000 to regain the property and then sold it a few months later for \$19,900. This was clearly a case of a homeowner being caught up in the refinancing frenzy of the real estate bubble. The fact that she received a loan for \$118,000 is not surprising given that the fair market value of nearby homes are in that range today. But assuming she only owed \$49,000 at the time of the foreclosure, this suggests that she, and her heirs, lost over half the value

home purchases at the height of the housing bubble, but these intestate foreclosures showed some potential loss of equity nonetheless. Although these eight or nine foreclosures represent a majority of the total foreclosures, they also are disproportionately distributed. Overall, 80% (four out of five) of the testate foreclosures resulted in little loss to the beneficiaries because the decedents appeared to have had very little equity in these homes. These were not the problematic foreclosures. On the other hand, only 40% of the intestate foreclosures were of this unproblematic type. The following table identifies specific characteristics of each of these fifteen forced sales.

Table 7. Testate and Intestate Foreclosures

Testate Foreclosures								
	Date of Death	Date of Acquisition of Home	FMV of Home	Legal Action	Bid Amount	Date of Foreclosure/Tax Sale	Later Sold For	Size of Probate Estate
A	7/9/2012	1973 as T/E	106,652	Foreclosure	100	3/2015	85,900	3,049
B	10/31/2012	1994	186,602	Foreclosure against son after decedent's death	63,000	12/2014	179,900	90,710 (HS)
C	6/7/2013	1976 as T/E	201,463	Foreclosure	75,100	5/2016	156,000	81,800 + HS
D	6/13/09	2007 as T/E	243,446	H x-fer to bank in lieu of foreclosure	258,000	4/2012	187,500	19,000

of her home, although it is likely the home was hard hit during the recession. In K, the decedent acquired his mobile home in 2005 at the height of the market, paying \$79,500 and taking out a mortgage for \$78,271. Shortly after his death in 2013 his heirs failed to make mortgage payments and the bank foreclosed in 2016, acquiring the property for a bid amount of \$54,200. Another intestate foreclosure also involved a line of credit that was at least as high as the value of the home taken out in 2007 (M) and the home was transferred to the mortgage company in lieu of foreclosure where it appears the mortgage was close to, if not higher than, the value of the home. And in the last foreclosure (O), the decedent had taken out a \$100,000 mortgage in 2004, a \$74,000 line of credit in 2005, and another mortgage for \$50,000 in 2007 on a home worth roughly \$180,000. The bank bid only \$100,000, however, which may indicate that the heirs lost nearly half the value of the home in equity assuming half of the three mortgages and lines of credit had been repaid. But the children may not have been able to continue paying on the home until the value rebounded enough to sell it and recoup any value. The bank, however, turned around and sold the house a few months after the foreclosure for \$181,000.

E	4/30/2010	1980 as T/E, built home in 1982	373,383	Bank acq'd	301,000	5/2014	290,000	30,000
Intestate Foreclosures								
F	2/14/13	2007 for 147,000	264,550	Foreclosure in 2014 - \$131K mortgage	100	2014	65,000 then 285,000	Unk – owned commercial properties and businesses
G	8/20/08	1989 w/ 33K mortgage	76,824	Foreclosure in 2011, 21K owed on loan	100	2/2011	26,000	25,000
H	6/5/13	1993	180,224	Foreclosure in 2016 against 2 kids. Had 224K mortgages since 2004	100,100 but no doc stamps	8/30/2016	181,000	120,000
I	12/31/11	2002 w/ 61K mortgage	73,920	Foreclosure in 2016 lists debt at 67K but only 41k is principal, 26K are costs	35,100	2016	43,000	85,000
J	4/8/11	2002	47,800	Foreclosure	49,000	3/19/13	19,900	26,000
K	7/22/13	2005	64,334	Foreclosure	54,193	7/6/2016	32,500	1,100
L	3/6/13	1991	103,102	Foreclosure	52,500 but no doc stamps	7/6/2017	86,000	150,000
M	10/22/12	2006	87,343	Foreclosure	QC in lieu of foreclosure	2011	35,000	Unk
N	6/27/08	Unknown	88,558	Tax Sale	8,800	9/20/2013	Not sold	7,000
O	9/9/08	2003	180,795	Foreclosure	100	11/2010	65,600 then 180,000	Unk

The mere fact that there were twice as many foreclosures and tax sales of intestate properties than testate properties, and that there were proportionally more testate real properties, shows that foreclosures hit the intestate decedents harder than the testate decedents. Sixteen percent of intestate real property-holding decedents lost their homes, while only 6% of testate decedents did. And proportionally more of the

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intestate foreclosures were of the problematic kind in which significant amounts of equity were likely lost. Only one (20%) of the testate foreclosures seemed to involve significant loss of equity, while five or six (50%-60%) of the intestate foreclosures involved significant loss of equity, including the tax sale in which all equity was lost for a tax debt of less than \$9,000. Admittedly, each property is unique, and it matters when the decedents acquired their homes, how much equity they had in them, and whether their heirs could afford to sell before foreclosure happened. Moreover, it also depended on the decedents themselves, and whether they had a long decline of incapacity during which no one was paying their bills, or whether they had family members or guardians who could manage the property to avoid foreclosures. The younger average age of intestate decedents also means that their heirs were probably in a less economically stable position to take over and pay their parent's debts to avoid loss of equity in these homes.

#### IV. WHERE DO WE GO FROM HERE?

By focusing in on the subsequent sales and foreclosures or tax sales, I have found a sobering pattern in which the lower-value homes of the intestate decedents are sold off, often for significantly below fair market value, or are at risk of forced sale at double or triple the rates of the homes of testate decedents. Intestate decedents had more heirs, leading to more fractionation, their real property was more likely to be the only reason for going through probate, they had very little other property, and they had nearly quadruple the rate of foreclosures. They had done far less planning, so there were delays in retitling their property where nearly a third of the testate decedents had their real property pass smoothly to their survivors without delay. All of these factors compound to create a downward wealth cycle for the generally poorer intestate decedents and an upward wealth cycle for the generally wealthier testate decedents. Although I am not suggesting causation here, there is significant correlation between intestacy and less wealth — a correlation that prompts us to examine whether there are points of intervention, or possible legal and policy changes that might disrupt the cycle perhaps at the point when the wealth transfer is happening.

Although the data set is not large enough to draw large-scale conclusions about home values and the likely disposition of intestate and testate decedents' homes, we can see how the wealth gap may be exacerbated by intestacy when we consider the size of inheritances and their likelihood of fractionation or partition. If we examine the heirs and beneficiaries of these estates, we also see the wealth gap problem. Intestate decedents had, on average, 2.78 heirs while testate decedents

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had, on average, 1.8 beneficiaries. The greater the fractionation of the intestate estates naturally result in smaller inheritances.

Further, considering the median age of intestate decedents is nearly twenty years younger than their testate counterparts, we can assume that their heirs are roughly twenty years younger as well. The larger inheritances of the testate beneficiaries come at a point in time when their beneficiaries likely don't need the money and they can put it to the benefit of grandchildren, who are likely to be college-aged or older. The smaller inheritances of the intestate beneficiaries come at a point in time when the beneficiaries themselves are likely to need it for payment of debts or living expenses for themselves and their, likely, minor children. And \$30,000 doesn't go nearly as far as a \$120,000 inheritance, especially if the recipient is in a very different economic position and can invest rather than spend the money.

An analysis of the real property records of the intestate and testate decedents reveals that the intestate decedents controlled much less wealth, and when they owned homes (which they were less likely to do), those homes were valued at significantly less than the homes of the testate decedents. When they were sold by the survivors, they were more likely to be sold at significantly below fair market value, and when the heirs received their inheritances, they were substantially less than the inheritances of the testate beneficiaries. In considering possible interventions to prevent the tax sales and foreclosures, to encourage protecting the value of this wealth, and setting up procedures to maximize its chance of being leveraged by the beneficiaries to build their own wealth, we can easily get quite discouraged. Freedom of alienation of property is a fundamental bedrock of our legal system. And we certainly cannot insist that grandma's home be kept in the family and passed on for generations as was the custom of our colonial forebears. With our global economy and the unprecedented mobility of our residents, we cannot assume that children will live even in the same state as their parents, will take over their parents' businesses or homes, or will need the inheritance given greater investment in education. With greater longevity and more investment in human capital by parents, many children don't need an inheritance and, when they are likely to finally get one, they are most likely able to save it. But for many working class and minority individuals, the family home may be the only asset of significance, and its loss can be devastating to the next generation's ability to scramble up the economic ladder. With the wealth gap increasing to its highest point since the 1920s, it is understandable why scholars and policymakers are intensely focused on the myriad ways to intervene in the downward wealth cycle.

There are a few things we can do, both legally and policy-wise, to prevent the loss of this wealth. Legally, we can prohibit tax sales and foreclosures of property owned by a decedent for a period, perhaps up to two years after death. This would give the heirs time to come to grips with their loss, sell the home to pay off the mortgage or tax debts, or pay off the debts themselves in order to protect the equity in these homes. Of course, in two years a home in Florida can easily deteriorate with the mildew, weeds, and hurricanes. So someone needs to take an interest in these homes. If an heir is not maintaining it with the intention of living in it himself or selling it, then perhaps the court could appoint a real estate protector who could be given authority to lease the house and use the rental income to provide maintenance. If there is no heir stepping up, then the real estate protector could perhaps sell the home to pay any back debts and ensure that the house is sold for maximum value. Like a guardian ad litem, a real property protector could be a fiduciary with the task of leveraging real property assets for the benefit of heirs. They could be prohibited from selling below a certain threshold, like 70% of fair market value, or perhaps they would be held to the fiduciary standard of a prudent investor.

It is unlikely that anyone would recommend that we return to the old days of primogeniture when the family estate passed to the eldest son, leaving the daughters and younger sons to seek their fortunes through marriage, the church, or the army. But creating ways to encourage people to make wills, or to use joint tenancies or enhanced life estate deeds with their beneficiaries can simplify the transition from one generation to the next. Reid Weisbord has suggested that people should be able to fill out a simple form will every year when they do their taxes.<sup>84</sup> If there were a simpler mechanism for enabling homeowners to pass their property smoothly outside of probate, that alone would likely lessen the chances that the property will be fractionated and sold, or lost through foreclosures and tax sales. By encouraging homeowners to do even a modest amount of planning before they die, their homes can now be passed outside of probate more smoothly and quickly. TOD deeds are permissible in twenty-eight states plus the District of Columbia and the U.S. Virgin Islands.<sup>85</sup> These deeds allow a landowner to simply designate a taker who will receive the property at death, retaining for the grantor all power and control to alienate, mortgage, and manage during life. At least five states, including Florida, allow the

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<sup>84</sup> Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 920 (2012).

<sup>85</sup> See Wright, *Beneficiary Deeds*, *supra* note 33 (manuscript at 2).

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use of enhanced life estate deeds to effectively accomplish the same thing. In my research, I found no decedent who had used one of these deeds, although I did see that numerous heirs and beneficiaries did, perhaps prompted by their recent experiences with the probate system. If these deed forms were made more easily available through the property recorder's office, and if there was more education about their use, landowners could ensure that their real property never passes through probate. More importantly, landowners could designate a single taker to avoid fractionation and ensure better maintenance and management of the property.

There are other things that could help, such as reducing the stigma of talking about death and property succession so decedents and their heirs can better plan for that fateful day.<sup>86</sup> If there were better educational programs to inform low-income homeowners of the importance of estate planning and of protecting their home equity from generation to generation, then perhaps there will be less intestacy. But that also means making different options available and informing people of their legal implications. Flyers could be included with tax bills or mortgage bills encouraging people to make a will and designate who should be responsible to maintain the real property in case of incapacity and at death. More importantly, if people are not in a position to benefit from the non-probate revolution, either because they don't want to make wills or are skeptical of the legal system, then perhaps the probate courts could intervene more regularly. A real estate protector program for intestate, pro bono probates could help, as could an appointed realtor whose job it is to act as a fiduciary for the estate to manage and dispose of the real property in the best way possible. It isn't necessary to have snoopy neighbors going through the belongings of the recently deceased to identify their assets, but it could be advantageous for people below a certain economic threshold to have some professional help maneuvering through the probate process.

There is no question that as people age, their ability to maintain their property declines. Homes fall into disrepair, mortgage payments may go unpaid in order to pay medical bills, and many elderly people retreat from society. Without children and grandchildren checking up and ensuring that bills are paid, the house is maintained, and grandma's needs are met, all of her assets become vulnerable to loss and destruction. With the loss of those assets, the next generation starts out well behind their middle-class peers. We cannot ensure that everyone lives to 100, nor can we ensure that everyone will own a well-

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<sup>86</sup> See Cahn & Zietlow, *supra* note 26, at 370.

maintained, high-value home at death. But we can make better efforts to help ensure that hard-earned wealth is not lost from generation to generation. Breaking the wealth-destruction cycle should be a priority for a legal system that places property rights and freedom of testation at its core. For having property rights should mean having the right to have that property protected as it passes from generation to generation and not be neglected by our current probate system.