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INTRODUCTION

Professor Danaya C. Wright and Beth Sterner deserve accolades for employing an ambitious, first of its kind study to test the integrity and effectiveness of our nation's intestacy laws.[1] Against the backdrop of one of the Uniform Probate Code's core principles — that the predominant objective of intestacy statutes is to carry out the probable intent of most decedents[2] — Wright and Sterner embarked on a careful analysis of nearly 500 wills probated in two Florida counties with divergent demographics in an effort to determine the extent to which the estate plans of testators from nontraditional families depart from the default distribution scheme of intestacy statutes.[3] To ensure that nontraditional families would be adequately captured in their data compilation, Wright and Sterner astutely focused on more recent probate administrations.[4] In the results of their study, Wright and Sterner observed a disconnect between the legislatively presumed intent of decedents as embodied in state intestacy laws and the real-life testator from a nontraditional family.[5] Their well-founded conclusions rightly question whether intestacy statutes adequately serve the very populations that need them most. This article will focus on the treatment of the blended family in the Wright-Sterner study because the blended family is the subset of the nontraditional family that is most commonly impacted by intestacy. The authors will also offer insights and potential conceptual solutions from the perspective of practitioners who encoun-

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1 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 (2017).

2 *Id*. at 345.

3 *Id.* at 355.

4 *Id.*

5 Nontraditional families are defined as blended families with stepchildren, single-parent families, and same-sex families. The article also cites to the rise in households with unmarried cohabitants. *Id.* at 344.

ter the challenges of blended families in both estate planning and estate litigation.

I. Presumed Testator Intent Combined with Principles of Fairness - A Better Intestacy Scheme for Blended Families?

The statistics developed from the Wright-Sterner study buttress those from other, earlier examinations of our nation's intestacy laws that have called into question what Wright and Sterner artfully refer to as the "cookie-cutter" model of intestacy.[6] Armed with their study results, Wright and Sterner ultimately join the chorus of criticism from other probate scholars who lament that intestacy statutes primarily favor the presumed intent of the decedent from a single marriage who leaves behind a traditional nuclear family, a fading commodity. Given the rise of divorce in America, the decline in marriage rates, and the concomitant explosion of nontraditional families, an intestacy scheme that prioritizes the bloodline of the testator will naturally come under attack for being out of touch with the norms of contemporary society.

While reforming our intestacy laws to better meet the needs of the evolving modern family is a laudable objective worthy of continued analysis, it will be difficult to accomplish the objective using probable decedent intent as the sole guiding principle, particularly in the instance of blended families. This is due to the fact that blended families are inherently complex and not well-suited for the simplistic, rigid scheme of most existing intestacy statutes. Furthermore, it is likely to be an exercise in futility to obtain a reliable statistical consensus of how decedents in blended families would prefer to distribute their property. Indeed, Wright and Sterner correctly note the growing utilization of trusts and other more sophisticated estate planning techniques in blended families to balance the competing interests of the surviving second spouse (and his or her own children) and the children of the first-to-die,[7] while acknowledging the unfortunate reality that such planning expertise is often not accessible to people of color and lower socioeconomic backgrounds.[8] Bridging the widening gap between the presumed intent of decedents and existing intestacy laws may require state legislatures to inject a fairness quotient into the intestacy scheme in certain areas.

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6 *Id.* at 344-45.

7 *Id.* at 354.

8 *Id.* at 354, 368.

II. Compelling Statistics and Conclusions for the Blended Family

The Wright-Sterner study generated a number of compelling statistics and conclusions that address the fitness of existing intestacy statutes for nontraditional families. We highlight the following statistics and conclusions for further discussion on the particular issue of intestacy and the blended family.

- Consistent with prior empirical studies, the results of the Wright-Sterner study showed that, overall, testators still dramatically favored spouses and children.[9]
- Even in the case of decedents from second and subsequent marriages with children from a prior marriage, there was a preference for the surviving spouse to receive most of the estate.[10]
- Married testators were more likely to incorporate the use of trusts in their estate plan than unmarried testators.[11] There was evidence that testators in second or subsequent marriages were more likely to use trusts than single marriage testators,[12] and men in second or subsequent marriages were more likely to use trusts than woman in the same context.[13]
- Testators from a second or subsequent marriage were less likely to leave their entire estate to their spouse than testators from a single marriage.[14]
- Women from second or subsequent marriages were more likely to exclude their spouse from their estate plan than men in the same context.[15] Overall there was a disproportionate number of male testators in the multiple marriage context.[16]
- A majority of testators left at least some property to their stepchildren, even in instances where they were survived by natural children.[17] Based on their study results, Wright and

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9 *Id.* at 361-62, 368.

10 *Id.* at 373.

11 *Id.* at 363.

12 *Id.*

13 *Id.* at 365.

14 *Id.*

15 Wright and Sterner posit that this statistic may relate more to wealth than gender. *Id.* at 366.

16 *Id*.

17 *Id.* at. 368.

Sterner conclude that intestacy laws provide inadequately for stepchildren.[18]

- Decedents of color were far more likely to die intestate than the White population.[19] Ninety-one percent of the testators in the study were White.[20] No Black testators in the study used a trust.[21]
- Black testators were less likely than White testators to leave their entire estate to their spouse.[22]

III. A Blend of Solutions for Blended Families

A. *Scenario #1:* Decedent dies survived by stepchildren; no natural children from first marriage; second spouse predeceased

In this circumstance, the bedrock intestacy principle of favoring surviving spouse and children is inapposite. Wright and Sterner are critical of the UPC's treatment of stepchildren in the intestacy statutory hierarchy which grants stepchildren intestacy rights only as takers of last resort.[23] Other states, including Florida[24] (home of Wright and Sterner), followed the lead of the UPC, favoring stepchildren only over escheat. With 82% of examined testators survived by stepchildren leaving at least some property to those stepchildren, the results of the Wright-Sterner study appear to make a persuasive case that the probable intent of the intestate decedent is misaligned with the UPC treatment of stepchildren.[25] Armed with their study statistics, Wright and Sterner advocate for the reform of intestacy statutes to place stepchildren (or at least stepchildren who were raised in in the decedent's home) before collateral heirs.[26] While there is rational appeal, and perhaps even popular appeal, for reforming intestacy statutes to favor stepchildren over "laughing heirs," we are leery of the sufficiency of the existing evidence to prioritize stepchildren over collateral relatives on the theory of presumed decedent intent. Estate planners still have many clients who are adamant about keeping their wealth "in the bloodline," particularly in the case of large estates and inherited wealth. However, in our opinion that need not necessarily frustrate intestacy reform to benefit stepchil-

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18 *Id.* at 370.
19 *Id.* at. 367.
20 *Id.* at 360.
21 *Id.* at 367.
22 *Id.*
23 *Id.* at 370.
24 Fla. Stat. § 732.103(5) (2017).
25 Wright & Sterner, *supra* note 1, at 377.
26 *Id.*

dren. Instead of relying upon empirical proof of probable decedent intent, state legislatures instead could move stepchildren up the hierarchical intestacy ladder on principles of fairness. As suggested by Wright and Sterner, perhaps stepchildren could qualify for their "fair share" of intestacy rights ahead of collaterals through being raised in the decedent's home or based upon some other objective measure such as the length of the marriage of the stepchildren's parent to the decedent (since longer marriages would more likely result in stepchildren becoming an active participant in the decedent's life).

B. *Scenario #2:* Decedent dies survived by stepchildren and decedent's natural children from first marriage; second spouse predeceased

Pointing to the statistical results in their study that decedents want to benefit their surviving spouse, regardless of whether the spouse is from a first or subsequent marriage, and that a majority of their examined testators left at least some property to their stepchildren even when survived by children from a prior marriage, Wright and Sterner entertain the concept of sharing intestate distributions between the stepchildren and natural children of the decedent.[27] Wright and Sterner acknowledge the improbability of gaining legislative support for equal treatment of stepchildren and natural children, and alternatively suggest that stepchildren receive half-shares of natural children.[28] While agreeing that stepchildren deserve strong consideration for an elevated intestacy status in those cases where the decedent dies without a spouse or natural children, we do not believe that there is sufficient empirical support, or sound policy, for treating stepchildren on par with natural children in intestacy. In particular, we disagree with the premise that a decedent's testamentary generosity with a second spouse logically equates to testamentary generosity with the second spouse's children, especially in larger estates and in cases of inherited wealth transfer.

In our practice, we see a significant distinction in how our estate planning clients treat natural children and stepchildren in their estate plans. In many cases, the stepchildren of our clients have already inherited substantial wealth from their own deceased parent. We believe that the statistics of the Wright-Sterner study may have been skewed by the fact that the study's sample only included two taxable estates,[29] and predict that the statistical results will change materially when the study is brought to a wealthier county like Palm Beach County.[30]

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27 *Id.* at 370, 377, 379.
28 *Id.* at 377.
29 *Id.* at 355, 361.
30 *Id.* at 315.

C. *Scenario #3*: Decedent dies survived by second spouse, stepchildren, and natural children from decedent's first marriage

This is the classic scenario pitting the interests of the children against the stepchildren. Even though intestacy laws would exclude the stepchildren from taking directly at the decedent's death, by prioritizing the spouse (even a second spouse in a short-term marriage) foremost, intestacy laws have the unintended effect of redirecting a sizeable portion of family wealth away from the decedent's natural children in favor of the stepchildren who are in line to inherit at the death of their parent/second spouse. A number of conclusions reached by Wright and Sterner relate to this particular blended family dynamic – (i) the fact that the decedent's probable intent in intestacy is to favor spouse and natural children, (ii) gender-based and race-based deviations from primary preference for the spouse,[31] (iii) the effective use of QTIP trust principles to provide for the spouse while protecting the interests of the natural children,[32] and (iv) the lack of access to trust creation across the socioeconomic spectrum.[33] By building upon these conclusions and layering in a quotient of fairness for all interested parties, does that suggest that traditional trust concepts should be drafted into intestacy statutes to add a life estate feature in the case of a surviving second (or subsequent) spouse with the remainder to the decedent's natural children at the death of second spouse?

Wright and Sterner propose a life estate mechanism to prevent the disinheritance of "the children of Mike Brady" in the fictional example at the end of their article.[34] While the life estate model would be a natural for real estate assets,[35] it would be more complicated to implement with tangible and intangible property. In recognition that the life estate model would not be as practicable for smaller estates, state legislatures could choose to phase in the life estate feature only when the estate reached certain threshold value levels. Longer term second and subsequent marriages could be rewarded within the framework of the life estate model by establishing a supplemental lump sum payment to the surviving spouse based on the length of the marriage. During the 2017 legislative session, the Real Property, Probate and Trust Law Section of

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31 *Id.* at 365-367.

32 *Id.* at 354.

33 *Id.* at 370.

34 *Id.* at 378.

35 Delaware, North Carolina, and Rhode Island are states that have historically incorporated a life estate in real estate for the surviving spouse in their intestacy statutes. *See* DEL. CODE ANN. tit. 12, § 502 (2017); N.C. GEN. STAT. § 29-14 (2017); 33 R.I. GEN. LAWS § 33-25-2 (2017).

The Florida Bar recommended that Florida's elective share statutes be amended to incorporate a sliding scale in the calculation of the surviving spouse's elective share amount based on the length of the marriage.[36] The Florida Legislature rejected the Section's proposal, as it had done previously to a similar proposal in 1999.[37] The sliding scale is compatible with the modern partnership theory of marriage in its recognition that in a longer term marriage the surviving spouse would have contributed more to the wealth of the family, while in a later-in-life marriage neither spouse would have contributed much to the acquisition of the other's wealth. Even the "Ozzie and Harriet" single marriage family may be served well by the life estate intestacy model when due consideration is given to the importance of preserving the interests of the natural children against a subsequent marriage involving stepchildren or the financial exploitation of an aged parent.

CONCLUSION

The Wright-Sterner study should prompt new debate about the merits of our existing intestacy laws. As the study continues in other parts of Florida and the country,[38] conclusions about the degree to which our intestacy laws are underserving certain populations will be further refined for consideration by policy makers and probate scholars alike. If reform is to come to our intestacy statutes' treatment of the burgeoning nontraditional family, it may be necessary to couple the developing empirical evidence of probable decedent intent with principles of fairness as defined by state legislatures.

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[36] An amendment to Fla. Stat. § 732.2065 was proposed to provide 10% of the elective estate for surviving spouses of marriages of less than 5 years; 20% for marriages of 5 to 15 years; 30% for marriages of 15 to 25 years; and 40% for marriages of 25 years or more. H.R. 267, 2017 Leg., 119th Sess. (Fla. 2017).

[37] The "new" elective share law enacted in 1999 amended the previous law from providing, "elective share is to consist of thirty percent of the fair market value of all of the decedent's property subject to administration . . ." to provide that the value of the elective share is the amount equal to thirty percent of the elective estate. H.R. 99-343, 16th Leg., 1st Sess. (Fla. 1999). *See* H.R. 301, 1st Sess., at 13 (Fla. 1999).

[38] Wright & Sterner, *supra* note 1, at 355.