ACTEC Law Journal

Volume 47 | Number 23 Article 2

6-1-2022

Married, with Children at Death

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"It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so." - Anonymous[1]

Despite the declining marriage rate,[2] increased non-marital cohabitation,[3] and delayed and reduced childbearing,[4] married couples residing with children comprise nearly 38% of family households in the United States.[5] Married couples with nonresident children—including adult children who live independently—bring the total number of married parents even higher.[6] If these individuals engage in estate planning,[7] they are forced to decide how, if at all, to allocate their property

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1 Although the quote has variably been attributed to Artemus Ward and Mark Twain, among others, recent investigation argues for anonymous ascription. *See It Ain't What You Don't Know That Gets You into Trouble. It's What You Know for Sure That Just Ain't So*, QUOTE INVESTIGATOR (Nov. 18, 2018), https://quoteinvestigator.com/2018/11/18/know-trouble [https://perma.cc/9LHL-DGFK].

2 *See, e.g., Table AD-3. Living Arrangements of Adults 18 and Over, 1967 to Present*, U.S. CENSUS BUREAU (Nov. 2021), https://www2.census.gov/programs-surveys/demo/tables/families/time-series/adults/ad3.xls (showing 50.4% of American adults reported living with a spouse in 2021, compared to 70.3% in 1967).

3 *See id.* (showing 8% of American adults reported living with an unmarried partner in 2021, compared to 0.4% in 1967).

4 *See* Pamela J. Smock & Christine R. Schwartz, *The Demography of Families: A Review of Patterns and Change*, 82 J. MARRIAGE & FAM. 9, 16-17 (2020).

5 *See Table F1. Family Households, by Type, Age of Own Children, Age of Family Members, and Age of Householder: 2020*, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/2020/demo/families/cps-2020.html [https://perma.cc/YK4E-Y75X]; *see also Figure AD-2a: Living Arrangements of Parents with Coresident Children, 2021*, U.S. CENSUS BUREAU, https://www.census.gov/content/dam/Census/library/visualizations/time-series/demo/families-and-households/ad-2a.pdf (finding that 69% of mothers who reside with children also reside with a spouse and 85% of fathers who reside with children also reside with a spouse).

6 Alicia VanOrman & Linda A. Jacobsen, *U.S. Household Composition Shifts as the Population Grows Older; More Young Adults Live with Parents*, POPULATION REFERENCE BUREAU (Feb. 12, 2020), https://www.prb.org/resources/u-s-household-composition-shifts-as-the-population-grows-older-more-young-adults-live-with-parents [https://perma.cc/H4UJ-PYVM] ("More than a third of householders ages 45 to 64 (37 percent) were empty nesters, heading married-couple households without children.").

7 Being a parent is positively associated with testacy, and those who are married are more likely to be testate than those who have never married, suggesting that married parents are more likely than others to have engaged in estate planning. *See* Emily S.

at death between their spouse and children. Trusts and estates practitioners who advise such individuals are routinely called upon to offer counsel on the potential repercussions of these choices.[8]

And, indeed, because the American laws of succession protect the freedom of disposition to a greater degree than the laws of many other countries,[9] there are choices for married parents to make. Contractual obligations and the spouse's right to an elective share or community property may prevent total disinheritance of a surviving spouse, but there is latitude beyond that to structure, limit, or condition transfers to spouses.[10] Disinheriting or otherwise limiting inheritance by surviving descendants is even easier, subject only to protections for disinherited heirs in some jurisdictions and public-policy-based restrictions.[11] Within these strictures, individuals can control much regarding the amount, content, timing, and circumstances of distributions to a surviving spouse or child; this freedom allows testators to satisfy idiosyncratic preferences, support those who are financially reliant upon them, avoid administrative burdens involved in transferring property to legally incompetent beneficiaries, and minimize tax liability.[12]

In contrast, married parents who forego estate planning will have any property not otherwise distributed at death dispatched as directed by the laws of intestacy of their state of domicile. Today, these laws universally recognize the primacy of spouses and descendants as intestate heirs; children and more remote descendants take any share of the intestate estate not allocated to the surviving spouse, to the exclusion of other relatives of the decedent.[13] However, there is dramatic jurisdictional variation in the division of the intestate estate between the surviving spouse and descendants, not only in the amount of the estate going to the surviving spouse but in how that allocation is structured.[14]

In this article, I show how this variation can be linked to differing assumptions about decedents' probable intent.[15] The laws of intestacy are intended to further the probable intent of the majority of intestate decedents to the extent possible while maintaining an efficient probate

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Taylor Poppe, *Surprised by the Inevitable: A National Survey of Estate Planning Utilization*, 53 U.C. DAVIS L. REV. 2511, 2521-22 (2020).

8 *See* LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE 46 (2009).

9 *See id.* at 36-37, 42-43.

10 *See id.* at 35.

11 *See id.* at 36, 38.

12 *See id.* at 42-44.

13 *See infra* Part I.A.3.

14 *See infra* Part I.A.3.

15 *See infra* Part I.B.1.

process.[16] Yet the allocation of property for an intestate married parent decedent implicates several competing objectives that complicate straightforward assumptions about probable intent: support for multiple financially dependent heirs, the need for guardianships to manage transfers to minors, the availability of simplified probate processes, and the tax benefit of the marital deduction.[17] These factors, several of which pull in different directions, may not be weighted consistently within individuals' formulations of the preferred allocation between a surviving spouse and child.

Policymakers have attempted to craft the intestate allocation to align with these preferences, relying on empirical evidence of revealed preferences to do so.[18] Yet there is reason to suspect that this evidence base, which is now quite dated, may not accurately reflect current beliefs.[19] In particular, changing patterns of family formation, including the increased divorce rate and prevalence of blended families, may undermine assumptions about spousal support of children embedded in current law, causing individuals to place greater emphasis on direct support to descendants.[20] Even where individuals themselves do not currently have a blended family, the prevalence of these family structures may influence the dispositive preferences of married parents as they plan for the future.

In addition, existing evidence leaves open several key questions about the stability of contemporary preferences across different fact patterns.[21] Despite recognition that the competing goals of support provision and administrative ease likely inform probable intent, we have little empirical understanding of the relative importance of these factors in generating preferences.[22]

With the goal of updating and deepening our understanding of these topics, this article presents the results of an empirical study of dispositive preferences.[23] The study investigates the self-reported preferred allocation of property between a surviving spouse and child in response to a series of hypothetical scenarios.[24] These scenarios manipulate the age of the surviving child (minor or adult) and the respondents' level of wealth (current or more), to reveal whether preferences vary based on

16 *See infra* Part I.B.
17 *See infra* Part I.B.1.
18 *See infra* Part I.B.2.
19 *See infra* Part I.B.2.
20 *See infra* Part I.C.
21 *See infra* Part I.C.
22 *See infra* Part I.C.
23 *See infra* Part II.
24 *See infra* Part II.A.

the presence of minor children or increases in decedent wealth.[25] In addition, the study leverages data regarding individual characteristics to evaluate preferences of relevant subgroups of respondents.[26]

The results evidence a surprising level of support for allocations that defy current expectations.[27] They also offer the surprising finding that preferences largely remain stable across scenarios changing child age and decedent wealth.[28] However, the results also document meaningful heterogeneity in preferences across groups in the population, defying easy conclusions about majoritarian preferences.[29] In response, the article identifies several areas that merit further investigation, while also drawing out several suggestions for policymakers and practitioners as they consider the desires of married parents.[30]

The article proceeds as follows. Part I traces the evolution of intestate allocations to a surviving spouse and child of a married parent decedent and documents the extensive variation in this allocation under modern state law. In the second section of Part I, it outlines the competing policy tensions that help to explain this variation, and reviews existing empirical evidence of actual preferences. After identifying several open empirical questions in the final section of Part I, Part II presents the empirical study, describing the data and methods and the findings. Part III considers the implications of the empirical findings for policymakers and practitioners and is followed by the conclusion.

I. Intestacy and the Married Parent Decedent

Guidelines regarding provision for surviving spouses and children are of ancient lineage[31] and ongoing importance. Like most inheritance practices, their long evolution bears the imprint of changing social norms, economic systems, and demographic patterns.[32] In this Part, I trace the development of modern intestacy provisions governing the allocation of property for a decedent who is survived by both a spouse and a child of that spouse. I first track iterations of the Uniform Probate Code ("UPC") to illustrate how shifting understandings of probable intent have influenced the spousal allocation over time. I then canvass contemporary state probate code provisions, revealing dramatic varia-

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25 *See infra* Part II.

26 *See infra* Part II.

27 *See infra* Part II.B.1.

28 *See infra* Part II.B.2.

29 *See infra* Part II.B.3.

30 *See infra* Part III.

31 *See, e.g.*, Richard H. Hiers, *Transfer of Property by Inheritance and Bequest in Biblical Law and Tradition*, 10 J.L. & Religion 121, 122 (1993).

32 *See, e.g.*, Friedman, *supra* note 8, at 11.

tion in state approaches to this allocation. To better understand this variation, I consider the competing policy objectives implicated in the allocation of intestate estate property to a surviving spouse or child. Recognizing the complex relationship among these objectives, I review existing empirical evidence of probable intent, and identify several important empirical questions that remain unanswered in the current literature.

So that I may delve deeply into the specific challenges of allocating intestate property between a surviving spouse and child, I leave other family structures to the side. My hope is that this work might inspire future investigation of dispositive preferences in other situations, such as where the decedent is survived by multiple children, in blended families, and in other functional family forms, where the distribution of preferences might differ quite significantly.[33] In addition, I focus my attention on the division of the intestate estate, mindful that other family and spousal protections also influence the transfer of intestate decedents' property.

A. The Evolution of Intestacy Rights for a Surviving Spouse and Child

The sections below trace the evolution of inheritance rights for the surviving spouse and descendants of an intestate decedent. They reveal that the relative interests of surviving spouses and children in intestacy have changed considerably over time and remain surprisingly unsettled today.

1. *Historical Approaches*

Historically, the inheritance rights of surviving spouses and descendants were primarily addressed through mechanisms other than intestacy.[34] In the early United States, a widow's right to dower and a husband's right to courtesy were the dominant statutory inheritance rights for surviving spouses.[35] These rights were limited, however, to life estates in the decedent's property: typically, an interest in one-third of the decedent's real property for widows and the entire estate for widowers.[36] While this provided the surviving spouse with financial support, the spouse had no right to direct the distribution of property at their

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33 *See, e.g.*, 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, 368-69 (2017).

34 *See, e.g.*, FRIEDMAN, *supra* note 8, at 19-22.

35 *See id.* at 22-24.

36 *See id.* at 22.

own death.[37] Those rights went instead to the decedent's surviving descendants, who were also entitled to the remainder of the decedent's estate.[38] Not surprisingly, there was variation across state laws, reflecting in part their differing origination in French,[39] Spanish,[40] or English[41] law.

Over time, dower and curtesy were replaced with rights under intestacy, which provided outright distributions to the surviving spouse.[42] Initially, however, intestacy provisions reflected historical practice, with the most common pattern providing the surviving spouse with a one-third interest in the decedent's real and personal property.[43]

2. *Uniform Probate Code Provisions*

Furthering the trend toward intestacy, the first UPC, adopted in 1969, abolished dower and curtesy[44] and sought to provide an increased intestate share for the surviving spouse.[45] The 1969 UPC provided the first $50,000 plus one-half of the balance to the surviving spouse if all of the decedent's issue were of the surviving spouse.[46] Any remainder was allocated to the decedent's surviving descendants, by representation.[47] To contextualize the spousal allocation for contemporary readers,

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37 *See id.* at 24.

38 *See id.* at 20-21.

39 *See, e.g.*, Sara Brooks Sundberg, *Women and Property in Early Louisiana: Legal Systems at Odds*, 32 J. EARLY REPUBLIC 633, 635 (2012).

40 *See, e.g.*, JEAN A. STUNTZ, HIS, HERS, AND THEIRS: COMMUNITY PROPERTY IN SPAIN AND EARLY TEXAS (2005) (documenting the influence of Spanish law on early Texas laws); Raphael J. Rabalais, *The Influence of Spanish Laws and Treatises on the Jurisprudence of Louisiana: 1762-1828*, 42 LA. L. REV. 1485, 1490-91 (1982) (noting the influence of Spanish law on Louisiana laws).

41 *See, e.g.*, FRIEDMAN, *supra* note 8, at 24-25 (noting English antecedents to American inheritance laws); *see also* Carole Shammas, *English Inheritance Law and Its Transfer to the Colonies*, 31 AM. J. LEGAL HIST. 145 (1987); *see also* JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 288-91 (5th ed. 2019) (describing historical English inheritance practices).

42 *See, e.g.*, FRIEDMAN, *supra* note 8, at 24-25.

43 UNIF. PROB. CODE Part 1 cmt. (1969) (noting the "imprint of history" and identifying the one-third share to the surviving spouse as the most common allocation in state intestacy statutes in effect at the time).

44 *Id.* § 2-113 ("The estates of dower and curtesy are abolished.").

45 *Id.* Part I cmt. (noting that a "principal feature" of the model code's intestacy provisions was to provide "a larger share . . . to the surviving spouse, if there are issue . . . .").

46 *Id.* § 2-102(3) ("[I]f there are surviving issue all of whom are issue of the surviving spouse also, the first $50,000, plus one-half of the balance of the intestate estate.").

47 *Id.* § 2-103(1) ("The part of the intestate estate not passing to the surviving spouse under Section 2-102 . . . passes as follows: (1) to the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation[.]").

$50,000 in August 1969 when the UPC was adopted by the National Conference of Commissioners on Uniform State Laws[48] equates to more than $370,000 in today's dollars.[49] Any intestate estates with values below the minimum lump sum distribution would be allocated entirely to the surviving spouse.

Although the UPC was amended several times over the following two decades, the provision regarding the intestate share of the surviving spouse when a decedent was survived by a spouse and descendants of the marriage was unaffected.[50] The 1990 UPC, however, departed from this approach. It increased the surviving spouse's share to the entirety of the probate estate if neither the decedent nor the surviving spouse has descendants from another relationship.[51] Subsequent amendments to the UPC have not altered the allocation, and it remains in effect today.[52]

3. *Modern State Laws*

In all states, intestacy provisions prioritize the surviving spouse and descendants over all other potential heirs, with any share not allocated to a surviving spouse directed to the decedent's descendants.[53] However contemporary allocations to the surviving spouse where an intestate decedent is survived by at least one child of the spouse and neither the spouse nor decedent has other descendants[54] vary in both form and substance across the states.[55] Table 1 divides these provisions into six broad categories: (i) provisions that provide all of the intestate estate to the surviving spouse (N=19); (ii) provisions allocating a share of the intestate estate to the surviving spouse (N=13); (iii) provisions that grant a

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48 Roger A. Manlin & Richard A. Martens, *Informal Proceedings Under the Uniform Probate Code: Notice and Due Process*, 3 U. MICH. J.L. REFORM 39, 39 (1969).

49 *CPI Inflation Calculator*, U.S. BUREAU LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm [https://perma.cc/L847-3UZU] (calculating the current value as of October 2021 of $50,000 in August 1969 as $373,768.92).

50 UNIF. PROB. CODE § 2-102 (1969) (as amended in 1975, 1982, 1987, and 1989).

51 UNIF. PROB. CODE § 2-102 (1990) ("The intestate share of a decedent's surviving spouse is: (1) the entire intestate estate if: . . . (B) all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent.").

52 *Id.* (as amended in 1991, 1997, 1998, 2002, 2003, 2004, 2008, 2010, and 2021).

53 *See* JEFFREY A. SCHOENBLUM, 2022 MULTISTATE GUIDE TO ESTATE PLANNING tbl. 7 (2022).

54 In some states, the statutory allocation depends on whether the decedent's children are all of the spouse, such as ARIZ. REV. STAT. ANN. § 14-2102(1) (2022), while in other states, the statute also considers whether the spouse's children are all of the decedent, such as COLO. REV. STAT. § 15-11-102(1)(b) (2022).

55 *See infra* Appendix.

minimum lump sum[56] plus a share of any residue from the intestate estate to the surviving spouse (N=8); (iv) community property states' allocations of a share of the separate property to the surviving spouse, in addition to the decedent's share of community property (N=6); (v) provisions that do not allocate any of the intestate estate to the surviving spouse (N=2); and (vi) a final "other" category of provisions providing alternate allocations to a surviving spouse (N=3).[57]

As the table also indicates, however, there is variation among states within several of these broad categories. For example, while six states allocate one half of the intestate estate to a surviving spouse, the District of Columbia allocates two-thirds of the estate, and four states condition the allocation on the number of children who survive the decedent.[58] Likewise, states providing a minimum lump sum distribution plus a share of any residue differ in both the minimum distribution allocated to a surviving spouse (ranging from $50,000 to $250,000) and the share of any residue; while most states that structure their intestate allocations in this way provide the surviving spouse with half of the residue, other states have adopted different formulations.[59]

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56 Importantly, the amounts in Table 1 reflect the original statutory grant, while in practice some are indexed for inflation. *See, e.g.*, ME. REV. STAT. tit. 18-C, § 1-108 (2021); *see also, e.g.*, UNIF. PROB. CODE § 1-109 (1990) (as amended in 2008).

57 *See infra* Table 1.

58 *See infra* Table 1.

59 *See infra* Table 1.

TABLE 1. STATE INTESTACY ALLOCATIONS TO A SURVIVING SPOUSE WHERE INTESTATE DECEDENT IS ALSO SURVIVED BY A CHILD OF THE SURVIVING SPOUSE

Allocation to the Surviving Spouse		**Adopting States**
All of the intestate estate (N=19)		Alaska, Colorado, Florida, Hawaii, Iowa, Maine, Massachusetts, Minnesota, Montana, New Jersey, North Dakota, Ohio, Oregon, South Dakota, Utah, Vermont, Virginia, West Virginia, Wisconsin
Share of the intestate estate (N=13)	One half of estate	Illinois, Indiana, Kansas, Oklahoma, South Carolina, Wyoming
	Two thirds of estate	District of Columbia
	Share of intestate estate contingent on number of children	Georgia (spouse shares equally with children, but not less than one-third share of intestate estate), Mississippi (spouse shares equally with children), Nevada (one half of intestate estate if decedent survived by one child; one third of intestate estate of decedent survived by more than one child), Tennessee (greater of one third of intestate estate or a child's share)
	Share or minimum distribution plus a share, depending on contingency (number or age of children, type of property)	North Carolina (one half of real property and $60,000 plus one half of residue of personal property if decedent survived by one child; one third of real property and $60,000 plus one third of residue of personal property if decedent survived by more than one child); Maryland (one half of intestate estate if there is a surviving minor child; $400,000 plus one half of residue if surviving issue but no surviving minor child)

Allocation to the Surviving Spouse		Adopting States
Minimum lump sum plus share of any residue (N=8)		Alabama ($50,000 plus one half of residue), Connecticut ($100,000 plus one half of residue), Michigan ($150,000 plus one half of residue), Missouri ($20,000 plus one half of residue), Nebraska ($100,000 plus one half of residue), New Hampshire ($250,000 plus one half of residue), New York ($50,000 plus one half of residue), Pennsylvania ($30,000 plus one half of residue)
Community and separate property allocations (N=6)	All community property plus a share of separate property	Arizona (one half of separate property), Idaho (one half of separate property), New Mexico (one quarter of separate property), Texas (one third of separate personal property and life estate in one third of separate real property), Washington (one half of separate property)
	All community property plus a share of separate property, contingent on number of children	California (one half of separate property if decedent survived by one child, one third of separate property if decedent survived by more than one child)
None of the intestate estate (N=2)		Arkansas, Kentucky
Other (N=3)		Delaware ($50,000 plus one half of personal property, life estate in real estate), Louisiana (usufruct in decedent's one half of community property until death or remarriage), Rhode Island (one half of personal property)

Note: Amounts listed are those indicated by the text of the state probate code's intestacy statute and do not reflect any indexing for inflation.

Of course, it is important to note that despite the jurisdictional variation in the structure and terms of the intestate allocation to a surviving spouse, the substantive effect of this variation will largely depend on the value of the intestate estate.[60] Where the value of an intestate estate is small, there is no practical difference between allocating the entirety of the estate and allocating a minimum lump sum plus a share of any residue to the surviving spouse; in either case, the spouse will take the entire estate. In contrast, the allocations under these provisions can depart significantly for a large estate.

In addition, it is also important to acknowledge that intestacy exists within a broader ecology of inheritance mechanisms, such as homestead protections and family allowances.[61] Moreover, the rise of non-probate transfers and changing patterns of asset holdings mean that probate distributions account for a decreasing proportion of property transmission at death for many individuals.[62] These alternative inheritance rights and non-probate transfers may diminish the practical import of intestate allocations for many families.[63]

At the same time, more than half of all adults in the United States are intestate,[64] meaning that the majority of the adult population could be subject to intestacy. The reality described above means that depending on the jurisdiction in which an intestate married parent decedent is domiciled at the time of death, his or her surviving spouse could be entitled to receive nothing, something, or everything from the intestate estate, with the decedent's surviving descendant's inverse share similarly

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60 Of course, as noted in the table, the number of surviving descendants, the relative value of real and personal property in the probate estate, and, in community property states, the value of community and separate property can also affect the amount of the distribution to the surviving spouse.

61 *See, e.g.*, UNIF. PROB. CODE § 2-102 cmt. ("Note that in all the cases where the surviving spouse receives a lump sum plus a fraction of the balance [in intestacy], the lump sum must be understood to be in addition to the probate exemptions and allowances to which the surviving spouse is entitled under [other sections of the code].").

62 *See, e.g.*, John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984) ("The law of wills and the rules of descent no longer govern succession to most of the property of most decedents."); *see also* David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 627 ("My research—the first since the nonprobate movement kicked into high gear—indicates a dramatic decline in the decedent-to-probate ratio.").

63 *See* Langbein, *supra* note 62, at 1108.

64 *See, e.g.*, Taylor Poppe, *supra* note 7, at 2545 tbl.2 (43% of respondents to a national survey had a will); Jeffrey M. Jones, *How Many Americans Have a Will?*, GALLUP (June 23, 2021), https://news.gallup.com/poll/351500/how-many-americans-have-will.aspx [https://perma.cc/XHA7-HVDY] (poll results indicate that 46% of U.S. adults have a will).

varying wildly.[65] This level of disagreement across states has aptly been characterized as "dramatic."[66]

While state-level differences in demographics or economics might be reasoned to account for a portion of this variation, it seems unlikely to account for divergence of this magnitude. Rather, it seems more likely that this disagreement is rooted in something more fundamental. In the next section, I consider how competing objectives implicated in the allocation to a surviving spouse or descendant help to explain this variation.

B. Objectives, Preferences, and Provisions

While some scholars debate the extent to which the freedom of disposition—as furthered by default provisions that capture probable intent—should and does control the design of the laws of intestacy,[67] probable intent remains a dominant force driving their design.[68] Policymakers recognize that because intestacy laws determine distributions solely on the basis of legally recognized kin relationships and apply regardless of financial, personal, or relational circumstances, it is unlikely that they will perfectly match the preferences of any given decedent.[69] There is also growing attention to the challenges inherent in formulating majoritarian defaults.[70] However, capturing probable intent regarding the allocation between a surviving spouse and descendant is particularly fraught. This is because there are multiple opposing objectives implicated by the allocation that factor into dispositive preferences. In this Part, I describe these objectives, review the empirical evidence regarding their combination into revealed preferences, and identify several open empirical questions.

1. *Objectives Implicated in Dispositive Preferences*

Scholars and policymakers have identified several competing objectives implicated by the intestate allocation between a surviving spouse and descendant. The variation over time and space in the intestate allocation to a surviving spouse when the decedent is also survived by at

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65 *See* Wright & Stener, *supra* note 33, at 372 tbl.8.

66 *Id.* at 371.

67 *See* Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1033-37 (2004); Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 MINN. J. L. & INEQ. 1, 7-13 (2000).

68 *See, e.g.*, UNIF. PROB. CODE Part 1 cmt. (1969) ("The Code attempts to reflect the normal desire of the owner of wealth as to disposition of his property at death . . . .").

69 *See, e.g.*, Gary, *supra* note 67, at 1.

70 *See, e.g.*, Emily S. Taylor Poppe, *Choice Building*, 63 ARIZ. L. REV. 103, 111-12 (2021).

least one descendant accords with differing prioritizations among these multiple competing objectives. Below, I describe each of these objectives: support for the surviving spouse and descendants, guardianship avoidance, reducing other probate administration burdens, and tax minimization.

a. *Support for the Surviving Spouse*

Providing financial support to a decedent's surviving spouse is a dominant objective furthered by many inheritance mechanisms, including not only intestacy but also the elective share and other protections like homestead rights and family allowances.[71] An allocation to the surviving spouse likely reflects a convergence between the personal preferences of many decedents and the societal goal of spousal protection.[72] The few states that provide no allocation to the surviving spouse in intestacy where the decedent is survived by descendants offer alternative forms of spousal support,[73] suggesting that even those states are unwilling to completely forego provision for the surviving spouse.

The thornier question is how much support should be provided to surviving spouses. Allocating the entirety of the intestate estate to the surviving spouse provides the greatest financial security and can also be seen as aligning with a partnership theory of marriage.[74] Providing a lump sum plus a share of any residue could serve to guarantee a minimum level of support, while accommodating variation in the values of intestate estates. In contrast, offering a share of the intestate estate that is unrelated to the estate value may satisfy abstract notions of fairness or prioritization among heirs, while in practice potentially leaving the surviving spouse with an allocation that falls below economic need. A life estate for the surviving spouse both harkens back to historical inheritance practices and nods to the popularity of modern devices such as Qualified Terminable Interest Property (QTIP) trusts, and provides spousal support during life while preserving assets for distribution to

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71 *See* Gary, *supra* note 67, at 10 n.43.

72 *See e.g.*, Taylor Poppe, *supra* note 70, at 122.

73 *See, e.g.*, Wright & Sterner, *supra* note 33, at 372 tbl.8.

74 *See, e.g.*, Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 229 (1991); John R. Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction*, 50 WASH. L. REV. 277, 312 (1975) ("Most spouses probably are actuated to leave their entire estate to their surviving spouse by a sense of responsibility for the survivor and a concern that the survivor may need all of the property the two have accumulated.").

descendants; however, it raises administrative challenges and may be viewed as offensive by the surviving spouse.[75]

Thus, both the amount and structure of the allocation to the surviving spouse can be tied to differing ideas of how best to ensure financial support for the widow or widower. In addition, the allocation to the surviving spouse may be intertwined with the desired allocation to surviving descendants. Because descendants are entitled to any of the intestate estate not allocated to the surviving spouse, the spouse's share directly impacts the interests of descendants.[76] However, allocations of the intestate estate to the surviving spouse may also be viewed as indirect allocations to, or for the benefit of, the decedent's descendants. As the reporter for the 1990 UPC notes, the policymakers drew on the belief that decedents "see the surviving spouses as occupying somewhat of a dual role, not only as [decedents'] primary beneficiaries, but also as conduits through which to benefit their children."[77] That is, a surviving spouse is assumed to use the decedent's property for the benefit of surviving descendants during life, and potentially to leave any remaining property to the descendants upon death.[78]

The drafters of the 1990 UPC qualified this assumption in the case of blended families, however. As noted above, where a decedent is survived by a spouse and descendants of the marriage and neither spouse has other descendants, the spouse receives the entire intestate estate.[79] However, if either the decedent or the spouse has other descendants, the allocation to the surviving spouse is reduced and descendants of the decedent are entitled to take.[80] As the reporter to the 1990 UPC noted, "The rationale for this is that the existence of children who are not joint children renders the conduit theory problematic."[81]

It is important to note that the UPC's spousal allocation relies on the conduit theory so long as the decedent does not have a blended family at the time of death. If the surviving spouse subsequently remarries and has additional children, the blended nature of his or her family structure at the time of death is accounted for in the intestacy provisions that would be applied at that later death.[82] There is, however, no undo-

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75 *See* Waggoner, *supra* note 74, at 234-35 (discussing the pros and cons of a statutory trust approach that would offer lifetime support to the surviving spouse but preserve property for ultimate disposition to the descendants of the decedent).

76 *See id.* at 231-32.

77 *Id.* at 232.

78 *See id.*

79 *See* UNIF. PROB. CODE § 2-102(1) (UNIF. L. COMM'N 1990). This revision has been preserved in subsequent amendments.

80 *See id.* § 2-102(3)-(4).

81 Waggoner, *supra* note 74, at 233.

82 *See* UNIF. PROB. CODE § 2-102(3)-(4).

ing the allocation of the entirety of the intestate estate to the surviving spouse at decedent's death.[83] I consider below the potential that concerns about future remarriage or parentage may be shaping dispositive preferences even where individuals do not currently have a blended family.

b. *Support for Surviving Descendants*

Support for surviving descendants—as dependent family members—also has a long history in inheritance laws.[84] However, given that the total value of the intestate estate is a fixed sum, any allocation directly to descendants is in direct opposition to the goal of providing financial support to the surviving spouse. One approach to balancing these opposing interests is to provide descendants with a share of any residue that exceeds a lump sum allocation to the surviving spouse. Similarly, allocations to descendants of a share of separate property, while community property is retained by the spouse, provide direct transfers to descendants while still prioritizing spousal support. Shared allocations between a surviving spouse and descendants also suggest an attempt to balance the interests of spouses and descendants but offer no guarantee that the amount allocated to the surviving spouse will meet any essential minimum threshold. As noted above, allocations to the surviving spouse may also be viewed as indirect allocations for the benefit of descendants but offer no guarantee that the descendant will inherit.

c. *Guardianship Avoidance*

The fact that minor descendants and other intestate heirs who lack legal capacity are eligible to inherit property but ineligible to control it necessitates the use of conservatorships or guardianships to administer property on their behalf.[85] Because these can be expensive, time-consuming, and public, policymakers generally assume that decedents would prefer to avoid them if possible.[86]

Several states obviate the need for guardianships by allocating the entirety of the intestate estate to the surviving spouse.[87] However, if guardianship avoidance is the sole basis for not providing an allocation to surviving descendants, the approach is overinclusive; it applies to all intestate decedents, regardless of the actual age or legal capacity of their

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83 *See* Waggoner, *supra* note 74, at 234.

84 *See, e.g.*, Gary, *supra* note 67, at 11.

85 *See, e.g.*, ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 126-27 (11th ed. 2022).

86 *See, e.g.*, Dennis M. Patrick, *Living Trusts: Snake Oil or Better than Sliced Bread*, 27 WM. MITCHELL L. REV. 1083, 1091, 1100-01 (2000).

87 *See infra* Appendix.

descendants. A more fine-tuned approach would condition the allocation to the surviving spouse on the presence of minor or legally incapacitated descendants. Maryland offers an example of an intestacy provision that conditions the share to the surviving spouse on the presence of minor children, but it does not eliminate the share to descendants who are minors.[88] Thus, while state law suggests the potential for generating a more complex default rule that accounts for the presence of minor—as opposed to adult—descendants, no state has used this formulation to avoid the need for guardianships.

The use of a lump-sum-plus-fractional-share structure for the spousal allocation can be viewed as an attempt to strike a balance between providing for descendants while avoiding guardianships for small amounts.[89] However, here again, the fit between policy problem and solution is imperfect. In jurisdictions taking this approach, formal probate will only be instituted if the *estate* exceeds a minimal amount, but it is possible that *the amount due to surviving descendants* will not be large.

The only way to fully avoid all such issues for intestate married parent decedents is to allocate the entirety of the intestate estate to the surviving spouse in all cases, or to condition the allocation of the intestate estate to the surviving spouse based on the presence of minor (or otherwise legally incompetent) descendants.

d. *Simplified Probate Process for Spousal Transfers*

Although not often referenced in the scholarly literature, the probate administration process may also be implicated by the allocation between spouses and descendants, at least where transfers to spouses are exempt from the probate process. In California, for example, there is a simplified probate process available for transfers to spouses and domestic partners.[90] Professor David Horton's study of probate records in Alameda County, California establishes the prevalence of this type of administration.[91] Whether this perk influences individuals' dispositive preferences is less clear, but it is another potential consideration at play.

e. *Tax Minimization: The Marital Deduction*

Finally, there are potential tax implications that flow from the allocation of intestate property to a spouse or descendant. While allocations

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88 *See* MD. CODE ANN., EST. & TRUSTS § 3-102(a)-(c) (West 2022).

89 *See, e.g.*, UNIF. PROB. CODE § 2-102 cmt. (UNIF. L. COMM'N 1969) ("[I]n the small estate (less than $50,000 . . .) the surviving spouse is given the entire estate . . .; the result is to avoid protected proceedings as to property otherwise passing to their minor children.").

90 CAL. PROB. CODE § 13500 (West 2021).

91 Horton, *supra* note 62, at 628.

to a spouse are exempt from federal estate taxes, transfers to a descendant could trigger transfer tax liability.[92] Thus, there is a potential tax benefit to allocating the entirety of the intestate estate to the surviving spouse. However, current exclusions—such as the $12,060,000 federal estate tax exclusion in 2022[93]—mean that most decedents are not subject to these taxes.[94] There is a small minority of states that levy an estate tax,[95] and lower exemption amounts for those taxes mean that a larger portion of estates may be subject to tax liability for assets transferred to descendants, but even in those states tax liability is limited to the higher end of the wealth distribution.[96] Because testacy is positively associated with wealth,[97] individuals who are subject to these taxes are less likely to be intestate. Thus, while this is an important consideration for some families, the extent to which this influences individuals' dispositive preferences across the population, and especially among intestate individuals, is unclear.

f. *Summary: Factoring Objectives into Preferences*

Mapping these objectives onto the differently structured spousal allocations adopted by states, Figure 1 summarizes the ways in which competing objectives are prioritized in each form of intestacy provision. While the figure simplifies the analysis, it helps to illustrate that optimizing all of these objectives in a single simple default rule allocation is impossible. For example, allocating any amount directly to a descendant of the decedent raises the potential need for a guardianship and decreases the benefit of the marital deduction; allocating everything to the spouse satisfies those objectives, but leaves nothing to descendants.

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92 *See, e.g.*, I.R.C. § 2056(a) (deducting from the value of the taxable estate any property passing from the decedent to his or her surviving spouse).

93 *IRS Provides Tax Inflation Adjustments for Tax Year 2022*, INTERNAL REVENUE SERV., https://www.irs.gov/newsroom/irs-provides-tax-inflation-adjustments-for-tax-year-2022 [https:// perma.cc/F8X2-9K8T] ("Estates of decedents who die during 2022 have a basic exclusion amount of $12,060,000, up from a total of $11,700,000 for estates of decedents who died in 2021.").

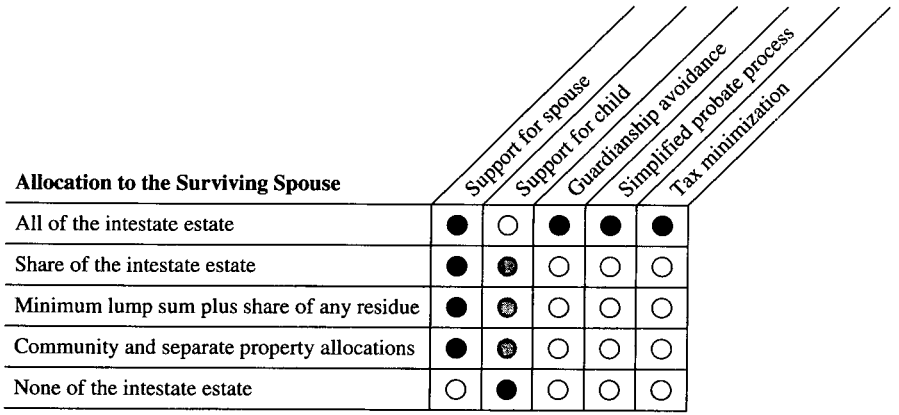
94 *Briefing Book: Key Elements of the U.S. Tax System: How many people pay the estate tax?*, TAX POL'Y CTR., https://www.taxpolicycenter.org/briefing-book/how-many-people-pay-estate-tax [https://perma.cc/MGJ6-9CM6]. As the Tax Policy Center reports, "About 4,100 estate tax returns will be filed for people who die in 2020, of which only about 1,900 will be taxable—less than 0.1 percent of the 2.8 million people expected to die in that year." Of course, some of those estates are not taxable because of the marital deduction, but the point remains that only a small percentage of Americans are subject to the estate tax. *Id.*

95 *See* SCHOENBLUM, *supra* note 53, tbl.14.02, at 14,020-57.

96 John Waggoner, *17 States with Estate or Inheritance Taxes*, AARP (Mar. 10, 2022), https://www.aarp.org/money/taxes/info-2020/states-with-estate-inheritance-taxes.html [https://perma.cc/3GSU-GNNB].

97 *See* Taylor Poppe, *supra* note 7, at 2546-47.

FIGURE 1. PRIORITIZATION OF TESTAMENTARY OBJECTIVES, BY SPOUSAL INTESTATE ALLOCATION TYPE



Note: Black circles indicate that an objective is prioritized; gray circles indicate that an objective is furthered, but not optimized; open circles indicate that an objective is not satisfied.

The fact that there is no single approach that optimizes all factors can help to explain the divergence observed across state jurisdictions. It also highlights the importance of understanding probable intent.[98] To the extent that individuals are aware of each of these objectives, their preferred allocation between a surviving spouse and child will indicate their favored equilibrium among them.[99] In the section that follows, I describe existing empirical evidence regarding the probable intent of decedents who are survived by a spouse and at least one child.

2. *Empirical Evidence Regarding Preferred Allocations to Spouse*

Several empirical studies of dispositive preferences[100] are identified as having influenced the design of the Uniform Probate Code's intestacy

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98 *See* Project, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1099 (1978).

99 *See, e.g.*, Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. BAR. FOUND. RSCH. J. 319, 323-24 (1978). While the desire to support a spouse and descendants is likely obvious, familiarity with guardianships, other aspects of probate administration, and taxes are less so. This has led some scholars to question whether revealed preferences necessarily indicate informed decisions. *Id.*

100 CAROLE SHAMMAS ET AL., INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT 42 (1987); MARVIN B. SUSSMAN ET AL., THE FAMILY AND INHERITANCE 44-46 (1970) (study of probate court records and survey of relatives of decedents for a sample of decedents' estates closed in Cuyahoga County, Ohio in 1965); Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1304 (1969) (study of wills filed in Washtenaw County, Michigan in 1963 and

provisions for married parent decedents,[101] and there are two additional relevant studies that were produced more recently.[102] The studies generally employ one of two potential research methodologies: (i) recording the distributive provisions embedded in a sample of wills filed with the probate court in a given jurisdiction within a particular period or (ii) surveying a sample of individuals regarding their preferences, either in response to hypothetical situations or as applied to their current familial structure. Because the relative strengths and limitations of these methodologies,[103] as well as the findings of these studies[104] have been discussed at length elsewhere, my summary here will be swift.

Several early studies using the first methodology—inferring dispositive preferences from the terms of probated wills—found that married parent testators most frequently allocated the entirety of their estate to their surviving spouse.[105] The strength of this finding is revealed by the statement of one author that, "[I]n all jurisdictions studied, an overwhelming majority of the married testators have given all of their property to their surviving spouses."[106] Because intestacy provisions in place

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similar records from London, England); Allison Dunham, *The Method, Process, and Frequency of Wealth Transmission*, 30 U. CHI. L. REV. 241, 241 (1963) (study of probate court records from 97 probate estates opened in 1953 and 73 probate estates for decedents who died in 1957 in Cook County, Illinois); William W. Gibson, Jr., *Inheritance of Community Property in Texas—A Need for Reform*, 47 TEXAS L. REV. 359, 364-66 (1969) (study of dispositive preferences of married parents); Price, *supra* note 74, at 285 (study of death certificates, probate court records, and inheritance tax filings for a sample of 211 individuals who died in King County, Washington, in 1969); Mary Louise Fellows et al., *An Empirical Study of the Illinois Statutory Estate Plan*, 1976 U. ILL. L.F. 717, 720 (1976) (study using a telephone survey of 182 Chicago and downstate Illinois residents) [hereinafter Fellows et al., *Illinois Study*]; Mary Louise Fellows et al., *Public Attitudes about Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. BAR. FOUND. RSCH. J. 319, 326 (1978) (study of a random sample of 750 respondents from a panel of families from Alabama, California, Massachusetts, Ohio, and Texas) [hereinafter Fellows et al., *Public Attitudes*]; Project, *supra* note 98, at 1045 (study of probate court records, a survey of intestate estate survivors, and interviews of a sample of Iowans); *Family Law: Distribution on Intestacy*, LAW COMM'N (1989), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/235789/0060.pdf (study of public opinion interviews with 1001 individuals in the United Kingdom completed between December 1988 and January 1989).

101 *See* Richard V. Wellman, *Selected Aspects of Uniform Probate Code*, 3 REAL PROP., PROB. & TR. J. 199, 204 (1968); Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 230-31 n.25 (1991); UNIF. PROB. CODE § 2-102 cmt. (UNIF. L. COMM'N amended 2019).

102 Horton, *supra* note 62, at 627, 630-31; Wright & Sterner, *supra* note 33, at 361-62.

103 *See, e.g.*, Taylor Poppe, *supra* note 70, at 117-19, 143-45.

104 *See* Wright & Sterner, *supra* note 33, at 347-54.

105 *See, e.g.*, Browder, Jr., *supra* note 100, at 1307; Dunham, *supra* note 100, at 252; Price, *supra* note 74, at 311, 313-17.

106 Price, *supra* note 74, at 311.

at the time these studies were carried out typically allocated only a portion of an intestate estate to a surviving spouse when the decedent was also survived by children, the prevalence of testators who departed from intestacy's default provisions was notable.[107]

Two more recent will studies also track testamentary dispositions to a surviving spouse or children but provide less instructive evidence regarding a dominant preference. A study of wills probated in Alameda County, California for decedents who died in 2007 found that spouses and children were named as non-contingent beneficiaries in 12% and 22% of wills, respectively.[108] This confirms that the majority of testators in the sample provided distributions to beneficiaries other than spouses and children—which could be seen as evidence of a move away from traditional disposition patterns—and made distributions to children more frequently than to spouses—which could be offered as evidence of shifting prioritizations between spouses and children. However, the sample is largely comprised of decedents who were *not* married parents,[109] and the patterns of testamentary dispositions are not disaggregated by the decedent's family structure. Thus, much caution is required in extrapolating these results into evidence of dispositive preferences.

A second, more recent, will study draws on data from a sample of wills probated in 2013 in two Florida counties—Alachua and Escambia—and finds that the most common testamentary dispositions among all wills were to distribute everything evenly among surviving children or to allocate everything to a surviving spouse.[110] In many cases where the estate was left to the children, however, it appeared that "the surviving spouse had made a new will after the death of a spouse"[111] leaving open the possibility that testators had allocated property to a surviving spouse in earlier instruments. Because the dispositions reported are not limited to decedents who were survived by a spouse and children, it is difficult to know the extent to which they reveal a preferred allocation among those potential heirs.

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107 *Id.* at 311 n.92.

108 Horton, *supra* note 62, at 627, 631 fig.1; *see also* David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1124-25 tbl.2 (2015) [hereinafter Horton, *Wills Law*].

109 *See* Horton, *Wills Law*, *supra* note 108, at 1125 (noting that the sample excludes many married decedents who transfer property using spousal property petitions, will disproportionately exclude married parents if they are more likely to have estate plans that obviate the need for probate, and may be comprised of testators motivated to engage in estate planning because of a desire to avoid intestacy provisions incompatible with their preferences).

110 Wright & Sterner, *supra* note 33, at 361-62.

111 *Id.* at 362.

Thus, early will studies offered evidence that married parent testators favored allocating all of the estate to their surviving spouse,[112] but there is less evidence that this remains the case today. There is also no evidence regarding whether testator preferences vary based on the age of the testator's children or the size of the testator's estate.[113] In addition, it is important to note the limitations of will studies for identifying the dispositive preferences of intestate decedents. Although will studies did influence the 1969 UPC[114] and can be instructive as to the preferences of those benefitting from professional legal advice,[115] evidence of systematic differences in the characteristics[116] and preferences[117] of testate and intestate individuals caution against the approach of inferring intestate preferences from wills.

Surveys have the potential to address several of these limitations because respondent samples can include intestate individuals, and surveys can solicit information about preferred allocations for a variety of fact patterns.[118] Interestingly, given this potential for survey results to depart from the patterns observed in will studies, early survey studies also offer evidence that allocating all of a decedent's intestate estate to the surviving spouse where the decedent is also survived by descendants is the favored approach; however, the magnitude of this preference is weaker than in the will studies.[119] In each of these studies, allocating all

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112 *Id.* at 350.

113 *See id.* at 347.

114 *See generally* UNIF. PROB. CODE pt. 1 (UNIF. L. COMM'N 1969) ("The Code attempts to reflect the normal desire of the owner of wealth as to disposition of his property at death, *and for this purpose the prevailing patterns in wills are useful in determining what the owner who fails to execute a will would probably want.*" (emphasis added)); *see also* § 2-102 cmt. (noting that the intestate share to the surviving spouse "reflects the desires of most married persons, who almost always leave all of a moderate estate, or at least one-half of a larger estate to the surviving spouse when a will is executed.").

115 *See* Thomas J. Mulder, *Intestate Succession Under the Uniform Probate Code*, 3 U. MICH. J.L. REFORM 301, 314 (1970).

116 *See* Taylor Poppe, *supra* note 7, at 2528-29 tbl.1 (summarizing scholarship investigating the prevalence and distribution of testacy).

117 *See, e.g.*, Monica K. Johnson & Jennifer K. Robbennolt, *Using Social Science to Inform the Laws of Intestacy: The Case of Unmarried Committed Partners*, 22 L. & HUM. BEHAV. 479, 498 (1998); *see also* Taylor Poppe, *supra* note 70, at 133-34, 139-40.

118 *See* Taylor Poppe, *supra* note 7, at 2515.

119 *See, e.g.*, Project, *supra* note 98, at 1085 tbl.12 (finding that 61% of respondents favored allocating the entire intestate estate to the surviving spouse when survived by spouse and minor children); LAW COMM'N, *supra* note 100, at 8; Fellows et al., *Illinois Study*, *supra* note 100, at 728 tbl.7 (finding that 53.3% of respondents favored allocating all of the intestate estate to the surviving spouse when survived by a minor child and 41.2% favored this allocation when survived by an adult child); Fellows et al., *Public Attitudes*, *supra* note 100, at 359 tbls.11 & 12 (finding that 58.3% of respondents favored allocating the entire intestate estate to the surviving spouse when survived by spouse and minor children and that 51.6% of respondents favored this allocation when survived by

of the intestate estate to the surviving spouse is at least a plurality preference, but does not accord with the allocation preferred by a substantial share of respondents.[120]

Two of these surveys investigate variation by child age and find that allocating the entirety of the estate to the surviving spouse remained the most popular allocation, even when the age of the surviving child/children was manipulated.[121] The first, a telephonic survey of a sample of Chicago and downstate Illinois residents (N=182), published in 1976, found that 53.3% of respondents favored allocating all of the intestate estate to the surviving spouse when survived by a minor child but only 41.2% favored this allocation when survived by an adult child; in both scenarios, the second-most-favored allocation was to split the estate evenly between the spouse and child.[122] The second study was a telephonic survey of respondents from Alabama, California, Massachusetts, Ohio, and Texas (N=750), published in 1978, which found that 58.3% of respondents favored allocating the entire intestate estate to the surviving spouse when survived by spouse and minor children and 51.6% of respondents favored this allocation when survived by spouse, a minor child and an adult child.[123] Thus, while there is evidence of some difference in preferences depending on child age, it was not sufficient to change the overall ordering of preferred allocations.[124]

Early surveys also offer limited evidence of variation by economic status strong enough to shift the dominant preference. In the multi-state survey just described, the share of respondents who allocated the entirety of the estate to the surviving spouse when also survived by minor children increased with family income, but at its lowest was still selected by 53.2% of respondents.[125] Results based on actual estate size are similar, ranging from 50% of respondents whose estates were less than

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spouse, a minor child and an adult child); *see also* Joel R. Glucksman, *Intestate Succession in New Jersey: Does it Conform to Popular Expectations?*, 12 COLUM. J.L. & SOC. PROBS. 253, 267-69 (1976) (reporting results of a telephone survey of New Jersey residents (N=47) presented with a hypothetical involving survival by a spouse and two children finding that more respondents preferred allocating a greater share to the surviving spouse than was granted under intestacy provisions at the time; given variation by gender and the reporting of summary results, it is impossible to draw direct comparisons to the findings of the other studies).

120 *See* Project, *supra* note 98, at 1085 tbl.12; LAW COMM'N, *supra* note 100, at 8; Fellows et al., *Illinois Study*, *supra* note 100, at 728 tbl.7; Fellows et al., *Public Attitudes*, *supra* note 100, at 359 tbls.11 & 12; Glucksman, *supra* note 119, at 267-69.

121 *See* Fellows et al., *Illinois Study*, *supra* note 100, at 728 tbl.7; *see also* Fellows et al., *Public Attitudes*, *supra* note 100, at 359 tbls.11 & 12.

122 Fellows et al., *Illinois Study*, *supra* note 100, at 728 tbl.7.

123 Fellows et al., *Public Attitudes*, *supra* note 100, at 359 tbls.11 & 12.

124 *See id.*

125 *Id.* at 363 tbl.16.

$13,000 preferring an allocation of all of the intestate estate to the surviving spouse, to 60.4% among respondents with estates of $100,000 or more.[126] Similarly, in a telephonic survey of a representative sample of Iowan residents (N=600), published in 1978, a smaller proportion of respondents who had less than $10,000 in annual family income preferred to allocate all of the estate to the surviving spouse (52%), relative to those with greater incomes (64%), yet allocating all of the intestate estate remained the majoritarian preference.[127]

In sum, several influential will studies conducted in the 1970s and earlier concluded that allocating the entirety of the intestate estate to the surviving spouse was a dominant preference. Survey studies carried out in the 1970s complicate this conclusion somewhat, offering evidence of support for dividing the estate between the spouse and descendants among a substantial minority of adults in various jurisdictions, but still found that allocating all of the estate to the surviving spouse was more popular. These surveys also provide some evidence of variation in preferences depending on child age and respondent wealth, but the magnitude is not sufficient to shape the overall order of preferences among various allocations.

C. Open Questions

Because most of this empirical evidence regarding probable intent is now quite dated, it is unclear whether allocating all of the intestate estate to the surviving spouse remains the dominant preference. There is reason to suspect that it may not. In particular, the rise of the multiple marriage society may have diminished comfort in assumptions about the surviving spouse's role as a conduit. As noted above, part of the logic of allocating all of the intestate estate to the surviving spouse where the spouse and decedent share all descendants is that the surviving spouse will use the funds for the benefit of the descendants during life and at his or her later death will provide any remaining assets to the descendants. Subsequent remarriage or parentage by the surviving spouse complicates this narrative. Although this has long been a concern,[128] the rise of blended families in the population generally could mean that this possibility is now more salient as individuals form their preferred allocation,

126 *See id.* at 364 tbl.17.

127 *See* Project, *supra* note 98, at 1085 tbl.12.

128 *See* Fellows et al., *Public Attitudes*, *supra* note 100, at 360 (noting that respondents who preferred to divide the estate between a surviving spouse and children often indicated that they were motivated by concern for the "possibility that the children might be disinherited, especially if the surviving spouse remarried.").

making it more likely that they would favor a diminished allocation to the surviving spouse in favor of a direct allocation to descendants.[129]

Of course, this allocation could trigger the need for a guardianship or conservatorship if the descendants are minors,[130] which militates against an increased share to descendants in some circumstances. If individuals are aware of and concerned by this possibility, we would expect allocations to descendants to be greater when surviving children are adults. Although, studies showing lay people's limited familiarity with intestacy laws[131] raise questions about the proportion of the population who is aware of these risks. On the other hand, adult children are less likely to be economically reliant on the decedent, which could result in reduced allocations to surviving descendants when they are adults.[132] This might be particularly true where decedents have modest estates and where a greater portion (or all) of the intestate estate is needed to support the surviving spouse. This suggests the potential for an interactive effect of child age and decedent wealth on dispositive preferences.[133] Understanding these dynamics would increase our ability to evaluate whether more complex intestacy provisions could better accommodate dispositive preferences.

Finally, because dispositive preferences can vary based on testacy, family structure, and other individual characteristics,[134] it is important to investigate whether aggregate preferences are representative of relevant subgroups in the population.

II. Empirical Study

To address these questions, this Part presents an empirical study of preferences regarding the allocation between a surviving spouse and child. The data and methods, and their strengths and limitations, are addressed first. The study's findings follow.

A. Data and Methods

The study relies on completed responses (N=1,975) to a custom online survey developed by the author and administered by Qualtrics.[135] Online surveys are an economical way to construct a diverse sample of

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129 *See id.*

130 *See id.* at 356.

131 *See id.* at 340.

132 *See id.* at 355.

133 *Id.*

134 *See, e.g.*, Fellows et al., *Public Attitudes*, *supra* note 100, at 363 tbl.16; Project, *supra* note 98, at 1085 tbl.12; *see also,* Taylor Poppe, *supra* note 70, at 120, 126.

135 *See* Taylor Poppe, *supra* note 7, at 2540-43 (containing additional description of the survey).

respondents, which is essential for producing results that can be generalized to a broader population.[136] While respondents self-selected into the sample, effort was made to avoid biasing the sample or responses on the basis of the survey invitation.[137] Although the resulting sample is not a probability sample, it is consistent with national statistics on population distribution by gender, age, race/ethnicity, household income, education, and geographic region.[138]

The survey was administered in the summer of 2019, which predates the onset of the COVID-19 pandemic. The results are therefore not biased by any short-term effects of the pandemic, including not only the direct public health aspects of COVID-19, but the related mental and emotional strain and economic and social disruption; however, the results also cannot speak to any changes in preferences driven by the experience of the pandemic.[139] Future work investigating the effects of the pandemic on estate planning practices and preferences may thus find this work a helpful indicator of baseline pre-pandemic patterns.

To generate information about dispositive preferences, the survey presented respondents with several hypothetical situations. For each situation, respondents were asked how they would want their property to be allocated at death if they were survived by a specified set of potential heirs.[140] To record their response, respondents moved a slider to allocate the share—if any—to each of the potential heirs, with all allocations forced to sum to 100%.

This Article focuses on a series of four hypotheticals that solicited respondents' preferred allocation of property at death if they were survived by a spouse and a child who was a descendant of that spouse and the respondent. In each case, respondents used a slider to allocate a share to the surviving spouse or child; any remaining amount would be allocated to the other. These scenarios included manipulations on the age of the child—minor or adult—and respondent wealth: whether the respondent had "about as much wealth as you do now" or "had signifi-

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136 *Id.* at 2540.

137 *Id.* at 2541 & n.142. For example, the introduction to the survey referenced both testacy and intestacy, in an effort not to bias the sample toward greater participation by either group ("This survey is about will-making. We are hoping to find out more about why people do or do not have a will."). *Id.*

138 *See id.* at 2541, 2558 app. tbl.1.

139 It is not clear whether or how, on average, the pandemic would affect such preferences. A range of phenomena—increased exposure to the probate process, greater consideration of mortality, changing patterns of familial interaction, and economic disruption to name a few—could plausibly affect individual dispositive preferences. On the other hand, these preferences may be so deeply rooted that change at the edges fails to have a dramatic impact on the distribution of preferences overall.

140 *See* Taylor Poppe, *supra* note 70, at pt. III (analyzing another sets of hypotheticals—involving survival by a parent and a spouse or romantic partner).

cantly more wealth" at death.[141] Interacting those two dimensions yields the four scenarios described in Figure 2.

FIGURE 2. SURVEY DESIGN: WEALTH AND CHILD AGE MANIPULATIONS

Child Age Manipulation	Wealth Manipulation: *Same Wealth*	Wealth Manipulation: *More Wealth*
Minor Child	Minor Child, Same Wealth	Minor Child, More Wealth
Adult Child	Adult Child, Same Wealth	Adult Child, More Wealth

This design offers several benefits. First, by comparing the distributions of preferred allocations across the four scenarios, we can explore the relationship between child age, level of wealth, and the combination of child age and wealth on aggregate preferences. In addition, because each respondent was asked each of the four questions, the data facilitate intra-respondent comparisons. That is, we can leverage the repeated measures to see how much, on average, individuals' preferences shifted across the four settings, allowing us to more cleanly identify the effects of the manipulations. Finally, using additional survey data on individual characteristics, we can focus on particular subgroups of respondents and draw inter-respondent comparisons.

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141 *See* Taylor Poppe, *supra* note 7, at 2540-41. The four survey questions were as follows: (1) Imagine you had about as much wealth as you do now and were survived by your spouse and a minor child of you and that spouse. What percent of your wealth would you want your spouse and minor child to receive?; (2) Imagine you had significantly more wealth and were survived by your spouse and a minor child of you and that spouse. What percent of your wealth would you want your spouse and minor child to receive?; (3) Imagine you had about as much wealth as you do now and were survived by your spouse and an adult child of you and that spouse. What percent of your wealth would you want your spouse and adult child to receive?; and (4) Imagine you had significantly more wealth and were survived by your spouse and an adult child of you and that spouse. What percent of your wealth would you want your spouse and adult child to receive? Unfortunately, the order of these questions was fixed, raising the possibility of bias on later questions resulting from exposure to the prior questions. This is a lamentable oversight in the survey's design. However, it is not clear how we would expect the question order to influence response in this situation.

There are two such comparisons that are particularly relevant for the topic of this article. The first is the comparison of the preferences of intestate married parents—who are most likely to actually face the hypothetical scenarios at issue in real life—to those of the rest of the population. To identify intestate married parents, I draw on three additional survey questions. The first is a question about testacy.[142] Responses to this question are recorded in a variable indicating whether the respondent reported having a will (0=intestate, 1=testate). Second, I use a question soliciting marital status[143] to identify respondents who are married, as opposed to those who are widowed, divorced, separated, or never married. Lastly, responses to the question, "Do you have any children (including biological, adopted, or step)?" are used to identify parents. The variable for intestate married parents indicates those respondents who satisfy each of these criteria (N=388, 20%) versus all other respondents (N=1,587, 80%). This approach excludes from the definition of "intestate married parents" those who may previously have been intestate married parents or who may become so in the future, focusing only on those who currently meet the definition.[144]

The second inter-respondent comparison investigates whether the distribution of preferred allocations to a surviving spouse varies with different levels of individual wealth. The variable for wealth draws on responses to two questions. The first question asked whether respondents had negative or positive net wealth.[145] For those who reported having positive net wealth, a second question asked them to estimate it.[146] Analyses in this article use a five-category coding of wealth indicating: negative wealth, zero wealth, less than $50,000 of net wealth; net wealth of at least $50,000 but less than $150,000; net wealth of at least $150,000 but less than $500,000; and net wealth that exceeds $500,000.[147]

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142 "Do you have a will? This is sometimes called a 'last will and testament.' It is a legal document that controls who will receive your assets when you die."

143 "What is your current marital status?"

144 This also includes stepparents within the definition of intestate married parents even though stepchildren may not be eligible to inherit as intestate heirs.

145 "Suppose you were to sell all of your major possessions (your car, your home, etc.), turn all of your investments and other assets into cash (including any financial assets such as stocks/bonds/mutual funds/401(k) plans, savings and checking accounts, etc.), and pay all of your debts (including your mortgage, any other loans, and credit cards). You should consider only your share of any jointly held assets. Would you have money left over, break even, or be in debt?"

146 "What is your best estimate of how much would be left over?"

147 The distribution of respondents across these categories is as follows: negative wealth N=389 (20%); zero wealth N=478 (24%); net wealth less than $50,000 N=349 (18%); net wealth of at least $50,000 and less than $150,000 N=313 (16%); net wealth of at least $150,000 but less than $500,000 N=251 (13%); and wealth of at least $500,000 N=195 (10%).

This construction of wealth includes assets that would likely not be probate property, such as retirement accounts, and thus would not be subject to the intestacy laws in question. However, the research question posed in this set of analyses is not how respondents would allocate particular assets, but rather whether respondents' preferred allocations between spouse and descendants vary with their level of wealth.

This analytic approach offers a rich set of results, but it is not without its limitations. First, it measures only respondents' preferences, as they are revealed by their chosen allocations of property. Although the results offer some exploratory hints as to what may be driving the aggregate patterns that are observed, we have no information about the complex idiosyncratic reasoning that underlies any single respondent's actions. In addition, the use of hypotheticals means that we cannot be certain that individuals would make the same choices in real life if actually faced with the situation described. However, research offering evidence of consistency between hypothetical responses and observed estate planning behavior helps to assuage this concern.[148] Moreover, it is important to recall that, by definition, it is impossible to observe the choices of intestate decedents.[149]

B. Findings

Using these data, I present three sets of results. For all results, I present findings in terms of the preferred allocation to the surviving spouse. Recall that any remainder after the allocation to the surviving spouse represents the preferred allocation to the surviving child. The choice to focus on allocations to one heir simplifies the reporting of results; framing the results with regard to the surviving spouse as opposed to the surviving child reflects the contemporary structure of intestacy, in which the surviving spouse's share is awarded first.

1. *Aggregate Preferences for the Full Sample of Respondents*

I begin with an exploration of the aggregate distributions of preferences. Figure 3 shows the distribution of preferred allocations to the surviving spouse for each of the four scenarios: survival by a minor child when the respondent dies with the same amount of wealth they currently have; survival by a minor child when the respondent has substantially more wealth; survival by an adult child when the respondent has

148 *See* Johnson & Robbennolt, *supra* note 117, at 496-97.

149 *See, e.g.*, Waggoner, *supra* note 74, at 235 ("In intestate-succession cases, by definition, there is no such [documentary] evidence [of testamentary intent]."). It is also instructive to recall that testators often express preferences for situations that are only hypothetical when a will is drafted, yet we assume them to be in accord with the testator's wishes when given legal effect at death.

the same amount of wealth; and survival by an adult child when the respondent has substantially more wealth. These raw frequency distributions show that the most popular allocations are to provide half or all of the intestate estate to the surviving spouse, followed by allocating nothing to the surviving spouse and instead having everything go to the surviving child. As a matter of historical interest, there is very limited support for the traditional share of one third of the estate to the surviving spouse.[150]

FIGURE 3. PREFERRED ALLOCATION TO SPOUSE, BY AGE OF CHILD AND LEVEL OF WEALTH

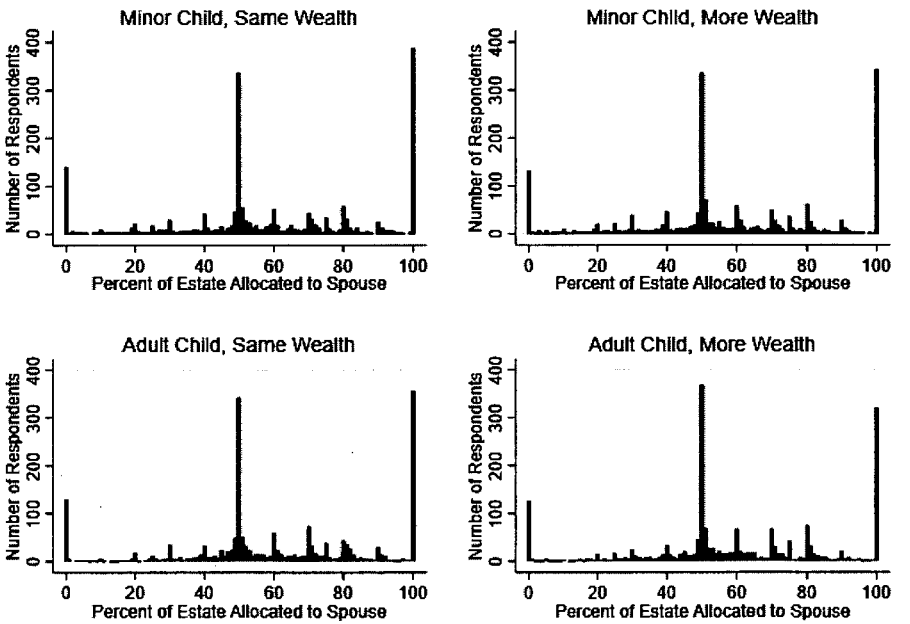

Table 2 provides summary statistics for the distributions of preferred allocations for each scenario and notes the frequency for each of the three dominant allocations to the surviving spouse. Together, Figure 3 and Table 2 reveal three notable findings. First, the similarity in the distributions of preferred allocations offers little evidence of an effect of the two manipulations. If avoiding transfers to a minor child and/or ensuring minimal support to a surviving spouse were heavily influencing

150 *See infra* Figure 3. The number and percent of respondents whose preferred allocation to the surviving spouse was 33% of the estate is as follows: minor child, same wealth: N=5 (0.25%); minor child, more wealth: N=6 (0.30%); adult child, same wealth: N=8 (0.41%); and adult child, more wealth: N=6 (0.30%).

allocations, we would expect to see more dramatic variation across the four scenarios.

Yet, despite this overarching similarity, the second notable finding is that the single most popular allocation to the surviving spouse varies across the four scenarios. Allocating all of the intestate estate to the surviving spouse is slightly more popular (N=386, 20%) than allocating half of the intestate estate (N=337, 17%) for the first hypothetical, where the decedent is survived by a minor child and has the same amount of wealth.[151] In contrast, the percent of respondents choosing to allocate half and all of the intestate estate to the surviving spouse is almost indistinguishable for the next two scenarios: survival by a minor child when the respondent has more wealth (allocation of half: N=335, 17%; allocation of all: N=342, 17%) and survival by an adult child when a respondent dies with their current level of wealth (allocation of half: N=342, 17%; allocation of all: N=356, 18%). In the scenario in which the respondent is survived by an adult child and has substantially more wealth, allocating half of the intestate estate is the most popular allocation (allocation of all: N=368, 19%; allocation of half: N=320, 16%). Thus, identifying a single preferred allocation is complicated by this variation.

TABLE 2. PREFERRED ALLOCATION TO SPOUSE, BY AGE OF CHILD AND LEVEL OF WEALTH

	Hypothetical Scenario			
	Minor Child, Same Wealth	*Minor Child, More Wealth*	*Adult Child, Same Wealth*	*Adult Child, More Wealth*
Mean	59.48	58.27	60.63	59.29
(SD)	(29.22)	(28.61)	(27.92)	(27.23)
Median	53	52	56	53
Most Frequent Allocations				
None	139 (7%)	131 (7%)	129 (7%)	127 (6%)
Half	337 (17%)	335 (17%)	342 (17%)	368 (19%)
All	386 (20%)	342 (17%)	356 (18%)	320 (16%)
N	1,975	1,975	1,975	1,975

However, the final important finding here is that a focus on only the most frequent allocations is somewhat misleading. As is evident in Figure 3 and further emphasized by the statistics in Table 2, allocations

151 *See infra* Table 2.

of nothing, half, and all of the intestate estate to the surviving spouse are the most popular preferences, but account for only a fraction of all responses. Even when combined, these allocations do *not* capture the preferences of more than half of respondents in each scenario. The number of respondents indicating a preferred allocation other than nothing, half, or all to the surviving spouse is as follows for each scenario: minor child, same wealth (N=1,113, 56%); minor child, more wealth (N=1,167, 59%); adult child, same wealth (N=1,148, 58%); and adult child, more wealth (N=1,160, 59%).

This presents a serious challenge to the goal of generating intestacy provisions that fully capture probable intent. Yet, intestacy has never claimed to offer that level of accommodation.[152] At its best, intestacy hopes to offer a majoritarian—or perhaps a plurality—preference. This leads to a further question: does a single dominant preference emerge if we force all respondents toward a more limited set of choices? To answer this, I transform the continuous variable for preferred allocation to the surviving spouse into a set of five categories: less than 20% to the surviving spouse; at least 20% but less than 40% to the surviving spouse; at least 40% but less than 60% to the surviving spouse; at least 60% but less than 80% to the surviving spouse; and 80% or more to the surviving spouse.

There are several assumptions involved in coarsening the data into this set of categories.[153] First, it assumes that if respondents could not have precisely the allocation they selected and had to choose from among the five options, they would select the category closest to their ideal allocation. Second, it assumes that they would experience some level of satisfaction with that choice. Data limitations force me to make these assumptions—the survey did not ask which of these possible options respondents would prefer, did not ask for a rank order preference, and did not ask about the strength of respondents' preferences—but alternate approaches might yield novel insights and merit future investigation. That said, although not empirically tested, the assumptions are facially reasonable.

However, even putting those issues to the side, it is not clear what single allocation would align with each category. Based on the underlying distribution of preferences, I assume the intestate allocation to the surviving spouse for the lowest, middle, and top categories would be

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152 At least, not yet. *See, e.g.*, Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417, 1425-27 (2014) (suggesting the potential for personalized probate).

153 Also at work are judgments about the proper number of categories to fairly capture the variation in the underlying distribution. Generally, the conclusions of the Article are unchanged if three categories are used instead.

nothing, one half, and all of the intestate estate, respectively. The process for converting the range of preferred allocations in the remaining two categories, where no single allocation is so disproportionately popular, into a single allocation is less straightforward. I assume allocations of 30% and 70% as averages of the range of potential values but could foresee several other possible approaches, including using the average, median, or mode of observed preferences.

Keeping these caveats in mind, the analysis of coarsened preferences offers a striking result: allocating half of the estate to the surviving spouse becomes the most prevalent preference choice in each scenario. Figure 4 illustrates the number of respondents whose preferences fall into each category in each scenario and clearly shows this result.

FIGURE 4. PREFERRED CATEGORICAL ALLOCATION TO SPOUSE, BY AGE OF CHILD AND LEVEL OF WEALTH

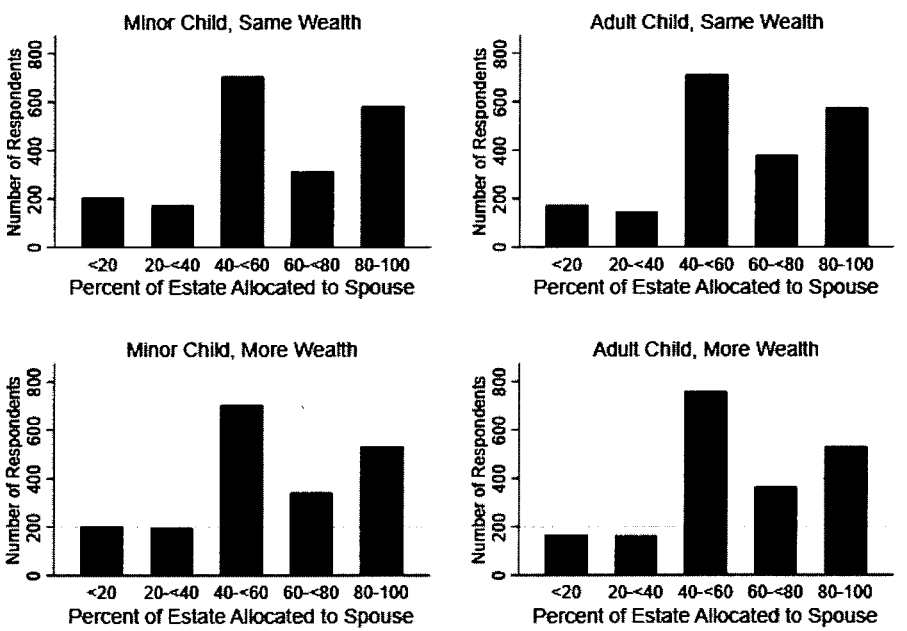

Table 3 provides the frequency data that underlie the figure. Notably, there is stability in the distributions across the four scenarios and in the dominance of an allocation between 40% and 60% of the intestate estate to the surviving spouse.

TABLE 3. FREQUENCY OF PREFERRED CATEGORICAL ALLOCATIONS TO SPOUSE, BY SCENARIO

	Hypothetical Scenario			
	Minor Child, Same Wealth	*Minor Child, More Wealth*	*Adult Child, Same Wealth*	*Adult Child, More Wealth*
Allocation to Spouse				
<20%	202 (10%)	203 (10%)	171 (9%)	166 (8%)
20%-<40%	173 (9%)	194 (10%)	143 (7%)	162 (8%)
40%-<60%	705 (36%)	704 (36%)	712 (36%)	757 (38%)
60%-<80%	312 (16%)	342 (17%)	377 (19%)	362 (18%)
>80%	583 (30%)	532 (27%)	572 (29%)	528 (27%)
N	1,975	1,975	1,975	1,975

2. *Effect of Child Age and Wealth: Intra-Respondent Variation in Preferences*

The descriptive results above reveal some variation in the distribution of preferred allocations to a surviving spouse and child across the four hypothetical scenarios, which vary the child's age and the respondents' wealth at death. However, the variation in the overall distributions is limited. Depending on the ways in which individual preferences vary across the four scenarios, it is possible—though not necessarily likely—that stability in the overall distribution hides underlying heterogeneity. In this section, I evaluate this possibility, investigating further the relationship between child age/respondent wealth and dispositive preferences, by focusing on variation in the preferences of individual respondents across the four scenarios.

To assess the extent to which respondents' preferences differed across the four scenarios, I first calculate the pairwise differences in each respondent's preferred allocations. For example, a respondent who allocated all of the intestate estate to the surviving spouse if survived by a minor child and possessing about the same level of wealth might allocate only half of the intestate estate if survived by an adult child while holding the same level of wealth. For this respondent, holding wealth constant at current level, the preferred allocation to the surviving spouse decreases by 50 percentage points when the hypothetical shifted the child from a minor to an adult. Another respondent might allocate 70% of the intestate estate to the surviving spouse in the first scenario and only 20% in the second, yielding the same difference (a decrease of 50 percentage points in the share of the intestate estate allocated to the surviving spouse) in response to the manipulation. Framing the compari-

son in this way allows us to investigate the effect of the manipulations in the scenarios independent from the absolute values of respondents' preferred allocations.

Of course, other respondents might allocate a greater share of the intestate estate to the surviving spouse in the second scenario. To understand how respondents as a whole reacted to the manipulations in the scenarios, I aggregate the pairwise differences across scenarios for all respondents. I then calculate statistics (mean, standard deviation, and median) that summarize the distribution of the differences between respondents' preferred allocations for each pair of scenarios.[154]

FIGURE 5. SUMMARY STATISTICS FOR CHANGES IN RESPONDENTS' PREFERRED ALLOCATIONS BETWEEN HYPOTHETICAL SCENARIOS

Child Age Manipulation	Wealth Manipulation: *Same Wealth* → *More Wealth*		
Minor Child ↓	Minor Child, Same Wealth	Mean = -1.21 SD = 16.11 Median = 0	Minor Child, More Wealth
	Mean = 1.14 SD = 21.38 Median = 0	Mean = -0.20 SD = 21.77 Median = 0	Mean = 1.01 SD = 20.58 Median = 0
Adult Child	Adult Child, Same Wealth	Mean = -1.34 SD = 13.68 Median = 0	Adult Child, More Wealth

I first use these results to consider how preferences differed across scenarios involving a minor versus adult child. Starting with the left column in the figure, the results indicate that the percent of the intestate estate allocated to the surviving spouse was, on average, 1.14 percentage points higher (SD = 21.38, median = 0) when the decedent was survived by an adult child as compared to a minor child and the level of wealth was constant at current levels. The right column of Figure 5 indicates that, on average, respondents allocated 1.01 percentage points more of the intestate estate to the surviving spouse (SD = 20.58, median = 0) when the decedent was survived by an adult child as compared to a minor child, but the level of wealth was substantially more than the re-

154 *See infra* Figure 5.

spondent currently has. While the standard deviations show that some respondents' preferences do shift in response to the manipulation on child age, the results do not offer evidence of a substantively significant relationship between child age and preferred allocation to a surviving spouse overall.

I next investigate the differences in preferences as wealth is manipulated but child age is held constant. The top row of the figure indicates that, on average, the percent of the intestate estate allocated to the surviving spouse is 1.21 percentage points lower (SD = 16.11, median = 0) when the decedent dies with substantially more wealth and is survived by a minor child. The bottom row indicates that the preferred allocation to the surviving spouse is an average of 1.34 percentage points lower (SD = 13.68, median = 0) when the decedent has substantially more wealth and is survived by an adult child. Here, again, the descriptive results offer limited evidence of a strong relationship between the manipulation under consideration—the level of wealth held at death—and the preferred allocation of the intestate estate to a surviving spouse.

Finally, the diagonal in Figure 5, from the top left to the bottom right, investigates the potential interaction between respondent wealth and the age of the surviving child. Comparing the preferred allocation to the surviving spouse when the decedent dies with substantially more wealth and an adult child and the scenario where the decedent has less wealth and a minor child, there is again limited evidence of substantive divergence in preferences. On average, the difference in preferred allocations was less than one percentage point between the two scenarios, with an allocation to the surviving spouse when the decedent has more wealth and is survived by an adult child that is just .2 percentage points lower on average (mean = -0.20, SD = 21.77, median = 0).

These descriptive results do not rule out the possibility that child age or level of wealth, as captured by the manipulations across scenarios, is associated with the preferred allocation to a surviving spouse.[155] However, they strongly suggest that any such association is not of a magnitude that is great enough to meaningfully alter dispositive preferences. In the next section, I shift my attention away from variation across the scenarios *within* respondents to focus instead on potential heterogeneity in preferences *across* different groups of respondents.

155 In light of the descriptive results, and given the complexity involved in appropriately modelling repeated measures, I do not undertake further statistical analysis here.

3. *Inter-Respondent Variation: Intestate Married Parents and Respondents Categorized by Wealth*

In this final set of analyses, I evaluate whether dispositive preferences within a given scenario differ across subgroups of respondents. This leverages additional survey data on individual characteristics to explore heterogeneity in preferences that could inform our understanding of probable intent. First, I consider whether the preferences of intestate married parents differ from those of other respondents. This identifies the preferences of those most likely to be affected by the intestacy provisions and recognizes that their life experience may inform their preferences. Then, I investigate the association between respondent wealth and preferred allocation to the surviving spouse. This addresses the possibility that individual preferences vary with wealth, even though individuals' responses are not meaningfully different across the wealth manipulations in the scenarios.[156]

a. *Intestate Married Parents*

If the laws of intestacy are intended to carry out the probable intent of decedents who die intestate with a particular family structure,[157] then the provision for married parent decedents should draw on the preferences of such individuals. Figure 6 shows the percent of intestate married parents and other respondents whose preferred allocation to a surviving spouse fits into each category for each of the hypothetical scenarios. There are differences in the distributions between these two groups for each scenario.[158] However, the most popular categorical allocation is the same for both groups in each scenario: allocating about half of the intestate estate to the surviving spouse.[159]

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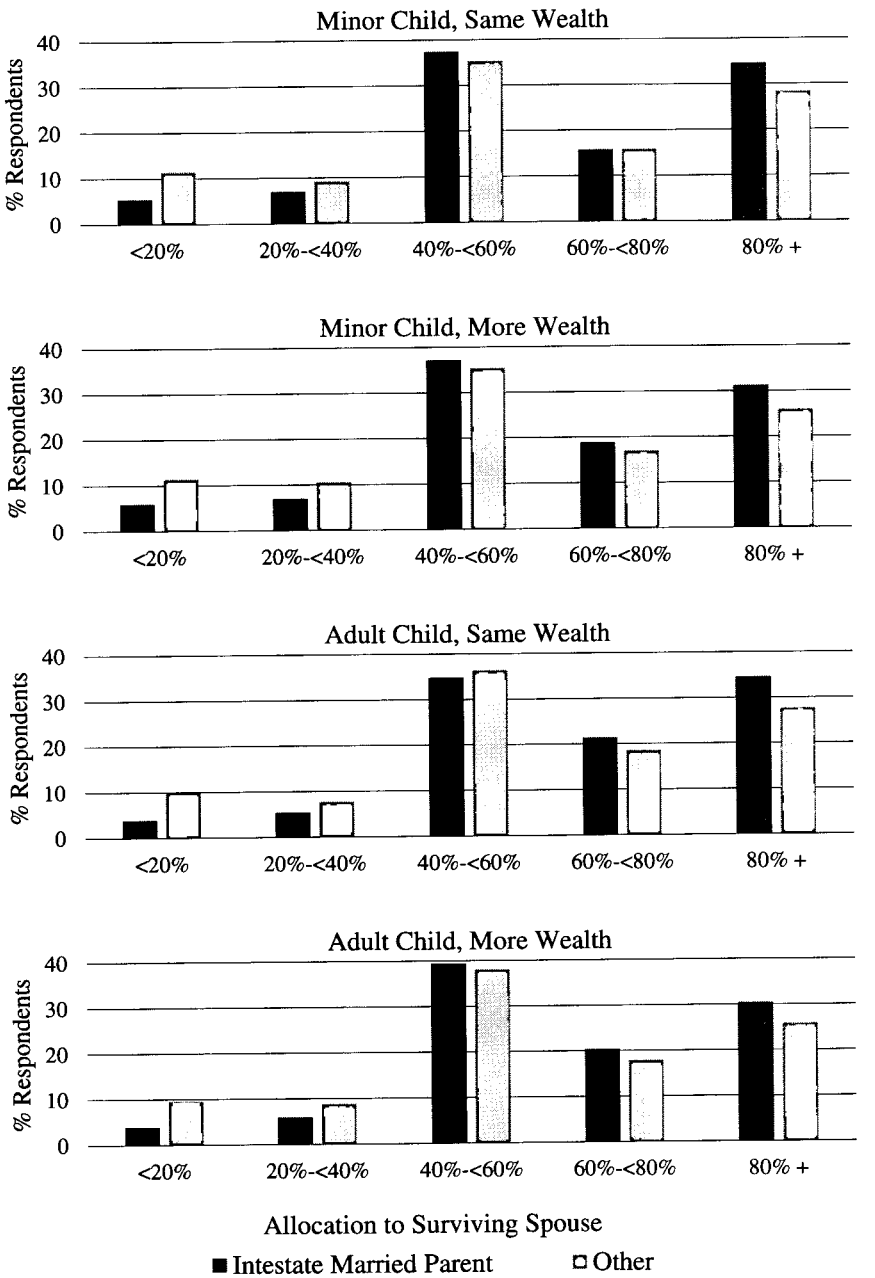
156 Some readers may wonder why I have not used additional data on individual characteristics to more fully model preferred allocations to the surviving spouse for each scenario. Preliminary analyses indicate that socio-demographic characteristics are, on the whole, poor predictors of dispositive allocations. While I do find evidence of statistically significant associations, overall model fit is poor. Additional theoretical and empirical grounding is needed in this area.

157 *See* Taylor Poppe, *supra* note 70, at 143-45 (discussing the importance of defining the population of interest in determining probable intent).

158 Statistical tests rejecting the null hypothesis that there is no difference in the distribution of preferred categorical allocations to the surviving spouse for intestate married parents and other respondents, by scenario: minor child, same wealth: X^2 (4, N=1,975) = 17.23, $p<0.01$; minor child, more wealth: X^2 (4, N=1,975) = 21.77, $p<0.001$; adult child, same wealth: X^2 (4, N=1,975) = 17.08, $p<0.01$; adult child, more wealth: X^2 (4, N=1,975) = 18.57, $p<0.01$.

159 *See infra* Figure 6.

FIGURE 6. DISTRIBUTIONS OF PREFERRED CATEGORICAL ALLOCATIONS, FOR INTESTATE MARRIED PARENTS AND OTHERS, BY HYPOTHETICAL SCENARIO



However, this overstates the difference in preferred allocations for intestate married parents in the scenario in which they are survived by an adult child with the same level of wealth that they currently possess. In that scenario, 34.79% (N=135) of intestate married parents favor allocating about half of the intestate estate to the surviving spouse, while 34.54% (N=134) favor an allocation of all of the intestate estate. This could indicate greater interest among intestate married parents in ensuring spousal support when the estate is modest and there are no longer any financially dependent descendants. However, on the whole, the results offer further evidence that the popularity of allocating all of the intestate estate to the surviving spouse has waned, including among those most likely to face the situation of being survived by a spouse and descendant.

b. *Wealth and Dispositive Preferences*

Finally, it is possible that preferred allocations to the surviving spouse are a function of respondent wealth. Although the manipulations across scenarios did not reveal large differences in preferences in the aggregate or within individual respondents, there is reason to expect that an analysis focused on individual wealth might reveal different patterns. For example, the preferences of a respondent who is already very wealthy may not be greatly affected by the manipulation on wealth, but that individual's preferences may differ from those of another individual with less wealth.

That said, it is not clear exactly how individual wealth is likely to shape dispositive preferences when a decedent is survived by a spouse and child. If there is a desire to ensure sufficient financial support to the surviving spouse, respondents with lower levels of wealth may be more likely to allocate more of the intestate estate to the surviving spouse than those of greater means. On the other hand, assessments of "sufficient financial support" are likely related to wealth, which could mean that those with more wealth are not necessarily likely to allocate a smaller share to the surviving spouse than those with more modest estates. This may also be further complicated by assessments about the needs of descendants; in lower-wealth families, descendants may have greater economic need, encouraging support to both spouse and descendants. Indeed, early survey research offers some support for this theory.[160]

Understanding these dynamics is important given that intestate estates tend to be smaller. To the extent intestacy laws aim to serve the

160 *See supra* Part II.B.2.

needs of those with more modest financial resources,[161] it is important to understand what those preferences are. As a first step toward addressing this need, I explore the distribution of preferred allocations among groups of respondents with different levels of individual wealth. Figure 7 indicates the proportion of respondents within each wealth category who preferred a given categorical allocation to the surviving spouse in each scenario. Because there are several wealth categories, I change the display from the bar graph format used in the analysis of intestate married parents, but the same type of information is displayed.

The distributions differ across wealth categories[162] and an interesting pattern emerges. In each scenario, among those at the lower end of the wealth spectrum (those with negative wealth, zero wealth, and wealth less than $50,000), splitting the estate between the spouse and child is the most common preference. In contrast, among those at the highest end of the wealth spectrum (those with wealth of at least $150,000), allocating all of the intestate estate to the surviving spouse is the most popular. Those with wealth of at least $50,000 and less than $150,000 are the crossover. In the scenario in which respondent is survived by a minor child and dies with the same wealth, respondents with this amount of wealth are almost perfectly split between allocating half (N=103, 32.91%) and all (N=101, 32.27%) of the intestate estate to the surviving spouse. A greater share of respondents chose to allocate about half of the intestate estate to the surviving spouse in the scenario in which they again were survived by a minor child but had more wealth,[163] and in the scenario where they were survived by an adult child and had the same wealth,[164] but the share allocating all of the intestate estate is close behind. In the "adult child, more wealth" scenario, allocating half of the intestate estate is the most popular allocation by a slightly larger margin (allocation of half N=108, 35% versus allocation of all N=85, 27%). This suggests that wealth matters for determining probable intent when a decedent is survived by a spouse and child, but also presents something of a conundrum.

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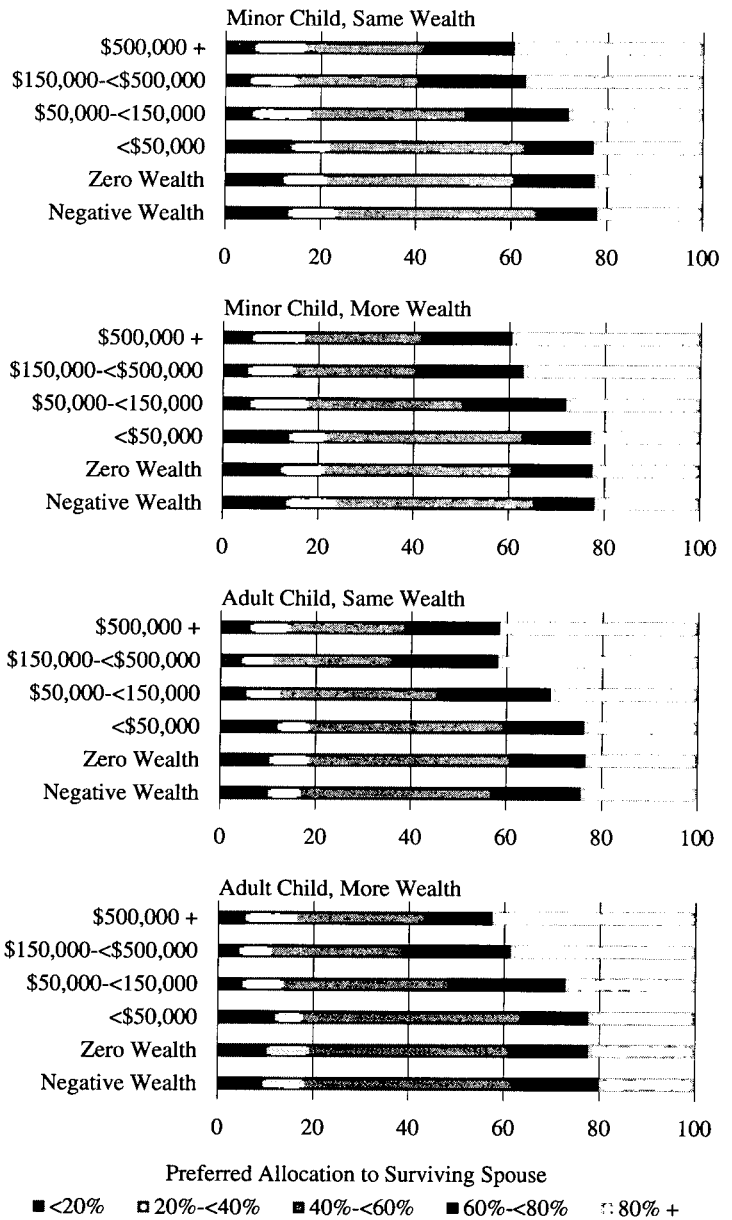
161 *See, e.g.*, UNIF. PROB. CODE pt. 1 cmt. (UNIF. L. COMM'N amended 2019) (noting that the goal of the UPC's intestacy provisions is to "provide suitable rules for the *person of modest means* who relies on the estate plan provided by law." (emphasis added)).

162 Statistical tests rejecting the null hypothesis that there is no difference in the distribution of preferred categorical allocations to the surviving across wealth categories, by scenario: minor child, same wealth: X^2 (20, N=1,975) = 93.84, p<0.001; minor child, more wealth: X^2 (20, N=1,975) = 98.67, p<0.001; adult child, same wealth: X^2 (20, N=1,975) = 88.88, p<0.001; adult child, more wealth: X^2 (20, N=1,975) = 108.14, p<0.001.

163 Allocation of about half of the intestate estate to the surviving spouse: N=101, 32%; allocation of all of the intestate estate to the surviving spouse: N=88, 28%.

164 Allocation of about half of the intestate estate to the surviving spouse: N=104, 33%; allocation of all of the intestate estate to the surviving spouse: N=96, 31%.

FIGURE 7. DISTRIBUTIONS OF PREFERRED CATEGORICAL ALLOCATIONS, BY RESPONDENT WEALTH CATEGORY AND HYPOTHETICAL SCENARIO



One interpretation of the results is that intestacy should prioritize the preferences of those with less wealth and thus allocate less to the surviving spouse. An alternative interpretation would highlight that those most strongly in favor of this type of shared allocation were those with negative or zero wealth, who would not actually be affected by the intestacy laws because there is no estate to distribute. Instead, one could argue that those with modest, but positive, net wealth are the group to which policymakers should pay the greatest attention. Unfortunately, this raises a question about what, exactly, constitutes a "modest" estate. Among respondents to this study, those with more than $50,000 but less than $150,000 in net wealth offer the most conflicting evidence of probable intent, while those with higher-value estates are more likely to favor allocating all of the intestate estate to the surviving spouse.

III. IMPLICATIONS

Policymakers charged with designing intestacy laws face the daunting task of crafting allocations that align with majoritarian preferences.[165] In the case of married parent decedents, this optimization process is particularly fraught, as several competing objectives may factor into individual preferences. Despite this, earlier empirical studies concluded that allocating the entirety of the intestate estate of a married parent decedent to the surviving spouse was overwhelmingly supported by most people.[166] This study suggests that this is no longer true. Rather, the findings of this study—revealing the preferences of a national sample of respondents—indicate that there is greater support for a reduced allocation to the surviving spouse that allows for the remainder to pass to the decedent's descendants. This is true even when we limit our focus to intestate married parents, those most likely to be affected by intestacy provisions.

At the same time, this preference is not overwhelmingly dominant. A large portion of respondents favor allocating the entire estate to the surviving spouse. That allocation offers the benefit of qualifying the entire estate for the marital deduction and avoids the need for guardianships, which policymakers have long noted as further justifications for this approach. Yet these concerns do not seem to be widely shared. For example, even where scenarios explicitly manipulate the presence of minor children, respondents' preferences largely remained stable. Thus, it is not clear that guardianship concerns are what motivate individuals to prefer this allocation.

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165 *See* Taylor Poppe, *supra* note 70, at 115.

166 *See supra* Part I.B.2.

Furthermore, although preferences remained largely stable across the four hypothetical scenarios, there was some slight evidence that respondents preferred a greater allocation to the surviving spouse when the surviving child was an adult. This offers suggestive evidence that respondents were motivated by a desire to ensure support directly to minor descendants, which overwhelmed any concerns about the administrative challenges involved.

On the other hand, there is also a question as to whether the respondents who preferred splitting the estate between the surviving spouse and child appreciate the potential repercussions of this allocation. This suggests a need for further investigation of whether preferences shift in response to additional legal information. Future empirical research could determine whether individuals who are informed of the realities of inheritance by minors continue to favor dividing the intestate estate between the spouse and children.

Additionally, the results raise questions about the needs and desires of individuals who are differently situated economically. The distributions of preferred allocations are strongly patterned by individual wealth, in directions that may be somewhat counterintuitive to policymakers and practitioners.[167] Many states allocate a minimum lump sum to the surviving spouse, with the spouse and descendants sharing any balance above. This is consistent with the idea that decedents want to ensure a minimal level of support to the surviving spouse but would like the spouse to share with descendants if enough remains. Following this intuition, we would expect individuals who have more wealth to be more likely to divide the estate between the spouse and descendants. The patterns in this study suggest a contrary narrative, in which individuals with less wealth are more likely to want to split the estate and those with more wealth allocate everything to the surviving spouse.

Before incorporating this preference into intestacy provisions, it would be helpful if we could better identify those respondents whose property is more likely to be subject to intestacy. We lack large-scale comprehensive data about the size of intestate estates, making it difficult to further target our analysis. In large part, this reflects sampling biases inherent in data collected from probate court records. For example, Professor David Horton's study of decedents' estates in Alameda County, California, for decedents who died in 2007 found that intestate estates had an average gross value of $530,704[168] and a median value that falls below that.[169] However, low-value estates omitted from the formal probate process are excluded from the data, biasing the results

167 *See* Johnson & Robbennolt, *supra* note 117, at 484.

168 Horton, *supra* note 62, at 627.

169 *See* Horton, *Wills Law*, *supra* note 108, at 1123 tbl.1.

upward; estates transferred to surviving spouses are also omitted from the data, although the impact of this omission is less clear.[170] Thus, the results suggest a potential benefit to additional investigation of the values and holdings of intestate estates subject to these provisions and their correspondence to the preferences of individuals with those characteristics.

Finally, assuming that this study is correct in identifying a greater appetite for allocations that divide the intestate estate between the surviving spouse and descendants, even if minors, it may indicate a need for policymakers to revisit existing mechanisms for transferring property to minors. Guardianships or conservatorships are imperfect solutions, as evidenced by the fact that those who benefit from legal counsel opt out of this system.[171] Are there ways that we might allow those who lack access to counsel but prefer to allocate a portion of their property to descendants to also enjoy these preferred approaches?

Of course, the scope of these suggestions is limited. There are more radical proposals that might address the situation of not only married parent decedents, but other intestate decedents as well. We might reform the default rules by gleaning dispositive preferences from other evidence of donative intent,[172] probate court judges might be given greater discretion,[173] or default rules could become increasingly complex and personalized.[174] Or we might focus on expanding access to estate planning, empowering a greater proportion of those who are currently intestate to exercise control over the disposition of their property at death.[175]

IV. Conclusion

As the initial UPC was being finalized in 1969, the reporter for the project declared—based on empirical and anecdotal evidence available at the time—that, "The pattern of dividing property between spouse and

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170 *See* Horton, *supra* note 62, at 628.

171 *See* Patrick, *supra* note 86, at 1100-01.

172 *See* Mary Louise Fellows et al., *An Empirical Assessment of the Potential for Will Substitutes to Improve State Intestacy Statutes*, 85 Ind. L.J. 409, 412-13 (2010) (noting the potential for will substitutes to inform understandings of decedent preferences, although limiting this to decedents other than married parents).

173 *See* Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 U. Mich. J.L. Reform 787, 815-16 (2012).

174 *See* Porat & Strahilevitz, *supra* note 152, at 1425; *but see* Shelly Kreiczer-Levy, *Big Data and the Modern Family*, 2019 Wis. L. Rev. 349, 351-52 (2019).

175 *See, e.g.*, Reid Kress Weisbord, *Facilitating Homemade Wills*, *in* Beyond Elite Law: Access to Civil Justice in America 395, 395 (Samuel Estreicher & Joy Radice eds., 2016).

issue . . . is patently obsolete."[176] Consistent with this belief, the 1990 UPC's intestacy provisions allocate the entirety of the intestate estate to the surviving spouse when the decedent is also survived by descendants of the marriage.[177] Unchanged for more than 30 years, the model legislation suggests stability in the probable intent of intestate married parent decedents.[178] Yet contemporary state intestacy provisions tell a different story. They differ dramatically by jurisdiction, indicating divergent understandings of probable intent and assessments of how best to further it.[179] Moreover, existing empirical evidence of dispositive preferences is now quite dated. Is it really true that most married parents still prefer to allocate all of their estate to their surviving spouse?

This study is the first to offer a modern empirical assessment of dispositive preferences when a decedent is survived by a spouse and a descendant of the marriage. It offers evidence that preferences have evolved; most notably, the study finds that the practice of dividing property between the spouse and issue has reemerged from its obsolescence and is now the dominant dispositive preference. Of course, as with most things, the more closely you look, the more complicated things become. While this preference emerges as the most popular among several options, it still fails to capture the preferred allocations of many individuals. Yet, among intestate married parents and those with smaller estates, there is evidence in favor of dividing the estate between spouse and child.

This is an important insight for both policymakers and practitioners. For policymakers—both those on the state level and those developing model legislation—it suggests the need to update assumptions about the probable intent of married parents. It also points the way for future empirical studies to further refine our understanding of dispositive intent. For practitioners, it offers an important reminder not to assume that current and future clients will continue to share the preferences of prior cohorts of testators.

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176 Wellman, *supra* note 101, at 204.

177 UNIF. PROB. CODE § 2-102 cmt. (UNIF. L. COMM'N amended 2019).

178 *See, e.g.*, Mary Louise Fellows & Thomas P. Gallanis, *The Uniform Probate Code's New Intestacy and Class Gift Provisions*, 46 ACTEC L.J. 127, 132 ("Section 2-102 [governing the allocation to the surviving spouse] was revised in 1990 and did not need further revision in 2019.").

179 *See* discussion *supra* Part I.A.2.

APPENDIX

JURISDICTION	CITATION	COMMENT
Alabama	ALA. CODE § 43-8-41(3) (2022).	"The intestate share of the surviving spouse is . . . [i]f there are surviving issue all of whom are issue of the surviving spouse also, the first $50,000.00 in value, plus one-half of the balance of the intestate estate."
Alaska	ALASKA STAT. § 13.12.102(a)(1)(B) (2021).	"[T]he intestate share of a decedent's surviving spouse is the entire intestate estate if . . . all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent."
Arizona	ARIZ. REV. STAT. ANN. § 14-2102 (2022).	Allocating one half of the community and quasi-community property to the surviving spouse
	ARIZ. REV. STAT. ANN. § 14-2102(1) (2022).	"The following part of the intestate estate, as to both separate property and the one-half of community property that belongs to the decedent, passes to the surviving spouse: if there are surviving issue all of whom are issue of the surviving spouse also, the entire intestate estate."
Arkansas	ARK. CODE ANN. § 28-9-214(1) (2022).	Allocating the entirety of the intestate estate to the children of the descendant per capita or per stirpes
California	CAL. PROB. CODE § 100(a) (West 2021).	Allocating one half of community and quasi-community property to the surviving spouse
	CAL. PROB. CODE § 101(a) (West 2021).	Allocating one half of community and quasi-community property to the surviving spouse

JURISDICTION	CITATION	COMMENT
	CAL. PROB. CODE § 6401(a)-(b), (c)(2)-(3) (West 2021).	Allocating the decedent's one half of community and quasi-community property to the surviving spouse and allocating one half of the separate property to the surviving spouse if the decedent "leaves only one child or the issue of one deceased child" or one-third of the separate property "[w]here the decedent leaves more than one child" or "the issue of one or more deceased children" or "issue of two or more deceased children."
Colorado	COLO. REV. STAT. § 15-11-102(1)(b) (2022).	"The intestate share of a decedent's surviving spouse is: [t]he entire intestate estate if . . . [a]ll of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent."
Connecticut	CONN. GEN. STAT. § 45a-437(a)(3) (2022).	"[T]he portion of the intestate estate of the decedent . . . which the surviving spouse shall take is . . . [i]f there are surviving issue of the decedent all of whom are also issue of the surviving spouse, the first one hundred thousand dollars plus one-half of the balance of the intestate estate absolutely."
Delaware	DEL. CODE ANN. tit. 12, § 502(3) (2022).	"The intestate share of the surviving spouse is: [i]f there are surviving issue all of whom are issue of the surviving spouse also, the first $50,000 of the intestate personal estate, plus one half of the balance of the intestate personal estate, plus a life estate in the intestate real estate."

JURISDICTION	CITATION	COMMENT
District of Columbia	D.C. CODE § 19-302(2) (2022).	"The intestate share of a decedent's surviving spouse is . . . [t]wo-thirds of any balance of the intestate estate, if the decedent's surviving descendants are also descendants of the surviving spouse . . . and there is no other descendant of the surviving spouse . . . who survives the decedent."
Florida	FLA. STAT. § 732.102(2) (2022).	"The intestate share of the surviving spouse is . . . [i]f the decedent is survived by one or more descendants, all of whom are also descendants of the surviving spouse, and the surviving spouse has no other descendant, the entire intestate estate."
Georgia	GA. CODE ANN. § 53-2-1(c)(1) (2022).	"If the decedent is [survived by a spouse and] also survived by any child or other descendant, the spouse shall share equally with the children . . . provided, however, that the spouse's portion shall not be less than a one-third share."
Hawaii	HAW. REV. STAT. § 560:2-102(1)(B) (2022).	"The intestate share of a decedent's surviving spouse . . . is . . . [t]he entire estate if . . . [a]ll of the decedent's surviving descendants are also descendants of the surviving spouse . . . and there is no other descendant of the surviving spouse . . . who survives the decedent."

JURISDICTION	CITATION	COMMENT
Idaho	IDAHO CODE ANN. § 15-2-102(a)(3), (b)(1) (2022).	"The intestate share of the surviving spouse is . . .[a]s to separate property . . . [i]f there are surviving issue of the deceased spouse, one-half (1/2) of the intestate estate [and] . . . [a]s to community property . . . [t]he one-half (1/2) . . . of community property which belongs to the decedent passes to the surviving spouse."
Illinois	755 ILL. COMP. STAT. 5/2-1(a) (2022).	"The intestate real and personal estate of a resident decedent . . . shall be distributed . . . [i]f there is a surviving spouse and also a descendant of the decedent: 1/2 of the entire estate to the surviving spouse . . . ."
Indiana	IND. CODE § 29-1-2-1(b)(1) (2022).	"[T]he surviving spouse shall receive . . . [o]ne-half (1/2) of the net estate if the intestate is survived by at least one (1) child or by the issue of at least one (1) deceased child."
Kansas	KAN. STAT. ANN. § 59-504 (2022).	"If the decedent leaves a spouse and a child, or children, or issue of a previously deceased child or children, one-half of such property shall pass to the surviving spouse."
Kentucky	KY. REV. STAT. ANN. § 391.010 (West 2022).	"When a person having right or title to any real estate or inheritance dies intestate as to such estate, it shall descend in common to his kindred . . . ."
	See KY. REV. STAT. ANN. § 391.030(1) (West 2022).	Allocating the personal property of a intestate decedent "among the same persons and in the proportions, to whom and in which real estate is directed to descend."

JURISDICTION	CITATION	COMMENT
Louisiana	LA. CIV. CODE ANN. art. 890 (2021).	"If the deceased spouse is survived by descendants, the surviving spouse shall have a usufruct over the decedent's share of the community property to the extent that the decedent has not disposed of it by testament. This usufruct terminates when the surviving spouse dies or remarries, whichever occurs first."
Maine	ME. REV. STAT. tit. 18-C, § 2-102(1)(B) (2022).	"The intestate share of a decedent's surviving spouse is . . . [t]he entire intestate estate if . . . [a]ll of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent."
Maryland	MD. CODE ANN., EST. & TRUSTS § 3-102(b)–(c) (West 2022).	"If there is a surviving minor child, the [intestate] share [of the surviving spouse] shall be one-half. If there is no surviving minor child, but there is surviving issue, the [intestate] share [of the surviving spouse] shall be the first $40,000 plus one-half of the residue."
Massachusetts	MASS. GEN. LAWS ch. 190B, § 2-102(1)(ii) (2022).	"The intestate share of a decedent's surviving spouse is the entire intestate estate if . . . all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent."

JURISDICTION	CITATION	COMMENT
Michigan	MICH. COMP. LAWS § 700.2102(1)(b) (2022).	"The intestate share of a decedent's surviving spouse is . . . [t]he first $150,000.00 plus 1/2 of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent."
Minnesota	MINN. STAT. § 524.2-102(1)(ii) (2022).	"The intestate share of a decedent's surviving spouse is . . . the entire intestate estate if . . . all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent."
Mississippi	MISS. CODE ANN. § 91-1-7 (2022).	"[W]here the deceased husband shall leave a child or children by that or a former marriage, or descendants of such child or children, his widow shall have a child's part of his estate . . . If a married woman die owning any real or personal estate not disposed of, it shall descend to her husband and her children or their descendants . . . in equal parts."
Missouri	MO. REV. STAT. § 474.010(1)(b) (2021).	"The surviving spouse shall receive . . . [t]he first twenty thousand dollars in value of the intestate estate, plus one-half of the balance of the intestate estate, if there are surviving issue, all of whom are also issue of the surviving spouse."

JURISDICTION	CITATION	COMMENT
Montana	MONT. CODE ANN. § 72-2-112(1)(b) (2021).	"The intestate share of a decedent's surviving spouse is . . . the entire intestate estate if . . . all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent."
Nebraska	NEB. REV. STAT. § 30-2302(3) (2022).	"The intestate share of the surviving spouse is . . . if there are surviving issue all of whom are issue of the surviving spouse also, the first one hundred thousand dollars, plus one-half of the balance of the intestate estate."
Nevada	NEV. REV. STAT. § 134.040 (2021).	"If the decedent leaves a surviving spouse and only one child . . . the estate goes one-half to the surviving spouse and one-half to the child . . . [i]f the decedent leaves a surviving spouse and more than one child . . . the estate goes one-third to the surviving spouse . . . ."
New Hampshire	N.H. REV. STAT. ANN. § 561:1(I)(b) (2022).	"If the deceased is survived by a spouse, the spouse shall receive . . . [i]f there are surviving issue of the decedent all of whom are issue of the surviving spouse also, and there are no other issue of the surviving spouse who survive the decedent, the first $250,000, plus 1/2 of the balance."

JURISDICTION	CITATION	COMMENT
New Jersey	N.J. STAT. ANN. § 3B:5-3(a)(2) (West 2021).	"The intestate share of the surviving spouse . . . is . . . [t]he entire intestate estate if . . . [a]ll of the decedent's surviving descendants are also descendants of the surviving spouse . . . and there is no other descendant of the surviving spouse . . . who survives the decedent."
New Mexico	N.M. STAT. ANN. § 45-2-102(A)(2), (B) (2022).	"The intestate share of the surviving spouse is . . . as to separate property . . . if there is surviving issue of the decedent, one-fourth of the intestate estate; . . . and as to community property, the one-half of the community property as to which the decedent could have exercised the power of testamentary disposition passes to the surviving spouse."
New York	N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(a)(1) (McKinney 2022).	"The property of a decedent not disposed of by will shall be distributed . . . as follows: . . . [i]f a decedent is survived by . . . [a] spouse and issue, fifty thousand dollars and one-half of the residue to the spouse . . . ."
North Carolina	N.C. GEN. STAT. § 29-14(a)(1)-(2) (2021).	"The share of the surviving spouse in the real property is . . . [i]f the intestate is survived by only one child . . . a one-half undivided interest in the real property [or] [i]f the intestate is survived by two or more children . . . a one-third undivided interest in the real property."

JURISDICTION	CITATION	COMMENT
	See N.C. GEN. STAT. ANN. § 29-14(b)(1)-(2) (2021).	Allocating $60,000 and one-half of any balance above to the surviving spouse if the decedent is survived by one child and $60,000 plus one-third of any balance above if the decedent is survived by two or more children
North Dakota	N.D. CENT. CODE § 30.1-04-02(1)(b) (2021).	"The intestate share of a decedent's surviving spouse is . . . [t]he entire intestate estate if . . . [a]ll of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent."
Ohio	OHIO REV. CODE ANN. § 2105.06(B) (West 2022).	"When a person dies intestate having title or right to any personal property, or to any real property or inheritance, . . . [the property] shall descend and pass in parcenary . . . in the following course: . . . [i]f there is a spouse and one or more children of the decedent . . . and all of the decedent's children who survive . . . also are children of the surviving spouse, then the whole to the surviving spouse."
Oklahoma	OKLA. STAT. tit. 84, § 213(B)(1)(c) (2022).	"If the decedent leaves a surviving spouse, the share of the estate passing to said spouse is . . . if there are surviving issue, all of whom are also issue of the surviving spouse . . . an undivided one-half . . . interest in all the property of the estate . . . ."

JURISDICTION	CITATION	COMMENT
Oregon	OR. REV. STAT. § 112.025(1) (2022).	"If the decedent leaves a surviving spouse and one or more descendants, the intestate share of the surviving spouse is . . . [i]f there are one or more surviving descendants of the decedent all of whom are descendants of the surviving spouse also, the entire net estate."
Pennsylvania	20 PA. CONS. STAT. § 2102(3) (2022).	"The intestate share of a decedent's surviving spouse is . . . [i]f there are surviving issue of the decedent all of whom are issue of the surviving spouse also, the first $30,000 plus one-half of the balance of the intestate estate."
Rhode Island	*See* R.I. GEN. LAWS § 33-1-10(2) (2022).	Allocating "[o]ne-half of the surplus [personal property] to the widow or surviving husband, forever, if the intestate died leaving issue."
South Carolina	S.C. CODE ANN. § 62-2-102(2) (2022).	"The intestate share of the surviving spouse is . . . if there are surviving issue, one-half of the intestate estate."
South Dakota	S.D. CODIFIED LAWS § 29A-2-102(1)(ii) (2022).	"The intestate share of a decedent's surviving spouse is [t]he entire intestate estate if . . . [a]ll of the decedent's surviving descendants are also descendants of the surviving spouse."
Tennessee	TENN. CODE ANN. § 31-2-104(a)(2) (2022).	"The intestate share of the surviving spouse is . . . [i]f there are surviving issue of the decedent, either one-third (1/3) or a child's share of the entire intestate estate, whichever is greater."

JURISDICTION	CITATION	COMMENT
Texas	*See* TEX. EST. CODE ANN. § 201.002(a)-(b) (West 2021).	Allocating from "the estate, other than a community estate" to the surviving spouse "one-third of the personal estate" and "a life estate in one-third of the person's land."
	TEX. EST. CODE ANN. § 201.003(b)(2) (West 2021).	"The community estate of the deceased spouse passes to the surviving spouse if . . . all of the surviving children and descendants of the deceased spouse are also children or descendants of the surviving spouse."
Utah	UTAH CODE ANN. § 75-2-102(1)(a)(ii) (West 2022).	"The intestate share of a decedent's surviving spouse is the entire intestate estate if . . . all of the decedent's surviving descendants are also descendants of the surviving spouse."
Vermont	VT. STAT. ANN. tit. 14, § 311(1) (2022).	"The surviving spouse shall receive the entire intestate estate if no descendant of the decedent survives the decedent or if all of the decedent's surviving descendants are also descendants of the surviving spouse."
Virginia	VA. CODE ANN. § 64.2-200(A)(1) (2022).	"The real estate of any decedent . . . passes by intestate succession . . . [t]o the surviving spouse of the decedent, unless the decedent is survived by children or their descendants, one or more of whom are not children or their descendants of the surviving spouse."
	See VA. CODE. ANN. § 64.2-201(A) (2022).	Allocating the personal estate "to the same persons, and in the same proportions, as real estate descends."

JURISDICTION	CITATION	COMMENT
Washington	WASH. REV. CODE § 11.04.015(1)(a)-(b) (2022).	"The surviving spouse . . . shall receive . . . [a]ll of the decedent's share of the net community estate and [o]ne-half of the net separate estate if the intestate is survived by issue."
West Virginia	W. VA. CODE § 42-1-3(a)(2) (2022).	"The intestate share of a decedent's surviving spouse is the entire intestate estate if . . . [a]ll of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent."
Wisconsin	WIS. STAT. § 852.01(1)(a)(1) (2022).	The intestate estate "passes to the decedent's surviving heirs as follows: [t]o the spouse . . . if the surviving issue are all issue of the surviving spouse and the decedent, the entire estate."
Wyoming	WYO. STAT. ANN. § 2-4-101(a)(i) (2022).	"If the intestate leaves husband or wife and children . . . one-half (1/2) of the estate shall descend to the surviving husband or wife . . . ."