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# Fringe Inheriting: Probate Avoidance at Both Ends of the Wealth Spectrum

*Allison Tait\**

The principal system in the United States for transferring wealth from one generation to the next – the probate system – is a historically and steadfastly public one. Probate is a set of public processes and a court system created to situate and facilitate wealth transfer, giving legal imprimatur to the distribution of family money. Nevertheless, while the probate system may be the central and most conventional system for transferring wealth, not all families and individuals avail themselves of the system. The broad swath of families who avail themselves of the services and certain benefits of the probate system are, more likely than not, families who fall somewhere in the expansive middle of the wealth spectrum.<sup>1</sup> Families and individuals on the polar ends of the wealth spectrum are far less likely than those in the middle to transfer wealth (whatever amount they have) through the probate process. That is to say, families and individuals at either end of the wealth spectrum often seek to transfer family money outside of probate, privately, off-grid.

This brief article examines why both low-income and high-wealth families manage and transfer wealth outside of probate courts – often through fringe financial institutions and outside of public processes. It also briefly explores the divergences in how each population negotiates such transfers outside of probate and the wages of both populations preferring private, nonprobate mechanisms. In some ways, the two populations resemble one another in that both populations possess a degree of mistrust in the public institution represented by probate and are guided by a sense that their needs are not served by such an institution. Nevertheless and predictably, within a political economy of marketized wealth mechanisms, fringe inheriting looks deeply dissimilar on each end of the

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<sup>1</sup> See Jesse Bennett et al., *Are You in the American Middle Class? Find Out with Our Income Calculator*, PEW RSCH. CTR. (July 23, 2020), <https://www.pewresearch.org/fact-tank/2020/07/23/are-you-in-the-american-middle-class/> [<https://perma.cc/U5ZU-SWG6>]. Class distinctions are difficult as most people identify as middle class. However, in a recent Pew Research Center Study (2020), researchers found that “[m]iddle-income households – those with an income that is two-thirds to double the U.S. median household income – had incomes ranging from about \$48,500 to \$145,500 in 2018. Lower-income households had incomes less than \$48,500 and upper-income households had incomes greater than \$145,500.” *Id.*

wealth spectrum and high-wealth families are possessed of dramatically different choices for transferring family money outside of probate than their low-income counterparts. In this way, families on either end of the wealth spectrum both differ from families in the middle while presenting distorted reflections of one another.<sup>2</sup>

### I. INHERITING IN A LOW-INCOME FAMILY

Families with lower incomes and less wealth (perhaps no wealth) have often escaped notice in the story of wealth transfer. These families do not form part of the “wealth canon”<sup>3</sup> in that they do not populate the cases and examples discussed in the legal canon of cases and doctrine, in large part because they are not in probate courts.<sup>4</sup> Moreover, the historical record often loses track of such families precisely because they do operate outside of the probate system: “Probate inventories [ . . . ] contain very few documents relating to labouring families, because the vast majority of such families remained outside the scope of the probate system.”<sup>5</sup>

Low-income families often do not fit into the probate picture because the decedents in these families do not have wills. And while it is not necessary to die testate in order to go through the probate process, many people associate the act of going to probate with will proving and administration. A surprisingly large percentage of people do not have wills<sup>6</sup> – “[t]he reality is that most people do not make wills”<sup>7</sup> – however the phenomenon is more acute and even more widespread with low-

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<sup>2</sup> See generally June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185, 1192-93 (2013). This categorization represents a “triple system” in wealth transfer, similar in some ways to the triple system of family law identified and described by June Carbone and Naomi Cahn. See *id.*

<sup>3</sup> 3 See Naomi Cahn & Amy Zietlow, “*Making Things Fair*”: *An Empirical Study of How People Approach the Wealth Transmission System*, 22 ELDER L.J. 325, 326-27 (2014). As Naomi Cahn and Amy Zietlow remark, “[t]he stories and legal issues faced by the non-elite are not deemed to be a central, organizing part of our trusts and estates tradition; they are not present within the overarching and defining narrative that articulates the field’s core precepts.” *Id.* at 327.

<sup>4</sup> See *id.*

<sup>5</sup> Peter King, *Pauper Inventories and the Material Lives of the Poor in the Eighteenth and Early Nineteenth Centuries*, in CHRONICLING POVERTY: THE VOICES AND STRATEGIES OF THE ENGLISH POOR, 1640-1840 at 155, 156 (Tim Hitchcock et al. eds., 1997).

<sup>6</sup> In a recent study 67% of the respondents said that they had no estate plan in place. See Lorie Konish, *67% of Americans Have No Estate Plan, Survey Finds. Here’s How to Get Started on One*, CNBC (Apr. 11, 2022, 3:25 PM), <https://www.cnbc.com/2022/04/11/67percent-of-americans-have-no-estate-plan-heres-how-to-get-started-on-one.html> [<https://perma.cc/3KG2-6D7K>].

<sup>7</sup> Cahn & Zietlow, *supra* note 3, at 329.

income families than it is with the rest of the population.<sup>8</sup> Moreover, statistics also reveal that “African Americans have much higher intestacy rates than the population as a whole: seventy percent die without a will, a much higher rate than whites.”<sup>9</sup> The phenomenon is present as well with Latinx families and Native American families.<sup>10</sup> Conversely, “[d]emographic analyses reveal that individuals are more likely to have a will if they are white, male, married or formerly married, educated, older, and wealthy; this demographic pattern has endured over time.”<sup>11</sup>

There are a number of reasons that low-income families and individuals do not have wills, including the fact that many low-income families see themselves as apart from a planning process designed to serve those with greater wealth.<sup>12</sup> One particularly common refrain that emerges in surveys – and one that touches directly on the desire to avoid conventional legal services and institutions – is the cost and anxiety of engaging in estate planning.<sup>13</sup> Low-income families and individuals often mention feeling a significant degree of distrust when confronted with a process that is potentially riddled with hidden costs. Accordingly, what comes into focus based on this distrust is a larger pattern of avoiding conventional legal and financial institutions on account of perceived cost, but also the fear of unknown forms of liability, unwanted burden, and unexpected obligations.

This distrust – this desire to take private, extra-legal, routes to wealth transfer – maps on to the desire among some low-income families and individuals to avoid other kinds of conventional financial institutions as well. For example, low-income individuals when surveyed mention that they avoid mainstream banks on a day-to-day basis because they don’t have enough money to meet minimum balance requirements, they are wary of overdraft fees and fines, and they don’t trust

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<sup>8</sup> See *id.* at 333, 343, 364.

<sup>9</sup> Carla Spivack, *Broken Links: A Critique of Formal Equity in Inheritance Law*, 2019 WIS. L. REV. 191, 204 (2019) (citing Earl G. Graves, Sr., *Lack of Estate Planning Puts Black Wealth at Risk*, BLACK ENTERPRISE (Nov. 3, 2015), <https://www.blackenterprise.com/lack-of-estate-planning-puts-black-wealth-at-risk/> [<https://perma.cc/JH57-5QD7>]).

<sup>10</sup> See, e.g., *id.* at 204-05; see also Danaya C. Wright, *Disrupting the Wealth Gap Cycles: An Empirical Study of Testacy and Wealth*, 2019 WIS. L. REV. 295, 313-15 (2019); but see Emily S. Taylor Poppe, *Surprised by the Inevitable: A National Survey of Estate Planning Utilization*, 53 U.C. DAVIS L. REV. 2511, 2549 (2020).

<sup>11</sup> Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 896-97 (2013).

<sup>12</sup> See generally Konish, *supra* note 6. (For example, 33% of the respondents replied that they did not think they had sufficient assets to make a will.).

<sup>13</sup> *Id.* (stating, “13% said the estate-planning process is too costly and 12% said they do not know how to get a will.”).

large banks.<sup>14</sup> Consequently, these families – in the bottom tier of income earners — are often “unbanked” or “underbanked,”<sup>15</sup> in that they avoid conventional financial institutions and manage their finances through the use of “fringe” providers such as payday lenders, check-cashing services, pawnshops, and car title lenders.<sup>16</sup> The low-income families that avoid probate, anxious about the rules and financial surprises of highly determined and bureaucratic public processes, are plausibly the same families that avoid mainstream banking for many of the same reasons.

Accordingly, in both cases – avoidance of probate and avoidance of conventional banks<sup>17</sup> – the relationships between these families and individuals and mainstream institutions are fraught because of financial precarity and the desire to privately manage their money in order to safeguard it from confiscation through fees and fines. And, as a result, low-income families turn to informal and extra-legal mechanisms of transfer. Whether there is a will or not, families keep the process within their control and strive to actualize both fairness and decedent intent according to their best intentions. Consequently, as Cahn and Zietlow observe, the “nuts and bolts of the inheritance process for many Ameri-

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<sup>14</sup> See *How America Banks: Household Use of Banking and Financial Services: 2019 FDIC Survey*, FED. DEPOSIT INS. CORP. 3 (2020), <https://www.fdic.gov/analysis/household-survey/2019report.pdf>. Over half of unbanked households cited “[d]on’t have enough money to meet minimum balance requirements” as a reason for not having an account. Approximately one-third of unbanked households gave “[d]on’t trust banks” as a reason for not having an account. *Id.*

<sup>15</sup> See BD. GOVERNORS FED. RESRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2020 at 39 (May 2021), <https://www.federalreserve.gov/publications/2021-economic-well-being-of-us-households-in-2020-executive-summary.htm> [<https://perma.cc/68SR-CWUU>]. The Federal Reserve counts 13% of Americans as “underbanked,” meaning that they had bank accounts but made use of alternative financial services, and 5% as “unbanked” meaning that they did not have a bank account.

<sup>16</sup> See *id.* at 39-40. Of the 5% of Americans who were unbanked in 2020, 84% of them had an annual income below \$25,000 and 94% of them had an annual income below \$50,000. The un- and underbanked are also more likely to be nonwhite. Of the 5% of adults who are unbanked, 13% are Black and 9% are Hispanic. Of the 13% of adults who are underbanked, 27% are Black and 21% are Hispanic. *Id.* at 40.

<sup>17</sup> See Jacob Faber & Terri Friedline, *The Racialized Costs of Banking*, NEW AM. (June 21, 2018), <https://www.newamerica.org/family-centered-social-policy/reports/racialized-costs-banking/the-racialized-costs-of-banking/> [<https://perma.cc/N2AG-L6HV>]. Anxiety and distrust also arise in the context of banks due to a variety of macro-level factors, including discriminatory credit scoring practices, low wages coupled with the rising costs of sustaining a household, and debt histories. See *id.* See also Natalie Campisi, *From Inherent Racial Bias to Incorrect Data – The Problems with Current Credit Scoring*, FORBES (Feb. 26, 2021), <https://www.forbes.com/advisor/credit-cards/from-inherent-racial-bias-to-incorrect-data-the-problems-with-current-credit-scoring-models/> [<https://perma.cc/4P7G-EHGR>] (stating that a history of discrimination affects the data that credit scoring models currently use).

cans takes place in a different universe . . . where the black-letter law is only a shadow, keepsakes and heirlooms assume outsized importance, and family dynamics drive outcomes.”<sup>18</sup>

## II. INHERITING IN THE WORLD OF HIGH-WEALTH FAMILIES

On the other end of the spectrum, high-wealth families and individuals are also notorious avoiders of probate.<sup>19</sup> The reasons why this population avoids probate so decidedly are fundamentally different from the reasons that low-income families do the same, but nevertheless there exists an analogous sense of mistrust in public institutions and an overriding sentiment that public processes of the probate system are inapt for their particular purposes.

Wills, to begin with, are viewed with skepticism in the high-wealth context because they make public the decedent’s wealth and turn family finances into public record.<sup>20</sup> On a micro level, publicity might reveal gifts to nonmarital partners or the disinheritance of children;<sup>21</sup> on a macro level, publicity may divulge previously secret levels of family wealth and subject the decedent and the decedent’s family to critique. Perhaps more importantly, however, high-wealth families avoid probate and tend to view the public system of wealth transfer as detrimental for their purposes because of the costs brought on by use of the probate system, most particularly the cost of taxation.<sup>22</sup> By using a will and the probate process, with no other transfer mechanisms, decedents leave their estates subject to full taxation and probate disallows them from taking advantage of wealth transfer vehicles that minimize taxation costs and maximize the family fortune.

High-wealth families and individuals, consequently, see the probate process as financially injurious and tax “inefficient.” Moreover, like their low-income counterparts, they see conventional financial services as misaligned with their asset management needs and banking desires, prompting a turn to fringe providers. In the high-wealth context, fringe providers are the private banking arms of conventional banks, boutique banks and trust companies, and even family offices. Perhaps most useful for wealth transfer, however, are trust companies that specialize in trust-

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<sup>18</sup> Cahn & Zietlow, *supra* note 3, at 325.

<sup>19</sup> See Jeff Ernsthause et al., *More Than Half of America’s 100 Richest People Exploit Special Trusts to Avoid Estate Taxes*, PROPUBLICA (Sept. 28, 2021, 10:45 AM), <https://www.propublica.org/article/more-than-half-of-americas-100-richest-people-exploit-special-trusts-to-avoid-estate-taxes> [<https://perma.cc/7ATX-THEB>].

<sup>20</sup> See Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 560 (2008) (“The decedent who chooses the will . . . [gets] public knowledge of her assets, beneficiaries, and disposition—both testamentary and personal.”).

<sup>21</sup> See *id.* at 568.

<sup>22</sup> See Ernsthause et al., *supra* note 19.

based wealth management and wealth transfer planning – especially ones located in states with permissive trust laws like Delaware, South Dakota, and Wyoming.

Trusts are a ubiquitous planning mechanism for high-wealth families because they provide financial privacy in a variety of ways. At the most basic level, trust details are not public record and,<sup>23</sup> although new Uniform Trust Code rules have given trust beneficiaries increased rights of access to the trust documents,<sup>24</sup> some U.S. states still market strict privacy as a benefit. Trust companies in Delaware, for example, regularly mention that “Delaware provides a maximum amount of privacy for the details of a family’s fortune because it does not require any court supervision or filings,”<sup>25</sup> and because “Delaware law allows a settlor to proscribe which beneficiaries should receive notice about the existence and assets of a trust.”<sup>26</sup>

Finally, layered on these forms of personal privacy, trusts also offer the signal benefit of asset “privacy” or protection through the structure of partitioned ownership. By avoiding the indices of legal ownership, a beneficiary can avoid any number of debts and obligations including taxes, equitable distribution and spousal support at divorce, and any other legal judgments. And, because of this ability to bar creditors, trusts retain and preserve family assets in a way that no other form of wealth transfer can, staving off even creditors with legitimate claims on the family wealth. None of this asset protection is possible when assets are owned outright, as assets that would pass through the probate system.

### III. EVALUATING WHAT HAPPENS IN THE FRINGE

Families on both ends of the wealth spectrum, then, perceive the public processes and the act of going to probate as misaligned with and even detrimental to their financial needs. Both populations seek to organize their family wealth transfers outside of probate and through mechanisms that offer increased privacy and control. What remains,

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<sup>23</sup> See *id.* at 566. Historically, trust law “has placed such a premium on privacy that it has denied trust beneficiaries as well as the general public access to the trust instrument.” *Id.*

<sup>24</sup> See generally Kevin D. Millard, *The Trustee’s Duty to Inform and Report Under the Uniform Trust Code*, 40 REAL PROP. PROB. & TR. J. 373, 379 (2005). This is particularly true of U.S. states that have adopted the Uniform Trust Code § 813(b)(1), which provides that a trustee must promptly furnish a copy of the trust instrument to any beneficiary who requests a copy. See *id.* at 379 n.23.

<sup>25</sup> Richard P. Trumpler, *Delaware Advantages for International Wealth Planning*, N.Y. PRIV. TR. 2 (2013), <https://www.nyprtrust.com/wp-content/uploads/2012/02/Delaware-Advantages-for-International-Wealth-Planning.pdf>.

<sup>26</sup> *Id.*

then, is to better understand the wages of both low-income and high-wealth families circumventing public processes.

Low-income families often turn to informal and extra-legal mechanisms for family wealth transfer, operating in the shadow of the probate system. In many ways, this choice to opt out of will-making and engaging with probate processes could be construed as beneficial to the families in question. By seeking privacy in the transfer process, these families realize their goal of avoiding legal costs, from planning to court costs. They lower chances of encountering unexpected and expensive roadblocks as they reduce legal friction. Moreover, as Cahn and Zietlow point out, avoiding probate means avoiding a legal system governed by definitions of family and property that are outdated and do not necessarily correspond with the family forms of low-income households.<sup>27</sup>

Detriments do, however, exist for these low-income families who disengage with probate. Avoiding probate strips low-income families of the opportunity to avail themselves of creditor-barring statutes, a forum for dispute resolution when family conflict cannot be easily managed in private, and the opportunity to keep car and home titles clear. The presence of these probate benefits for low-income families and individuals has led many commentators to express support for probate reform and the increased availability of small estate processes, available in many jurisdictions for estates under \$50,000.<sup>28</sup> Small estate administration “serves an important niche in the probate code, especially for poor families[.]”<sup>29</sup> and can help put into place certain protections that might help safeguard family wealth rather than destabilizing it for low-income families. Accordingly, putting in place public wealth transfer systems tailored to the needs of low-income families and individuals, meant to help them obtain the benefits of public processes without subjecting them to hidden costs, would be one step toward recognizing and addressing the needs of low-income families.

On the other end of the wealth spectrum, families turn to trusts and financial vehicles that operate outside of probate in order to transfer family wealth. That this system of private wealth transfer has benefits for the families and individuals who engage in such estate planning is relatively obvious. Family secrets remain secret, and undisclosed assets are protected from a range of creditors, including tax authorities. Oper-

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<sup>27</sup> See Cahn & Zietlow, *supra* note 3, at 359.

<sup>28</sup> See generally *id.* at 358 (“For many people, the default intestacy system and small estate administration work as they should; property is distributed without conflict and with maximum efficiency to a predictable group of people.”).

<sup>29</sup> Mark T. Johnson, *A “Simple” Probate Should Not Be This Complicated: Principles and Proposals for Revising Wisconsin’s Statutes for Probate Summary Procedures*, 3 WIS. L. REV. 575, 609 (2008).



ating outside of the publicity of the probate system is financially beneficial and a strong factor in family wealth preservation.

There are detriments, however, and they redound to those outside of the family rather than to the high-wealth families themselves. Financial privacy in wealth management and wealth transfer laws has played a large part in creating the wealth inequality that now plagues countries and communities, and high-wealth privacy has repercussions on the lives of ordinary- and low-wealth families through this consolidation of wealth that intensifies unequal levels of access and opportunity. The functioning of high-wealth families in private spheres reconfigures the social and economic fabric of communities and states. Speaking to this point, one commentator has remarked that “[t]rusts are one of the primary vehicles used to create and perpetuate wealth concentration, enabling wealthy elites [to] escape tax, regulation and creditors — and they must lie at the centre of debates about inequality.”<sup>30</sup> From this perspective, pushing high-wealth families toward public processes and systems of transfer defined by increased transparency, like probate, might have larger, societal benefits.

#### IV. CONCLUSION

Low-income and high-wealth families and individuals share a sense that their financial interests are not served by the public processes of probate and, in many cases, this assessment is correct. On the low-income side, probate represents a minefield of unknown costs and outcomes. On the high-wealth side, probate represents a failure to maximize wealth preservation. Accordingly, families within both populations manage their family money through fringe financial institutions and turn to fringe mechanisms for wealth transfer purposes. For low-income families, this turn to private, off-grid financial management and wealth transfer may help the families in question escape cost and a set of inapt succession rules. Reimagining public processes to help low-income families, however, could provide benefit most particularly in managing creditors and debt. For high-wealth families, the private turn is highly beneficial. In this case, reimagining the intervention of public process could help attenuate high-wealth privilege and increase benefit to collectives, communities, and citizenries dependent on the tax contributions of those families with the greatest wealth.

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<sup>30</sup> Andres Knobel, *Trusts: Weapons of Mass Injustice?* TAX JUST. NETWORK 5 (Feb. 13, 2017), <https://www.taxjustice.net/wp-content/uploads/2017/02/Trusts-Weapons-of-Mass-Injustice-Final-12-FEB-2017.pdf>.