

# An Empirical Assessment of the Potential for Will Substitutes to Improve State Intestacy Statutes<sup>†</sup>

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## I. BACKGROUND AND RATIONALE FOR AN EMPIRICAL STUDY

## A. Will Substitutes and Donative Intent

The promotion of donative freedom is the primary principle grounding inheritance law.<sup>1</sup> Indeed, succession law seeks to respect the donative intent of those who effectively express that intent.<sup>2</sup> It also, in many instances, seeks to give effect to the ineffectively expressed or unexpressed intent of decedents.<sup>3</sup> Thus, each state's intestacy statute provides a scheme for distributing an owner's property at her death in the absence of a valid will or will substitute.<sup>4</sup> In furtherance of the central goal of

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1. See, e.g., E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1069 n.31 (1999) (noting that the 1990 Uniform Probate Code "is replete with . . . provisions that the Code expressly points out serve to effectuate the decedent's donative intent" and citing nineteen examples).

2. See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. a (1998) ("The purpose of the statutory formalities . . . [for the execution of a will] is to determine whether the decedent adopted the document as his or her will. The formalities are meant to facilitate this intent-serving purpose, not to be ends in themselves.").

3. See Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALA. L. REV. 891, 912 (1992) ("[S]uccession law should reflect the desires of the 'typical person,' both with regard to protecting expressions of desire and anticipating situations where those expressions are inadequately presented."); Spitko, *supra* note 1, at 1074 n.55 (noting that the 1990 Uniform Probate Code "contains numerous provisions that serve to effectuate the donative freedom of those who do not effectively express their donative intent" and citing eleven examples, including a provision for a spouse unintentionally omitted from a premarital will, a provision for pretermitted children, a simultaneous-death provision, a revocation-upon-divorce provision, and antilapse provisions).

4. The takers of a decedent's intestate property, as prescribed by the law of intestate succession, are called "heirs." RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.1 cmts. a, b (1998). Intestacy statutes determine the disposition of a decedent's probate estate—all the property that a decedent owned at death that is not controlled by a will substitute—that the decedent did not dispose of by a valid will. *Id.* A will substitute is a lifetime revocable transfer that becomes irrevocable at the donor's death. *Id.* § 7.1. Will substitutes include life insurance policies; payable-on-death accounts; retirement accounts; certain bank, brokerage, and mutual fund accounts; certain revocable inter vivos trusts; and joint tenancies. *Id.* § 7.1 cmts. b–g; see also JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES M. LINDGREN *WILLS, TRUSTS, AND ESTATES*, 393–96 (8th ed. 2009). Notably, however, a joint tenancy with right of survivorship in real or personal property does not fit neatly into the will-substitute category. See John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1114 (1984) (labeling the joint tenancy with right of survivorship an "imperfect" will substitute because these joint tenancies also involve irrevocable lifetime transfers). Joint tenants have the right to sever a joint tenancy immediately and take their proportionate shares of the property. Therefore, a joint tenant who contributes an amount in excess of the proportionate amount of the joint tenancy retained makes an irrevocable gift to the other joint tenant or joint tenants. *Id.* The joint tenancy with right of survivorship nevertheless retains some aspects of a will substitute both because each joint tenant can sever the joint tenancy and deny the other joint tenants the right to survivorship over her share of the property and because, if the joint tenancy is not revoked, the survivors can obtain marketable title to all of the property without going through probate. *Id.*

promoting donative intent, a primary aim of American intestacy statutes is to provide for a distribution of the probate property of decedents that most likely approximates what intestate decedents would have called for had they expressed their donative intent effectively.<sup>5</sup>

A decedent might die without a will, yet might die nevertheless with one or more will substitutes.<sup>6</sup> Over the last half century, will substitutes have gained in popularity as courts and legislatures have given them their imprimatur,<sup>7</sup> financial institutions have provided a range of products allowing for beneficiary designations at death,<sup>8</sup> and public concerns about the potential expense and delay associated with probate

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5. See, e.g., UNIF. PROBATE CODE § 2-102 cmt. (2008), 8 U.L.A. 38 (Supp. 2009) (“Empirical studies support the increase in the surviving spouse’s intestate share, reflected in the revisions of this section.”); UNIF. PROBATE CODE § 2-106 cmt. (2002), 8 U.L.A. 44–45 (Supp. 2009) (revised to adopt the per-capita-at-each-generation system); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.2 reporter’s note 1 (1998) (discussing empirical studies surveying donative intent in relation to a surviving spouse’s intestate share); *id.* § 2.3 reporter’s note 5 (discussing empirical studies surveying donative intent in relation to the per-capita-at-each-generation system of representation); Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 7 (2000) (concluding that “[t]he most commonly identified goal of intestacy statutes is to create a dispositive scheme that will carry out the probable intent of most testators”); Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 230 (1991) (concluding that the decedent’s intent is the “predominant consideration” grounding an intestacy statute); Contemporary Studies Project, *A Comparison of Iowans’ Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1043 (1978) (commenting that “effectuating the intent of intestates[] has recently become the primary goal of state intestacy provisions”).

6. See generally Langbein, *supra* note 4, at 1109–15 (discussing the four main will substitutes).

7. See, e.g., KAN. STAT ANN. § 59-3501 (2005) (permitting a death beneficiary to be named in a deed of land); *Farkas v. Williams*, 125 N.E.2d 600 (Ill. 1955) (validating a revocable inter vivos trust); *In re Estate of Hillowitz*, 238 N.E.2d 723 (N.Y. 1968) (validating a payable on death contract); UNIF. PROBATE CODE § 6-101 (amended 1998), 8 U.L.A. 223 (Supp. 2009) (providing that “[a] provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary”); UNIF. PROBATE CODE § 6-212 (2006) (providing that “on death of a party sums on deposit in a multiple-party account belong to the surviving party or parties”); *id.* § 6-301 to -311 (Uniform Transfer on Death Security Registration Act permitting registration of securities in a transfer-on-death form); UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT § 201 (2009) (permitting the owner of real property to transfer the property on the owner’s death by a beneficiary designation without probate).

8. See Langbein, *supra* note 4, at 1108 (“Life insurance companies, pension plan operators, commercial banks, savings banks, investment companies, brokerage houses, stock transfer agents, and a variety of other financial intermediaries are functioning as free-market competitors of the probate system and enabling property to pass on death without probate and without will.”).

administration have grown.<sup>9</sup> In the United States today, more property passes at death by will substitute than by will.<sup>10</sup>

Notwithstanding that the central goal of an intestacy statute is to approximate the donative intent of decedents dying without wills, up until now, policy makers have not considered using the donative intent expressed in will substitutes to determine the disposition of probate property passing by intestacy. Despite the widespread popularity of will substitutes and the fact that they often control the disposition of most of a person's wealth at death, legal experts and lay people alike continue to ascribe a special status to wills. The legal advice and ritualistic formalities (e.g., witnesses) frequently associated with the execution of a will likely contribute to the belief that a will contains the clearest and most reliable expression of a decedent's intent. Revered legal traditions and legal intricacies operate together to make it difficult to imagine why a state should, or how it would, take will substitutes into account when applying intestacy statutes.

This Article uses an empirical study to test whether, in the absence of a will, beneficiary designations in will substitutes provide reliable evidence for approximating decedents' donative intent in an intestacy statute. No previous scholarship has explored the relationship between will-substitute beneficiary designations and intestacy statutes. We set out to investigate public attitudes about will substitutes and determine if the public prefers current law, which ignores will substitutes when determining the disposition of a decedent's property passing by intestate succession, or a statutory pattern that takes into account beneficiary designations found in a decedent's will substitutes. We are mindful that the import of will-substitute designations can be ambiguous when it comes to imputing intent with regard to an intestate decedent's probate estate. Our project, therefore, investigates under what circumstances and in what ways, if at all, decedents make known their donative intent with respect to their probate estates by naming a beneficiary in a will substitute.

We start with the general hypothesis that, in some cases, when a decedent has died without a will but with one or more will substitutes, those will substitutes better predict how the decedent would want her probate estate to pass than does existing intestacy law. For example, consider a woman who has died unmarried. Her closest living relative is her brother. She has died without a will but has left a life insurance policy and a retirement account naming her cousin as the beneficiary of both. Current intestacy law in every American jurisdiction would pass the entire intestate estate to her brother.<sup>11</sup> Under existing law, none of her intestate estate would pass to her cousin.<sup>12</sup> We hypothesize that, if the will substitutes are of a substantial value relative to the probate estate, it is likely that the decedent would prefer that her cousin take a

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9. *See id.* at 1116 (“Since the mid-1960’s . . . there has been no denying the depth of public dissatisfaction with probate. . . [which] has earned a lamentable reputation for expense, delay, clumsiness, makework, and worse.”).

10. DUKEMINIER ET AL., *supra* note 4, at 38–39; *see also* Langbein, *supra* note 4, at 1108 (asserting in 1984 that “[t]he law of wills and the rules of descent no longer govern succession to most of the property of most decedents”).

11. *See, e.g.*, UNIF. PROBATE CODE § 2-103 (2008), 8 U.L.A. 40–42 (Supp. 2009) (providing for surviving sibling to take entire intestate estate to exclusion of surviving cousin).

12. *See id.*

share of her intestate estate, rather than have her brother inherit the entire probate estate. We call this the “new heir hypothesis.”

Alternatively, consider the same intestate decedent, except that she has died survived by two brothers as her closest relations, one of whom she has named as the beneficiary of both her will substitutes. We hypothesize that in such circumstances it is likely that the decedent would want the will-substitute gifts to be taken into account as an advancement on the one brother’s inheritance. That is, she would prefer that the law reduce the share of the probate estate passing to the brother named in the will substitutes, rather than, in accordance with current law, divide the probate estate equally between the two brothers.<sup>13</sup> We call this the “advancement hypothesis.”

Our hypotheses lend themselves to empirical study. We designed an empirical study principally to assess public attitudes about (1) whether a beneficiary of a will substitute who would not otherwise be an heir of the decedent should take under an intestacy statute, and (2) whether a beneficiary of a will substitute who would otherwise be an heir of the decedent should take less under an intestacy statute in light of the nonprobate property the heir took as a will-substitute beneficiary. Our study also sought to gather information on public attitudes concerning two implementation issues. First, should the law consider the number of will substitutes for which a decedent named a certain individual to be the beneficiary in determining the intestacy distribution scheme? Second, should the law consider the value of a will substitute relative to the value of the probate estate in determining the intestacy distribution scheme? Part I.B describes in greater detail the hypotheses we designed the empirical study to test.

Part II describes the design of the empirical study, the data collection, and the bivariate and multivariate analyses we conducted. Part III sets forth the results of the empirical study. Part IV.A discusses the advantages and disadvantages of a telephone survey to determine public attitudes concerning inheritance issues. Part IV.B considers the limited role will substitutes should play when a decedent dies survived by a spouse or a descendant. Part IV.C considers the statutory reform implications of the results pertaining to the new heir hypothesis. Part IV.D does the same for the advancement hypothesis. Both Part IV.C and Part IV.D detail the direction further empirical study needs to take before states should consider integrating will substitutes into the design of their intestacy statutes.

In general, we conclude that will substitutes should affect the distribution scheme of intestacy statutes only for decedents who die without a surviving spouse or a descendant. These decedents are the very people about whom we know least in terms of their likely donative intent, and they should be the focus of any future empirical study regarding will substitutes and inheritance law. Although more empirical study is necessary, based on this study, there is little support for the advancement hypothesis. The results of this study do suggest that the more distantly related the decedent’s heirs, determined under a traditional intestacy statute, the more likely a decedent would want a will-substitute beneficiary who is not otherwise an heir to be treated as a new heir and a will-substitute beneficiary who is otherwise an heir to be treated as a favored heir. The results of our empirical study further suggest that the number of will-substitute

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13. *See, e.g., id.* § 2-103(a)(3) (providing for equal distribution of intestate estate between two siblings when decedent is survived only by two siblings).

designations and, to a lesser extent, the value of those will substitutes relative to the probate estate matter. Any law reform would have to establish some threshold number and value before taking into account will substitutes in determining the distribution of a decedent's estate.

The Conclusion sets forth the promise and complexity of an intestacy scheme that accounts for will-substitute beneficiary designations. It outlines the need for more research while simultaneously demonstrating the significance of this project. This project asked the simple question of why the law ignores easily available evidence of a decedent's donative intent in a statute designed to approximate a decedent's donative intent. The results of this empirical study significantly advance our understanding of the relationship between will substitutes and intestacy statutes. The question no longer is *whether* will substitutes should be integrated into intestacy schemes, but *how*.

### B. Hypotheses

As described more fully below in Part II of this Article,<sup>14</sup> our general approach for the testing of public attitudes was to present survey respondents with a series of vignettes in which a decedent has died without a will but has left will substitutes naming a specified individual as the beneficiary. The interviewer then asked respondents how they would distribute the decedent's probate estate if they were in the same situation as the decedent described in the scenario. Using this approach, we tested the following hypotheses concerning public attitudes about will substitutes and their relation to intestate succession statutes.

#### 1. The New Heir Hypothesis

If a person the decedent named in a will substitute is otherwise not a legal heir of the decedent, the question arises whether the decedent would prefer that person, along with the legal heirs identified in a conventional intestacy statute, receive some of the probate property. We hypothesized that when the will-substitute beneficiary is not otherwise an heir, a majority of intestate decedents would prefer to have some of the probate estate allocated to a will-substitute beneficiary, thus revealing a decedent's intent to create a new heir. We further hypothesized that the higher the value of a will substitute relative to the probate estate, the more likely decedents would prefer to have some of the probate estate allocated to a will-substitute beneficiary. We also hypothesized that the higher the number of will substitutes naming the same beneficiary, the more likely decedents would prefer to have some of the probate estate allocated to that will-substitute beneficiary.

We proceeded in this study with the supposition that nonprobate beneficiary designations are a strong indication of a decedent's intent to favor the nonprobate beneficiary or beneficiaries as an heir or heirs only when the nonprobate estate is a relatively large portion of the total (probate and nonprobate) estate. In addition, we postulated that multiple will-substitute beneficiary designations of the same nonheir will-substitute beneficiary are a strong indication of donative intent. For example, consider a decedent who has died with a probate estate worth \$100,000 and one

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14. See *infra* notes 35–44 and accompanying text.

payable-on-death account with a \$500 balance in it. We conjecture that the will-substitute beneficiary designation of a nonheir on the payable-on-death account would not necessarily be indicative of how the decedent would have intended her \$100,000 probate estate to be distributed. Conversely, if a decedent has died having named a nonheir as the beneficiary of every one of a number of will substitutes and those will substitutes together have a substantial value relative to the value of the decedent's probate estate, we postulate that the decedent would prefer that the law take into account the will substitutes. In this situation, the intestacy statute should give some portion of the probate estate to the will-substitute beneficiary and reduce the share of the probate estate passing to those relatives determined to be the decedent's heirs under a conventional intestacy statute.

Thus, the new heir hypothesis would support a radical departure from current law. The central premise is that will-substitute beneficiary designations readily reveal a decedent's familial-type relations or charitable inclinations that otherwise are unknowable. Therefore, will-substitute beneficiary designations could be the basis for making persons heirs, even though those persons named in the will substitutes are not the persons most closely related to the decedent according to traditional kinship rules. Given the results obtained in other empirical studies, which find strong support for inheritance by spouses and lineal descendants,<sup>15</sup> we believe that will substitutes generally should not create new heirs when a spouse or lineal descendant survives the decedent.<sup>16</sup> But, in view of the fact that the strength of kinship ties are considerably less certain in those situations where a decedent dies with neither a spouse nor a lineal descendant, the law should not ignore the distributive preferences found in a decedent's will-substitute designations.

Finally, with respect to will-substitute beneficiaries who are not otherwise an heir of the decedent, we hypothesized that, holding constant the identity of the decedent's existing heir, the closer the familial relationship of the will-substitute beneficiary to the decedent on the family tree, the more likely a decedent would prefer to have some of

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15. See, e.g., JOULA E. DEKKER & MARK V.A. HOWARD, N.S.W. LAW REFORM COMM'N, RESEARCH REPORT 13: I GIVE, DEVISE AND BEQUEATH: AN EMPIRICAL STUDY OF TESTATOR'S CHOICE OF BENEFICIARIES 13 (2006) ("Of the 16 testators [in the study] who had a current relationship with a spouse but had no children at the time the will was written, 100% gave the entire residue of the estate to their spouse."); *id.* at 13–14 (reporting that of the 222 testators in the study who had both a spouse and a child or children at the time the will was written, 75.2% left the entire residue to the spouse, 19.4% left the entire residue to the child or children, 2.3% split the residue between the spouse and the child or children, and 3.2% split the residue between the child or children and other family members or nonfamily members; none excluded both the spouse and children from the residue); Mary Louise Fellows, Rita J. Simon & William Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 350–68 (summarizing earlier studies showing strong support for inheritance by spouses, and reporting on the authors' study finding the same); Contemporary Studies Project, *supra* note 5, at 1100 (concluding that their survey results "indicate a very strong preference for a disbursement of the entire estate to the surviving spouse when the intestate's parents are the only other survivors").

We use the term "spouse" to include civil union partners or other status-based equivalent partners who have a right to inherit under a state's intestacy statute.

16. See *infra* notes 82–91, 93–99 and accompanying text (discussing exceptions to this general rule).

the probate estate allocated to the will-substitute beneficiary. We also hypothesized that the closer the familial relationship of the will-substitute beneficiary to the decedent, the more likely the decedent would want a larger portion of the probate estate to be allocated to the will-substitute beneficiary. We base these suppositions on the results of previous studies indicating that property owners tend to favor close blood relations (and spouses) over more distant blood relations and nonrelatives when allocating property upon death.<sup>17</sup> Under this premise, any law that may utilize will substitutes to determine who is an heir of a decedent and what portion of the intestate estate that new heir takes should consider the degree of kinship between the decedent and the will-substitute beneficiary.<sup>18</sup>

## 2. The Advancement Hypothesis

A number of ambiguities arise when a will-substitute beneficiary would also be an intestate taker under an intestacy statute, regardless of her status as a will-substitute beneficiary. For example, consider a decedent who has died intestate survived by two children, Child A and Child B, and no spouse. Under extant U.S. intestacy statutes, both children would be the decedent's heirs and each would take one half of the intestate estate.<sup>19</sup> Suppose further that the decedent named Child A to receive the proceeds of her life insurance policy (a will substitute), which constitutes her entire nonprobate estate. There are three possible interpretations of the decedent's intent regarding the will substitute in this case: (1) the will substitute naming Child A is evidence of a transfer that the decedent would want the law to credit against Child A in the distribution of the probate estate (i.e., an advancement that should reduce the share of the probate estate passing to Child A); (2) the decedent would prefer that the will substitute naming Child A not have any effect on the distribution of the probate estate; or (3) the will substitute naming Child A is evidence that the decedent favors Child A and would prefer Child A to take most or all of the probate estate and Child B to take little or none of it. The question we have sought to answer is whether a will-substitute beneficiary designation in favor of an heir should decrease, not affect, or increase the

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17. See, e.g., DEKKER & HOWARD, *supra* note 15, at 18–19 (reporting that, with respect to testators who did not have a spouse or descendant at the time they executed their wills, 68.1% of residuary beneficiaries were family members (siblings, nieces or nephews, etc.) while only 31.9% of beneficiaries were not family members); Fellows et al., *supra* note 15, at 374–76 (describing survey results showing respondents' preference for allocating decedent's estate to decedent's surviving son over decedent's surviving grandchildren, including a child of decedent's predeceased son).

18. We also speculate that the law might beneficially consider the degree of kinship between the decedent and the existing heir in determining whether to make a will-substitute beneficiary a new heir and determining the size of the new heir's intestate share. See *infra* note 102 and accompanying text. Our study did not test for this issue.

19. See UNIF. PROBATE CODE § 2-103(a)(1) (2008), 8 U.L.A. 40 (Supp. 2009) (providing that the entire intestate estate passes to the decedent's descendants by representation when the decedent is survived by such descendants but is not survived by a spouse); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.3 (1998) (“An intestate decedent's surviving descendants take the entire intestate estate if the decedent leaves no surviving spouse.”); *id.* § 2.3 cmt. b (“In the absence of a surviving spouse, the law of all states awards the entire intestate estate to the decedent's descendants.”).



intestate share passing to an heir who also receives proceeds from an intestate decedent's will substitutes.

The strong tradition for equality among heirs in the same generation arguably supports the proposition that an intestacy statute should take into account will substitutes by giving a greater share of the probate estate to an heir not otherwise named in a decedent's will substitutes.<sup>20</sup> The notion of taking into account gifts during life to further the equality tradition under an intestacy statute is not a new one. The common law developed the concept under the rubric of the doctrine of advancements.<sup>21</sup> Since the mid-twentieth century, however, the doctrine has not had much vitality. Most states now require a writing to prove a decedent's intent to make an advancement.<sup>22</sup> A decedent is just as likely to write a will taking into account any prior gifts as to create written evidence of an intent to make an advancement, which seems to explain why the doctrine has fallen into disuse.<sup>23</sup>

In the context of our empirical study, we hypothesized that when the will-substitute beneficiary is otherwise an heir, a majority of decedents would prefer to have the non-will-substitute beneficiary heir receive a greater share of the probate estate than the share passing to an heir who is named as a will-substitute beneficiary. Earlier empirical studies that have demonstrated the strong equality norm have informed our thinking.<sup>24</sup> We observe the role of this norm in studies of actual wills,<sup>25</sup> as well as in preference studies using vignettes.<sup>26</sup> For us, the critical question is how and in what circumstances

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20. See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.3 reporter's note 5 (1998) (citing to empirical studies finding that the public overwhelmingly supports a per-capita-at-each-generation system of representation, which provides for equal treatment among members of the same generation whose parents had predeceased the decedent); Deidre G. Drake & Jeanette A. Lawrence, *Equality and Distributions of Inheritance in Families*, 13 SOC. JUST. RES. 271, 273 (2000) ("Reliance on equal distribution as a cultural norm for providing for heirs is suggested by at least three sources in Western societies: intestacy legislation, distributive preference studies, and empirical studies of wills."); Fellows et al., *supra* note 15, at 370 ("[E]quality of treatment among children is generally accepted and preferred, regardless of sex [of the children], age [of the children], or previous marriage [from which one of the children was produced]."); Contemporary Studies Project, *supra* note 5, at 1046 ("When an intestate is survived only by grandchildren who are the offspring of two or more predeceased children of the intestate, an overwhelming majority of the respondents indicated that they prefer that the grandchildren receive equal portions of their grandparent's estate.").

21. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.6 cmt. a (1998).

22. See *id.* § 2.6 cmt. b; see also UNIF. PROBATE CODE § 2-109(a) (1990), 8 U.L.A. 88 (1998) (requiring a writing to prove decedent's intent to make an advancement).

23. See Mary Louise Fellows, *Concealing Legislative Reform in the Common-Law Tradition: The Advancements Doctrine and the Uniform Probate Code*, 37 VAND. L. REV. 671, 678 (1984).

24. See *supra* note 20 and accompanying text.

25. See Drake & Lawrence, *supra* note 20, at 273 ("Studies of twentieth-century wills have found that most wills follow the principle of equal distribution."). *But cf.* Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 243-44 (1996) (reporting her finding that courts were far more likely to uphold a will where the will contestant and the principal will beneficiary were equally related to the testator as compared to cases where the will contestant was related to the testator by blood or marriage and the principal will beneficiary was not).

26. For example, Deidre G. Drake and Jeanette A. Lawrence, of the University of

should a will-substitute beneficiary designation in favor of an heir impact the baseline equality norm.

We theorized that when a will-substitute beneficiary and competing claimant are equally related to the decedent (e.g., both are siblings or both are children), a decedent would want them to take an equal share of the *total* estate. Therefore, a decedent would prefer that the law give less of the probate estate to the will-substitute beneficiary. We also conjectured that the greater the value of the will substitute relative to the probate estate, the smaller the share of the probate estate the decedent would want to have allocated to the will-substitute beneficiary.

Where a decedent's will substitutes have a substantial value relative to the probate estate and the decedent has named the same will-substitute beneficiary in multiple will substitutes, the advancement hypothesis would seem inapt. Instead, in these circumstances, we hypothesize that a decedent would prefer to have the law treat the will-substitute beneficiary as a preferred intestate taker, rather than to have the law treat the will-substitute beneficiary as the recipient of an advancement. We went on to suppose that the greater the number of will substitutes, the greater the share of the probate estate decedents would want allocated to the will-substitute beneficiary.

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Melbourne, Australia, used a vignette design to test respondents' attitudes concerning inheritance of a decedent's estate by the decedent's surviving children. *See* Drake & Lawrence, *supra* note 20 (studying the inheritance distribution preferences of older adults via hypothetical vignettes). The population in this survey was not random. Rather, Drake and Lawrence surveyed day clients of a large geriatric hospital. The eighty-nine respondents ranged in age from sixty-three to ninety-one. *Id.* at 277. The researchers gave each respondent a "baseline" vignette, which described only the gender of the two surviving children, and four additional vignettes, which "varied degrees of need and deservedness." *Id.* With respect to deservedness, in one vignette the deserving child simply provides social support to the parent, such as taking the parent out to lunch, while in another vignette the deserving child provides instrumental assistance to the parent, such as cooking and cleaning for the parent. *Id.* Similarly, in one vignette, the needy child is in poor financial circumstances and has a physical incapacity not of her own doing. In another vignette, the needy child's financial need is more ambiguous. *Id.* at 278. Drake and Lawrence asked respondents to distribute the estate between the two children. Not surprisingly, when the respondents were given no information other than the gender of the children (the baseline vignette), they overwhelmingly divided the estate equally. *Id.* at 280 ("Participants' responses to the baseline vignette indicated that they used equality as their basic distribution principle when there was no information available beyond the gender of the two children."). Perhaps surprisingly, however, a core group of respondents (20%) did not move from equal distribution, even if one child took care of the decedent parent and that child also was sick and in need. *Id.* at 280 (reporting that "[o]verall, 20% (18) of participants adhered to equal distribution in all the four vignettes"). The authors actually concluded that their study did not strongly support the notion that equality is a cultural norm in inheritance distributions, but they nevertheless concede that the equality principle is indeed the strong baseline norm. *See id.* at 284 (concluding that "although equality was the preferred distribution criterion where conditions were not known, it could be modified by reciprocity and need"); *id.* at 286 (reporting that "equality is more than just an appropriate initial position for cases where there is no distinguishing information—20 percent of participants endorsed equality at every presented opportunity, ignoring other claims").

### 3. Demographically Based Hypotheses

We designed our empirical study to investigate the attitudes of the general public concerning the relationship between will substitutes and donative intent with respect to the probate estate. In fact, however, we are more concerned with the attitudes of persons who fit within one or more of the following categories: (1) persons who do not have a will, (2) relatively younger persons, (3) unmarried persons, and (4) childless persons. The attitudes of persons who do not have a will are important for the obvious reason that they are more likely to be subject to the intestacy scheme than are those persons who do have a will. Moreover, we know from earlier empirical studies that the demographics of people who die testate differ meaningfully from people who die intestate.<sup>27</sup> These demographic divergences make it reasonable to expect that the donative intent of those who die testate may differ significantly from those who die intestate.<sup>28</sup> The donative intent of those persons who do not have a will, therefore, is more likely to provide the best measure of intent in the consideration of reform of intestacy statutes.<sup>29</sup>

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27. See, e.g., Fellows et al., *supra* note 15, at 338 (setting out demographic characteristics of study respondents and whether they do or do not have wills); Monica K. Johnson & Jennifer K. Robbennolt, *Using Social Science to Inform the Law of Intestacy: The Case of Unmarried Committed Partners*, 22 LAW & HUM. BEHAV. 479, 483–84 (1998) (“Persons who die leaving wills differ from those who die intestate on several dimensions [namely age, wealth, and occupation], including some which may be related to preferences for estate distribution.”); see also *infra* notes 61–64 and accompanying text.

28. Monica K. Johnson and Jennifer K. Robbennolt studied data that had been collected by telephone survey relating to (1) distributive preferences under varying hypothetical conditions and (2) respondents’ actual estate plans. See Mary Louise Fellows, Monica K. Johnson, Amy Chiericozzi, Ann Hale, Christopher Lee, Robin Preble & Michael Voran, *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1 (1998) (collecting the data subsequently studied by Johnson and Robbennolt). Johnson and Robbennolt were interested in comparing the expressed preferences (relating to hypothetical scenarios set out in research vignettes) of those who had wills and those who did not, and also comparing the actual estate plan of those who had wills with their stated preferences relating to the research vignettes. See Johnson & Robbennolt, *supra* note 27, at 485. Johnson and Robbennolt concluded from their study “that due to the differences between persons with and persons without wills, the results of will studies do not best reflect the probable donative intent of persons who die intestate.” *Id.* at 498; see *infra* Part IV.A.

29. See DEKKER & HOWARD, *supra* note 15, at 30 (“The difference between the two groups threatens generalisations extended from testators to those who die intestate.”). Joula E. Dekker and Mark V.A. Howard, who authored a study of testate and intestate estates, give the following illustration of how the demographic characteristics of those who die testate might influence distributive preferences in a way that would make probated wills less valuable as a guide for imputing the donative intent of those who die intestate:

Since the mean age of testators [in the study] is 81.2 years, there is a difference of 21.2 years between testate and intestate cases, a difference large enough to be a generation gap. In a majority of testate cases parents, grandparents and aunts and uncles will most likely have predeceased the testator, skewing distributive preferences in favour of siblings, their family, friends and even charities. . . . This means that potential distribution of one who dies unmarried and childless could

We have a special concern about the attitudes of persons who are unmarried because we have concluded that any reform of intestacy statutes to account for will-substitute beneficiary designations generally should apply only to the probate estates of persons who die without a surviving spouse. A significant body of empirical scholarship has focused on understanding the donative preferences of married persons.<sup>30</sup> This body of work shows that the overwhelming majority of people who die with a surviving spouse prefer that a spouse take all or nearly all of the probate estate.<sup>31</sup> In light of these empirical studies, we generally would not recommend any law reform that reduces the share of the probate estate passing to a surviving spouse in favor of a will-substitute beneficiary.<sup>32</sup>

For similar reasons, we have concluded that any statutory reform to take account of will-substitute beneficiary designations generally should apply only if the decedent is not survived by a descendant. Given the empirical evidence showing a strong desire of most people with children to have those children inherit any probate property that does not otherwise go to a spouse,<sup>33</sup> in most circumstances, we would not recommend any

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indeed favour parents or grandparents, since they are more likely to be available, over siblings and other family when compared to the average testate cases.

*Id.* at 30–31.

30. See, e.g., Fellows et al., *supra* note 15, at 348–68; Contemporary Studies Project, *supra* note 5, at 1084–1100.

31. See, e.g., UNIF. PROBATE CODE § 2-102 cmt. (2008), 8 U.L.A. 38 (Supp. 2009) (citing to relevant studies and commenting that “[t]he studies have shown that testators in smaller estates (which intestate estates overwhelmingly tend to be) tend to devise their *entire* estates to their surviving spouses, even when the couple has children.” (emphasis in original)); see also *supra* note 15 and accompanying text.

32. One possible exception to this general rule, which deserves further study, would be for the law to increase the intestate share to the decedent’s descendant when that descendant is the decedent’s will-substitute beneficiary and is not a descendant of the decedent’s surviving spouse. See UNIF. PROBATE CODE § 2-102(1), (4) (2008), 8 U.L.A. 37 (Supp. 2009) (allocating the entire intestate estate to the decedent’s surviving spouse 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,” but allocating only “the first [\$150,000], plus one-half of any balance of the intestate estate [to the decedent’s surviving spouse], if one or more of the decedent’s surviving descendants are not descendants of the surviving spouse”); see also DEKKER & HOWARD, *supra* note 15, at 15–16 (reporting that testators in their study who had a spouse and a child or children from a previous relationship were more likely to give a larger share of the residuary estate to the child or children and a smaller share to the spouse as compared to when the testator did not have a child from a previous relationship); *id.* at 27–28 (“The results indicate an increased trend toward making some provision for the testator’s children where there are children from a previous relationship.”); Contemporary Studies Project, *supra* note 5, at 1094–1095 (reporting that respondents to their survey allocated less to the surviving spouse and more to the decedent’s child when the surviving spouse was not the parent of the child as compared to when the surviving spouse was the parent of the child). The “conduit” theory, which grounds UNIFORM PROBATE CODE § 2-102 and would ground this possible exception, is explained in Waggoner, *supra* note 5, at 229–35, and it is discussed *infra* notes 95–98 and accompanying text.

33. See ALBERTA LAW REFORM INST., REFORM OF THE INTESTATE SUCCESSION ACT, REPORT NO. 78, 194 (1999) (reporting that 76.5% of unmarried testators with a child or children left their entire estate to their child or children); DEKKER & HOWARD, *supra* note 15, at 13 (reporting that of the 232 testators in their study who had a child or children but no spouse, 190 left the

law reform that reduces the share of the probate estate passing to a decedent's descendant in favor of a will-substitute beneficiary who is not a descendant of that decedent.<sup>34</sup>

The new heir, advancement, and demographic hypotheses, along with the subsidiary implementation issues, determined the parameters of the empirical study. They affected who we identified as heirs and will-substitute beneficiaries in the vignettes presented to respondents. They also affected the demographic information we gathered from respondents. We turn next to a discussion of the methods we used to gather and analyze the data we obtained.

## II. METHODS

We designed a survey to assess public attitudes about the relationship between will substitutes and intestacy statutes. Instead of asking respondents directly about will substitutes, we used a factorial research design in which interviewers ask respondents to react to a series of hypothetical vignettes that differ along several dimensions. In our study, respondents were told that a decedent named Pat had died without a will and had left will substitutes. The interviewer asked respondents how they would distribute the decedent's probate estate if they were in the same situation as the decedent described in the scenario.<sup>35</sup>

Factorial survey methods are useful for studying normative beliefs for several reasons. These methods reduce social desirability bias by masking the researcher's underlying goals.<sup>36</sup> Moreover, this approach allowed us to make questions about will substitutes and donative intent concrete by setting out specific fact patterns. It also allowed us to measure the effects of multiple independent variables (alone and in combination) on the respondents' preferences.<sup>37</sup>

### A. Data

The Minnesota Center for Survey Research conducted a random-digit-dial telephone survey of the noninstitutionalized English-speaking adult population in the forty-eight contiguous United States. Data were collected from 202 individuals and the response rate was 18%. After excluding individuals with missing data (n = 12), our

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entire residue of the estate to the child or children, twenty-eight left some of the residuary to the child or children and only fourteen left none of the residuary to the child or children).

34. For a discussion of exceptions that we would make to this general rule, see *infra* notes 93–99 and accompanying text.

35. Questions posed in this manner are more likely to reveal a respondent's personal values rather than a respondent's views with respect to public policy. See John H. Evans, *Commodifying Life? A Pilot Study of Opinions Regarding Financial Incentives for Organ Donation*, 28 J. HEALTH POL. POL'Y & L. 1003, 1026 (2003).

36. See *id.* at 1008–09; Guillermina Jasso & Karl-Dieter Opp, *Probing the Character of Norms: A Factorial Survey Analysis of the Norms of Political Action*, 62 AM. SOC. REV. 947, 951 (1997).

37. See Cheryl S. Alexander & Henry J. Becker, *The Use of Vignettes in Survey Research*, 42 PUB. OPINION Q. 93, 94–95 (1978) (stating that “the systematic variation of characteristics in the vignette allows for a rather precise estimate of the effects of changes in combinations of variables as well as individual variables on corresponding changes in respondent attitude or judgment” (emphasis in original)).

final sample size was 190. To gauge the representativeness of the sample, we compared the demographic characteristics of individuals in our sample with figures from the U.S. Census Bureau's 2007 Current Population Survey<sup>38</sup> and the 2006 General Social Survey.<sup>39</sup> Table 1 is based on data from the 2007 Current Population Survey, except for the data for "have any children," which is based on the 2006 General Social Survey.<sup>40</sup>

**Table 1. Characteristics of Individuals in the Study Sample**

	Study Sample	U.S. Population
Age (mean)	54 years	46 years
Female	61%	52%
Have any children	84%	73%
Have at least four-year college degree	44%	26%
Nonwhite (including Hispanic)	15%	31%
Married	57%	56%
Have will	56%	n/a
Have any will substitute	89%	n/a

Compared to the U.S. population aged eighteen years and older living in households, our study sample was slightly older and disproportionately represented females, individuals with children, people with at least a four-year college degree, and whites. Thus, our findings may overrepresent these groups. There was no difference between our study sample and the U.S. population with respect to the proportion married (57% versus 56%, respectively).

### *B. The Factorial Vignettes*

The interviewer asked respondents how they would distribute a probate estate if they were in the same situation as the decedent described in a series of vignettes. The interviewer introduced the vignettes by telling the respondents the following facts: A person named Pat has died. Pat did not have a will, but in each situation Pat did name a person to receive certain property at Pat's death outside of any will. Pat otherwise owned a home that had been sold for \$100,000.<sup>41</sup> Interviewers then described eight vignettes and asked respondents how they would want the probate estate (the \$100,000 proceeds from the sale of Pat's home) to be divided among the individuals described in the scenario.

38. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, DESIGN AND METHODOLOGY: CURRENT POPULATION SURVEY (2006), available at <http://www.census.gov/prod/2006pubs/tp-66.pdf>.

39. JAMES ALLAN DAVIS & TOM W. SMITH, GENERAL SOCIAL SURVEYS: CULMULATIVE CODEBOOK, 1972–2008 (2009), available at <http://www.norc.org/GSS+Website/Documentation/> (codebook for machine readable data).

40. The 2006 General Social Survey collects information about *ever* having children, not whether the respondent has any *living* children.

41. Each scenario involved a decedent named Pat. We intentionally named the decedent Pat in order to avoid specifying gender. We limited the probate estate to decedent's home, because we believed that respondents of different economic classes would be able to relate easily to a person dying owning a home. We described the sale of the home to avoid any confusion about estimated value or difficulty of sharing an asset other than cash.

The vignettes differed across four dimensions. The first dimension was the relationship of the decedent to the person named in the will substitute(s). The values included in the first dimension were (1) Pat's adult child; (2) Pat's sibling; (3) Pat's niece, who is a child of Pat's sibling who died before Pat; (4) Pat's favorite charity, a library; (5) Pat's niece, whose parent is Pat's living sibling; (6) Pat's cousin; and (7) Pat's nonmarital life partner. The second dimension was those persons who would otherwise take under existing intestate succession statutes (i.e., legal heirs). For vignettes in which the will-substitute beneficiary was Pat's adult child, the second dimension was another one of Pat's adult children. For all other vignettes, the second dimension was Pat's sibling. This enabled us to test our advancement hypothesis with respect to three different family situations in which there were two heirs, but only one of them was named as the will-substitute beneficiary (child/child, sibling/sibling, and sibling/niece representing a predeceased sibling) while keeping the heir constant as a sibling in all of the vignettes testing our new heir hypothesis. The third dimension was the value of the will substitute or will substitutes, either \$45,000 or \$145,000. The fourth dimension was the number of will substitutes, either one (a bank account) or three (a U.S. savings bond and two bank accounts).<sup>42</sup>

We created vignettes with all possible combinations of the dimensions above (twenty-eight in total) and presented eight randomly selected vignettes to each respondent.<sup>43</sup> The following are two sample vignettes:

Vignette testing new heir hypothesis: "Pat had one cousin [dimension one] and one sibling [dimension two] alive at the time of Pat's death. Pat named the cousin to receive the money in a bank account [dimension four] containing \$45,000 [dimension three]."

Vignette testing advancement hypothesis: "Pat had two siblings, Sibling A [dimension one] and Sibling B [dimension two], alive at the time of Pat's death. Pat named Sibling A to receive money from one U.S. savings bond and two different bank accounts [dimension four], for a total of \$145,000 [dimension three]."

For each vignette, respondents were asked to allocate all, most, half, little, or none of the probate estate to the will-substitute beneficiary, with the other person named in the scenario to receive the remainder.<sup>44</sup>

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42. Technically, this fourth dimension mixes both number and type of will substitutes. The difference between "a bank account" and "one U.S. savings bond and two different bank accounts" is both number and type of will substitute.

43. See Evans, *supra* note 35, at 1011 ("Deciding the number of vignettes to be evaluated by each respondent is somewhat arbitrary but is a balance between avoiding respondent fatigue and obtaining statistical power.").

44. We excluded from our data analysis forty-one instances in which respondents either answered "don't know" to a question pertaining to a vignette or refused to answer a question pertaining to a vignette. The complete survey is available from the authors upon request.

*C. Analysis*

We separately analyzed the vignettes in which the will-substitute beneficiary was a nonheir and those vignettes in which the will-substitute beneficiary was an heir. For each group of vignettes, we first examined the distribution of the respondent's allocation of the probate estate to the will-substitute beneficiary. This examination simply involved examining the percentages of respondents who allocated all, most, half, little, or none of the probate estate to the will-substitute beneficiary. When the will-substitute beneficiary was a nonheir, this analysis tested our new heir hypothesis—that when the will-substitute beneficiary was not an heir, respondents would allocate at least some of the probate estate to the will-substitute beneficiary. When the will-substitute beneficiary was an heir, this analysis tested our advancement hypothesis—that when the will-substitute beneficiary was an heir, most respondents would allocate more of the probate estate to the heir who was not the will-substitute beneficiary. In addition, we examined how a respondent's allocation of the probate estate to the will-substitute beneficiary differed according to (1) the relationship of the will-substitute beneficiary to the decedent, (2) the value of the will substitutes, and (3) the number of will substitutes.

We then conducted multivariate analyses predicting the respondents' allocation of the probate estate to the will-substitute beneficiary. Again, we separately analyzed the vignettes involving nonheir will-substitute beneficiaries and the vignettes involving heir will-substitute beneficiaries.<sup>45</sup> The multivariate analysis had several purposes. First, it allowed us formally to test whether respondents provided different allocations to the will-substitute beneficiary depending on several factors, such as the relationship of the will-substitute beneficiary to the decedent, the value of the will substitutes, the number of will substitutes, and the respondent's demographic characteristics. Second, it allowed us to estimate the independent effects of these variables while holding the other variables constant. Third, it allowed us formally to test whether the effects vary depending on the demographic characteristics of respondents. In all the regressions, we used the following variables for predicting the allocation of the probate estate to the will-substitute beneficiary: (1) the relationship of the will-substitute beneficiary to the decedent, (2) the value of the will substitutes, (3) the number of will substitutes, (4) the respondent's marital status, (5) whether the respondent has any living children, (6) whether the respondent has a will, (7) whether the respondent has any will substitutes, and (8) the respondent's age (linear term).<sup>46</sup>

The next Part of the Article discusses the results from the bivariate and multivariate analyses. The results demonstrate the potential of empirical studies to advance policy makers' general understanding of inheritance law and, in particular, policy makers' understanding of the relationship between will substitutes and intestacy statutes. While they provide some clear answers to the relationship between will substitutes and intestacy statutes, they also raise new issues that require further study.

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45. All multivariate models are adjusted to take the clustering of vignettes within individuals into account.

46. In all multivariate models, we examine whether including a random intercept (which removes the assumption that all respondents have the same underlying propensity to allocate the probate estate to the will-substitute beneficiary) improves the fit of the model to the data.



## III. RESULTS

In this discussion of the results from the empirical study, we first examine the vignettes in which the will-substitute beneficiary was *not* a legal heir of the decedent. We then present our results for the vignettes in which the will-substitute beneficiary was a legal heir.

*A. The New Heir Hypothesis: Vignettes in Which the Will-Substitute Beneficiary Was Not a Legal Heir*

## 1. Bivariate Analysis

In Table 2, we present a cross-tabulation of the allocation of the probate estate to the will-substitute beneficiary for vignettes in which the will-substitute beneficiary was *not* an heir. In a majority of the vignettes (55%), respondents allocated no part of the probate estate to the will-substitute beneficiary. In 24% of the vignettes, respondents split the probate estate equally between the will-substitute beneficiary and the legal heir. And in 11% of the vignettes, respondents allocated all of the probate estate to the will-substitute beneficiary.

Pooling the vignettes together, however, masks important differences based on the identity of the will-substitute beneficiary. In 70% of the vignettes in which the will-substitute beneficiary was the library, respondents allocated none of the probate estate to the library. Respondents, however, treated the nonmarital life partner differently: in only 42% of these vignettes did respondents allocate “none” of the probate estate to the nonmarital life partner. We interpret the data as supporting the new heir hypothesis depending on the identity of the will-substitute beneficiary. That is, the data support allocating at least a portion of the intestate estate to the will-substitute beneficiary in some cases but not others, depending on the identity of the will-substitute beneficiary.

**Table 2. Allocation to Will-Substitute Beneficiary, by Relationship of the Will-Substitute Beneficiary to the Decedent, for Vignettes in Which the Will-Substitute Beneficiary Is *Not* an Heir (Percent)**

	Total	Library	Niece*	Cousin	Partner
All	11	9	10	9	18
Most	3	2	3	3	4
Equal	24	11	34	23	29
Little	7	8	5	7	6
None	55	70	48	58	42
Total	100%	100%	100%	100%	99%
(N)	(741)	(192)	(187)	(190)	(172)

\*Child of living sibling

*Percentages may not sum to 100 due to rounding.*

In Table 3, we show how the allocation to the nonheir will-substitute beneficiary varied by the number and value of will substitutes. These cross-tabulations do not suggest any meaningful differences in the allocation of the probate estate to the will-substitute beneficiary depending on the value and number of will substitutes.

**Table 3. Allocation to Will-Substitute Beneficiary by the Number and Value of Will Substitutes for Vignettes in Which the Will-Substitute Beneficiary Is *Not* an Heir (Percent)**

	Total	Number of will substitutes		Value of will substitutes	
		1	3	\$45,000	\$145,000
All	11	11	12	10	13
Most	3	2	3	2	4
Equal	24	24	24	25	23
Little	7	8	6	8	5
None	55	56	54	54	56
Total (N)	100% (741)	101% (368)	99% (373)	99% (384)	99% (357)

*Percentages may not sum to 100 due to rounding.*

## 2. Multivariate Analysis

Next, we conducted a logistic regression that predicts whether the will-substitute beneficiary receives *any* of the probate estate (“all,” “most,” “half,” or “little”) rather than none of the probate estate.<sup>47</sup> We distinguished the response categories in this way, because when a respondent allotted any of the intestate estate to the will-substitute beneficiary who was not otherwise an heir, the respondent was treating the will-substitute beneficiary as a new heir.

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47. We included a random intercept in this model, which allows respondents to differ with respect to their underlying propensity to allocate the probate estate to the will-substitute beneficiary. We conducted a likelihood ratio test that compared a model without a random intercept to a model with a random intercept. This test was statistically significant [ $\chi^2(1)=133.6$ ;  $p < .001$ ], which provides evidence for including the random intercept.

**Table 4. Parameters in a Logistic Regression Predicting Whether the Will-Substitute Beneficiary Receives “All,” “Most,” “Half,” or “a Little” of the Probate Estate Compared to “None” for Vignettes in Which the Will-Substitute Beneficiary Is *Not* an Heir**

	Odds Ratio (95% Confidence Interval)	P Value
<i>Characteristics of the will substitute</i>		
\$145,000 (versus \$45,000)	.910 (.578, 1.43)	.686
Three (versus one)	1.10 (.701, 1.74)	.666
Will-substitute beneficiary is library (versus niece)	.179 (.090, .355)	< .001
Will-substitute beneficiary is cousin (versus niece)	.558 (.296, 1.05)	.071
Will-substitute beneficiary is partner (versus niece)	2.64 (1.37, 5.10)	.004
<i>Respondent demographics</i>		
Married (versus unmarried)	.983 (.376, 2.56)	.972
Has living children (versus no children)	.122 (.032, .457)	.002
Has will (versus no will)	1.05 (.404, 2.75)	.912
Has any will substitutes (versus none)	.227 (.044, 1.16)	.076
Age	.99 (.96, 1.02)	.589

In this model, we did not observe any statistically significant effects of the value or number of the will substitutes and respondents' allocation to a will-substitute beneficiary. The odds of a library will-substitute beneficiary receiving any of the probate estate were 82% (1-.179) lower than the odds of a niece will-substitute beneficiary getting any of the probate estate; this was statistically significant ( $p < .001$ ). The odds of a cousin will-substitute beneficiary receiving any of the probate estate were 44% (1-.558) lower than the odds of a niece will-substitute beneficiary getting any of the probate estate; this was marginally statistically significant<sup>48</sup> ( $p = .071$ ). A life partner will-substitute beneficiary, however, did better than did a niece will-substitute beneficiary. The odds of a life partner will-substitute beneficiary receiving any of the probate estate were 2.64 times as great as the odds of a niece will-substitute beneficiary getting any of the probate estate; this was statistically significant ( $p = .004$ ).

Marital status had no statistically significant effect on the allocation to the will-substitute beneficiary ( $p = .972$ ). Parental status, however, had a large, statistically significant effect ( $p = .002$ ). Having any living children was associated with a reduction in the odds of giving the will-substitute beneficiary any of the probate estate by 88% (1-.122). There was no statistically significant association between having a will and

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48. Following convention, we define  $p \leq .05$  as our cutoff for statistical significance. We treat  $p$  values greater than .05 and less than .10 as marginally statistically significant.

allocating money to a will-substitute beneficiary ( $p=.912$ ). We did observe, however, a negative association between having a will substitute and allocating any money to the will-substitute beneficiary; this was marginally statistically significant ( $p=.076$ ). Having a will substitute decreased the odds of respondents' giving any of the probate estate to the will-substitute beneficiary by 77% ( $1-.227$ ).

### 3. Analysis of Respondents' Demographic Characteristics

The results in Table 4 assumed that effects of the independent variables were the same for individuals in different demographic groups. That is, the number of will substitutes had the same effect on allocation to the will-substitute beneficiary regardless of whether someone was married versus unmarried, had children as opposed to did not have children, etc. But it is possible that the effects of the independent variables do, in fact, depend on people's demographic characteristics. The effect of the value of will substitutes, for example, may be stronger for people who are childless compared to those who have children. To test whether this was the case, we estimated a series of different models, including interaction terms between the value and number of will substitutes and the five demographic characteristics in Table 4.<sup>49</sup> We found no evidence that the effect of the *value* of will substitutes was different across the five demographic characteristics. All the interaction terms were not statistically significant at  $p < .05$ .

There were, however, four statistically significant interactions between the *number* of will substitutes and all of the respondent characteristics except age. The interaction terms between the number of will substitutes and marital status, parental status, had a will, and had a will substitute were all statistically significant at  $p < .05$ . These results suggest that the effect of the number of will substitutes differed depending on whether a respondent was married, had children, had a will, or had a will substitute. Although the number of will substitutes had no effect in Table 4, these analyses show that the number of will substitutes did matter, but only for certain subgroups.

To show how the effect of the number of will substitutes varied according to four respondent characteristics, we present predicted probabilities of respondents allocating the will-substitute beneficiary any of the probate estate.<sup>50</sup> The results in Table 5 show that there was a positive effect of there being three, rather than one, will substitutes among unmarried respondents, but a negative effect among married respondents. Specifically, among unmarried respondents, the probability of allocating any of the probate estate to the will-substitute beneficiary was .16 when there was one will substitute, but .32 when there were three will substitutes. But the probability dropped

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49. We also conducted similar analyses with other demographic characteristics, such as race, education, and gender. None of these interaction terms were statistically significant.

50. See *infra* Table 5. To generate these predicted probabilities, we estimated the logistic regression in Table 4 four times, each time including an interaction term between the number of will substitutes and a particular respondent characteristic. Next, we evaluated the predicted probabilities for a hypothetical person with the mean age for the sample, a status of unmarried, no children, no will, and no will substitutes. For the vignette characteristics, we evaluated the predicted probabilities for a vignette with \$45,000 and in which the will-substitute beneficiary was a niece whose parent was still alive. This set of characteristics is arbitrary; choosing another hypothetical individual would not alter the pattern of statistical significance.

from .26 when there was one will substitute to .18 when there were three will substitutes among married respondents. Similarly, there was a positive effect for the number of will substitutes among respondents without children, but no effect among those with children. Among respondents without a will, three (rather than one) will substitutes increased the probability that a respondent would allocate any of the probate estate to the will-substitute beneficiary. There was also a positive effect for respondents without any will substitutes, but no effect for respondents with will substitutes.

**Table 5. Predicted Probability of Allocating Any of the Probate Estate to the Will-Substitute Beneficiary by Number of Will Substitutes and Respondent Demographic Characteristics for Vignettes in Which the Will-Substitute Beneficiary Is *Not* an Heir**

	<i>Number of will substitutes</i>	
	1	3
<i>Marital Status</i>		
Unmarried	.16	.32
Married	.26	.18
<i>Parental Status</i>		
No living children	.11	.42
Have living children	.03	.03
<i>Will</i>		
Do not have will	.16	.35
Have will	.31	.20
<i>Will substitutes</i>		
Do not have any will substitutes	.10	.52
Have any will substitutes	.05	.05
<p>Note: These predicted probabilities were generated by four logistic regressions predicting whether the will-substitute beneficiary receives any of the probate estate using the independent variables from the model in Table 4. Each logistic regression also contained an interaction term between the particular demographic characteristic and the number of will substitutes. All four of these interaction terms were statistically significant at <math>p &lt; .05</math>, suggesting that the effect of the number of will substitutes differed according to the four demographic characteristics.</p>		

*B. The Advancement Hypothesis: Vignettes in Which the Will-Substitute Beneficiary Was a Legal Heir*

1. Bivariate Analysis

In Table 6, we present a cross-tabulation of the allocation of the probate estate to the will-substitute beneficiary for vignettes in which the will-substitute beneficiary was an heir. In 57% of the vignettes, respondents divided the probate estate equally between the will-substitute beneficiary and the other legal heir. Thus, for a majority of vignettes, respondents preferred the existing law with respect to distribution of the intestate estate. The heir will-substitute beneficiary received “all” or “most” of the probate estate in only 10% of the vignettes. In 34% of the vignettes, respondents allocated “little” or “none” to the will-substitute beneficiary. Thus, in 34% of the vignettes, respondents treated the will-substitute proceeds as an advancement.

Table 6 also shows that there was variation in the allocation of the probate estate to the heir will-substitute beneficiary depending on the relationship of the will-substitute

beneficiary to the decedent. Sibling will-substitute beneficiaries fared the best: in only 23% of the vignettes did the sibling receive “little” or “none,” compared to 36% for child will-substitute beneficiaries and 43% for niece will-substitute beneficiaries who were the child of a predeceased sibling.

**Table 6. Allocation of the Probate Estate to Will-Substitute Beneficiary by Relationship of the Will-Substitute Beneficiary to the Decedent for Vignettes in Which the Will-Substitute Beneficiary Is an Heir (Percent)**

	Total	Child	Sibling	Niece*
All	8	7	7	9
Most	2	1	2	3
Equal	57	56	68	45
Little	14	19	12	11
None	20	17	11	32
Total (N)	101% (746)	100% (245)	100% (247)	100% (254)

\* child of decedent's predeceased sibling

Percentages may not sum to 100 due to rounding.

In Table 7, we show how the allocation to the heir will-substitute beneficiary varied by the number and value of will substitutes. We observed few differences according to the number of will substitutes: in 33% of the vignettes with one will substitute, the will-substitute beneficiary received “little” or “none,” compared to 35% of vignettes with three will substitutes.<sup>51</sup> For vignettes in which the value of will substitutes was \$45,000, 22% were allocated “little” and 11% were allocated “none.” This contrasts with the vignettes in which the value of will substitutes was \$145,000. In these vignettes, 5% were allocated “little” and 29% were allocated “none.” This data provide some evidence that respondents who allocated less than half of the probate estate to the will-substitute beneficiary viewed the will substitute transfer as an advancement.<sup>52</sup>

**Table 7. Allocation to Will-Substitute Beneficiary by the Number and Value of Will Substitutes, for Vignettes in Which the Will-Substitute Beneficiary Is an Heir (Percent)**

	Total	Number of will substitutes		Value of will substitutes	
		1	3	\$45,000	\$145,000
All	8	5	10	7	9
Most	2	3	2	3	1
Equal	57	60	53	57	56
Little	14	15	13	22	5
None	20	18	22	11	29
Total (N)	101% (746)	101% (368)	100% (378)	100% (385)	100% (361)

Percentages may not sum to 100 due to rounding.

51. To preview: our multivariate analysis, which controls for other dimensions of the vignette and respondent characteristics, reveals a significant effect of the number of will substitutes. We describe this finding following Table 8.

52. See *infra* Part IV.D.

## 2. Multivariate Analysis

We conducted a logistic regression that predicts whether the will-substitute beneficiary received “a little” or “none” of the probate estate, rather than “half,” “most,” or “all” (see Table 8).<sup>53</sup> We distinguish the response categories in this way because, when the respondent allotted less than half of the intestate estate to the will-substitute beneficiary who was also an heir, the respondent was treating the will-substitute beneficiary less favorably than do existing intestacy statutes. The existing intestacy statutes would divide the estate equally between the two surviving heirs.<sup>54</sup> This less favorable treatment of the will-substitute beneficiary was an indication that the respondent viewed the will-substitute transfer to the heir as an advancement.

**Table 8. Parameters in a Logistic Regression Predicting Whether the Will-Substitute Beneficiary Receives “a Little” or “None” of the Probate Estate Compared with “All,” “Most,” or “Half” for Vignettes in Which the Will-Substitute Beneficiary Is an Heir**

	Odds ratio (95% Confidence Interval)	P Value
<i>Characteristics of the will substitute</i>		
\$145,000 (\$45,000)	1.28 (.806, 2.04)	.300
Three (versus one)	1.49 (.93, 2.39)	.094
Will-substitute beneficiary is child (versus sibling)	2.04 (1.12, 3.73)	.019
Will-substitute beneficiary is a niece, who is the child of the decedent’s predeceased sibling (versus sibling)	4.39 (2.42, 8.00)	< .001
<i>Respondent demographics</i>		
Married (versus unmarried)	1.62 (.584, 4.54)	.355
Has living children (versus no children)	3.66 (.86, 15.9)	.080
Has will (versus no will)	.819 (.298, 2.24)	.695
Has any will substitutes (versus none)	.689 (.123, 3.87)	.674
Age	1.03 (1.00, 1.07)	.020

There was no statistically significant effect of the value of will substitutes on the allocation to the will-substitute beneficiary ( $p=.300$ ). There was a marginally significant effect of the number of will substitutes on the allocation to the will-substitute beneficiary ( $p=.094$ ). When there were three (rather than one) will substitutes, the odds of the will-substitute beneficiary getting “a little” or “none” of the probate estate (being treated as having received an advancement), rather than “half,”

53. Like the previous logistic regression, this model contains a random intercept. We conducted a likelihood ratio test comparing a model without a random intercept to a model with a random intercept; the test was statistically significant [ $\chi^2(1)=142.5$ ;  $p<.001$ ].

54. See *supra* note 13.

“most,” or “all” of the probate estate, were increased by 49%. This effect contrasts with the bivariate results in Table 7, in which the number of will substitutes did not affect the allocation to the will-substitute beneficiary. However, the multivariate analysis is a more rigorous test because it controls for the other dimensions of the vignette and the respondent’s characteristics. These relevant factors are uncontrolled in the bivariate analysis. In a supplemental analysis (results not shown), we examined the association between the number of will substitutes and the odds of the will-substitute beneficiary getting “all” or “most” of the probate estate (being treated as a favored heir). We found that having three will substitutes rather than one will substitute also increased the odds of the heir will-substitute beneficiary getting “all” or “most” of the probate estate (being treated as a favored heir), rather than getting “half,” “a little,” or “none” of the probate estate, by 65% ( $p=.012$ ).<sup>55</sup> Thus, the effect of an increase in the number of will substitutes may have been to move respondents away from an equal distribution of the probate estate between the two heirs and toward the treatment of the will-substitute beneficiary as either the recipient of an advancement or as a favored heir.

In Table 8, there were also differences by the identity of the will-substitute beneficiary. Child will-substitute beneficiaries were more likely than sibling will-substitute beneficiaries to receive “a little” or “none” (rather than “half,” “most,” or “all”); this was statistically significant ( $p=.019$ ). Similarly, niece will-substitute beneficiaries were more likely than sibling will-substitute beneficiaries to receive “a little” or “none” of the probate estate ( $p<.001$ ).

There were no statistically significant differences by marital status in the allocation to the will-substitute beneficiary ( $p=.355$ ). Respondents with living children were 3.66 times more likely than those without living children to allocate “a little” or “none” to the will-substitute beneficiary; this was only marginally statistically significant though ( $p=.080$ ). There were no statistically significant differences in the allocation to the will-substitute beneficiary by whether the respondent had a will or had any will substitutes.

Older respondents were more likely than younger respondents to allocate “a little” or “none” (rather than “half,” “most,” or “all”) of the probate estate to the will-substitute beneficiary. This difference was statistically significant ( $p=.020$ ). The model suggests that every additional year of age was associated with the odds being multiplied by 1.03. For example, a ten-year age difference was associated with a 34% ( $1.03^{10}$ ) increase in the odds of the heir will-substitute beneficiary getting “a little” or “none” of the probate estate as compared with “half,” “most,” or “all.”

We also explored whether the effect of the number and value of will substitutes was different for particular demographic groups of respondents. To do so, we also included interaction terms between a respondent’s demographic characteristics and the value of the will substitutes and then included interaction terms between demographic characteristics and the number of will substitutes. None of these interaction terms were statistically significant at  $p<.05$ .

With the results of the empirical study now set forth, Part IV relates the statistical analysis of the data to potential areas of legal reform. It discusses the value of our using an empirical study to assess public attitudes regarding inheritance issues and situates our study among the other published empirical studies on inheritance. It then

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55. Due to small sample sizes, this analysis did not contain a random intercept.



relies on those earlier projects and our own analysis of the data from this survey to propose a number of legal reforms to state intestacy statutes and to suggest other areas that require further study.

#### IV. DISCUSSION

##### *A. The Use of Empirical Studies in the Design of Intestacy Statutes*

There is wide agreement that intestacy statutes should reflect the likely donative intent of intestacy decedents.<sup>56</sup> The issue is how best to determine that likely intent. In general, there are two principal ways to test for or uncover public attitudes regarding the distribution of intestate estates—wills studies and opinion surveys.<sup>57</sup> Each method has its merits and demerits.<sup>58</sup>

The first way to gather information useful for predicting how a typical decedent would want the intestate estate divided at death is to examine how testate decedents actually devised their probate property.<sup>59</sup> For example, to help predict how the typical married person with a child or children would want the intestate estate divided at death, one might examine the probated wills of people who died leaving a surviving spouse and a child or children. This method has the virtue of focusing on what people have actually done, rather than relying on what people tell us they would do.<sup>60</sup>

An important shortcoming of this method is that people who die testate differ demographically from people who die intestate.<sup>61</sup> Principally, those who die testate tend to be older and wealthier than those who die intestate.<sup>62</sup> Monica K. Johnson and Jennifer K. Robbennolt provide possible explanations for the demographic differences.

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56. *See supra* note 5.

57. Johnson & Robbennolt, *supra* note 27, at 483.

58. For a discussion of the relative advantages and disadvantages of will studies and studies utilizing interviews concerning estate distribution preferences, see generally *id.*

59. *See, e.g.,* DEKKER & HOWARD, *supra* note 15 (reviewing 650 matters filed in the Probate Registry of New South Wales, Australia during September 2004); Contemporary Studies Project, *supra* note 5 (examining probate files for 150 testate and 150 intestate estates from six Iowa counties).

60. To the extent that a study relies upon respondents' reports of the content of their wills, however, the danger arises that respondents might not accurately recall or report the content of their wills. Johnson & Robbennolt, *supra* note 27, at 495.

61. *See id.* at 483–84.

62. DEKKER & HOWARD, *supra* note 15, at 30 (reporting that the average age of intestate decedents in their study was sixty years versus 81.2 years for testate decedents, and the value of intestate estates was “significantly lower” than the value of testate estates); MARVIN B. SUSSMAN, JUDITH N. CATES & DAVID T. SMITH, *THE FAMILY AND INHERITANCE* 65–68, 73 (1970) (reporting results of a study that found a correlation between increase in age and increase in testacy, and in which “[i]ndividuals who died testate had, on the average, total estates that were five times larger than the estates of those who died intestate”); Johnson & Robbennolt, *supra* note 27, at 484; Contemporary Studies Project, *supra* note 5, at 1071–74 (noting that the data from its study suggests that age is “an important factor influencing testacy” and that “wealth is another major factor determining whether or not individuals die testate or intestate”); *see also* Fellows et al., *supra* note 15, at 338.

As people get older, they are more likely to be aware of their own mortality and to contemplate what they would like done with their property. Those with greater wealth may be more concerned with how it is divided at their death, and may be more concerned with the tax implications of their estate plan. They may also be more likely to be in contact with attorneys and other professionals who would advise writing a will.<sup>63</sup>

Moreover, there is some evidence that those who have a will, on average, are more educated, are more likely to be white-collar workers, and are more likely to have children than are those who do not have a will.<sup>64</sup> These differences raise questions about whether results from will studies provide meaningful evidence about the donative intent of intestate decedents.<sup>65</sup> It is reasonable to expect that the donative intent of those who die testate differs meaningfully from those who die intestate.<sup>66</sup>

Indeed, our empirical study found significant differences in the donative preferences of respondents with wills versus those without wills with respect to distribution of the hypothetical intestate estates in the vignettes. There was a positive effect of having three (rather than one) will substitutes on the odds of allocating any of the intestate estate to a nonheir will-substitute beneficiary for individuals without wills, but not for those with wills. In sum, our study provides additional evidence that the estate plans of

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63. Johnson & Robbennolt, *supra* note 27, at 484; *see also* Fellows et al., *supra* note 15, at 336 (“Imminence of death accounts for the differences in testacy between the young and the old, and] the accumulation of wealth, especially among middle-aged persons, presumably creates the compelling need to execute a will.”).

64. Fellows et al., *supra* note 15, at 338 (reporting that older respondents were more likely to have a will than younger respondents, wealthier respondents were more likely to have a will than less wealthy respondents, more-educated respondents were more likely to have a will than less-educated respondents, white-collar respondents were more likely to have a will than blue-collar respondents, and respondents with children were more likely to have a will than childless respondents); *see also* Joel R. Glucksman, *Intestate Succession in New Jersey: Does It Conform to Popular Expectations?*, 12 COLUM. J.L. & SOC. PROBS. 253, 258 (1976) (reporting study finding that “[w]hite-collar workers were more likely to die testate than were blue-collar workers, and service industry workers . . . came in last”). In our instant study, of the 190 respondents from whom we gathered valid data, 27% (8/30) of the respondents without children had a will while 61% (98/160) of the respondents with children had a will.

There also is some evidence that intestate decedents are more likely than testate decedents to have never been married. Contemporary Studies Project, *supra* note 5, at 1075. It appears, however, that because of the high rate of testacy among widowed and widowed persons, unmarried persons are more likely to die testate than are married persons. *Id.*; *see also* Glucksman, *supra* at 259–60 (reporting study finding that “the incidence of intestacy [among widows and widowers] was substantially lower” than for any other marital group). In our instant study, of the 190 respondents from whom we gathered valid data, 47% (38/81) of the unmarried respondents had a will while 62% (68/109) of the married respondents had a will. Our study, of course, involved interviews with living respondents. Our data is not inconsistent with the notion that many of the married respondents with wills in our survey, in time, will die as widows or widowers with wills.

65. *See supra* note 29.

66. Johnson & Robbennolt, *supra* note 27, at 498 (concluding from the authors’ empirical study “that due to the differences between persons with and persons without wills, the results of will studies do not best reflect the probable donative intent of persons who die intestate”).

those who die testate may not be adequate guideposts for designing an intestacy scheme.

A second way to uncover donative intent with respect to intestate property is to ask people how they would want their property to be distributed if they were to die intestate under certain circumstances.<sup>67</sup> This methodology allows us to present a range of family situations that typical will studies seldom observe, such as unmarried decedents and decedents without lineal descendants. It also allows us to focus on other factors of particular relevance to the issue being studied, such as the effect of the size of the estate.

The vignette method, however, has three important limitations.<sup>68</sup> First, respondents may not be able to relate to the hypothetical situation that the researcher asks respondents to consider.<sup>69</sup> Second, respondents undoubtedly give much less thought to the survey questions than they would were they engaged in estate planning.<sup>70</sup> Finally and relatedly, respondents participate in the survey without the advice of legal counsel, whose advice likely would influence the distributive preferences of the respondents.<sup>71</sup>

Monica K. Johnson and Jennifer K. Robbennolt studied data that had been collected by telephone survey relating to (1) distributive preferences under varying hypothetical conditions, and (2) respondents' actual estate plans.<sup>72</sup> Johnson and Robbennolt were interested in comparing the expressed distributive preferences (relating to hypothetical scenarios set out in research vignettes) of those who had wills with those who did not, and also in comparing the actual estate plans of those who had wills with their stated preferences relating to the research vignettes.<sup>73</sup> Johnson and Robbennolt concluded that

the close correspondence between testate participants' wills and their distributive preferences on the hypothetical scenarios should be taken as support for the validity of interview studies. Interview studies show a definite improvement over the biases demonstrated in will studies, and they may be the best possible alternative given the circumstances.<sup>74</sup>

With the merits and demerits of the alternative means for studying donative intent with respect to intestate property in mind, we used a factorial design<sup>75</sup>—a series of

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67. See, e.g., Fellows et al., *supra* note 28; Fellows et al., *supra* note 15; Contemporary Studies Project, *supra* note 5 (examining actual probate files, but also posing hypothetical intestate survivor situations to randomly selected citizens of Iowa and asking how the interviewee would distribute the hypothetical estate).

68. See Evans, *supra* note 35, at 1025 (commenting with respect to the vignette method that “there is an unknown gap between what people say and what they would do”).

69. Johnson & Robbennolt, *supra* note 27, at 484.

70. *Id.*

71. *Id.* at 485.

72. *Id.*

73. *Id.*

74. *Id.* at 497.

75. For a general discussion of the design and merits of the variable vignette research method, see Evans, *supra* note 35, at 1008–14. See also Lawrence H. Ganong & Marilyn Coleman, *Multiple Segment Factorial Vignette Designs*, 68 J. MARRIAGE & FAM. 455, 456 (2006) (“The primary advantages of factorial surveys are that they generally have high internal and external validity because they combine random assignment to experimental conditions with

vignettes—which allowed us systematically to alter certain variables in a fact pattern and then to ask respondents to react to a number of scenarios that differed along one or more of these dimensions.<sup>76</sup> “The basic idea [grounding the factorial design] is to include dimensions that make the decision-making process as realistic as possible, as well as dimensions of theoretical interest, but that also limit the number of dimensions in order not to overload the mental capacity of respondents with inordinately complicated vignettes.”<sup>77</sup> Given that we planned to conduct a telephone survey, we were especially sensitive to keeping our vignettes simple.<sup>78</sup>

### *B. Statutory Reform for Decedents Who Die Leaving a Spouse or Descendants*

#### 1. Decedents Dying with a Surviving Spouse

An intestacy scheme generally should not take will-substitute beneficiary designations into account if the decedent leaves a surviving spouse (including a state-recognized civil union partner or other status-based equivalent).<sup>79</sup> As discussed above,<sup>80</sup> a significant body of empirical scholarship strongly suggests that the overwhelming majority of people who die intestate and with a spouse want the spouse to take all or nearly all of the intestate estate.<sup>81</sup> Any statutory reform should ignore a will-substitute beneficiary designation of someone other than the decedent’s spouse because, given the overwhelming evidence that decedents favor their spouses, it is an insufficient indication that the decedent would want the fact of a will substitute to alter current intestacy schemes favoring surviving spouses.<sup>82</sup> Therefore, under a statute

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usually large, representative samples.”).

76. See, e.g., Drake & Lawrence, *supra* note 20, at 277 (“Used in the inheritance domain, [vignettes] also allow experimental manipulation of the critical factors (e.g., deservedness, need . . . .” (citation omitted)).

77. Evans, *supra* note 35, at 1010.

78. See *id.* at 1013–14 (attempting to justify use of a “convenience survey” of graduate students, in part, by asserting that “multiple vignettes cannot be evaluated with a phone survey because their complicated nature requires that the respondent be able to study them”).

Although we selected a factorial design for this study, we believe it would be helpful in studying the relationship between decedents’ will-substitute beneficiary designations and their distributional preferences regarding their probate estates to examine the actual practices of those who have executed will substitutes. To that end, we are currently working on a second study to gather information on respondents’ actual estate-planning practices. That survey instrument asks what will substitutes a respondent has executed and whom the respondent has named as the primary beneficiary of each will substitute. If the respondent has a will, the survey asks for the identification of the will’s primary beneficiary. If the respondent does not have a will, the survey asks whom the respondent would want to receive the probate property at death.

79. For a possible exception to this general rule, see *supra* note 32.

80. See *supra* note 15 and accompanying text (discussing empirical studies on the donative preferences of married persons).

81. See UNIF. PROBATE CODE § 2-102 cmt. (2008), 8 U.L.A. 38 (Supp. 2009) (“The studies have shown that testators in smaller estates (which intestate estates overwhelmingly tend to be) tend to devise their entire estates to their surviving spouses, even when the couple has children.”); Fellows et al., *supra* note 15, at 350–68.

82. In the instant study, we decided against testing our assumption that the typical decedent would want the surviving spouse to take a full intestate share as defined under extant intestacy statutes, even if the decedent named someone other than the surviving spouse as a will-

modeled after the Uniform Probate Code (UPC), any proposed reform would be limited to the section (2-103) governing that part of the intestate estate not passing to a decedent's surviving spouse.

Section 2-102 of the UPC, which governs the intestate share of a decedent spouse, should remain largely intact. We do, however, propose a slight modification to it to address situations in which the decedent died with one or more will substitutes that name the surviving spouse as the beneficiary. Section 2-102 of the UPC makes the surviving spouse the sole heir in cases in which the decedent is not survived by a parent or a descendant,<sup>83</sup> and in cases in which the decedent is survived by one or more descendants and all of her descendants and the surviving spouse's descendants are mutual descendants—that is, descendants of both the decedent and the surviving spouse.<sup>84</sup> In cases in which the decedent is survived by a spouse and a parent, and in cases in which the decedent is survived by a spouse and descendants, one or more of whom are from another relationship, or the spouse has a descendant from another relationship, the UPC uses a “lump-sum-plus-a-fraction-of-the-balance” formula to calculate the surviving spouse's intestate share.<sup>85</sup> For example, “[t]he intestate share of a decedent's surviving spouse is . . . the first [\$300,000], plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent.”<sup>86</sup>

The lead drafter of the 1990 changes to the UPC, Professor Lawrence W. Waggoner, has commented that the purpose of the lump-sum-plus-a-fraction-of-the-balance approach is to ensure that the surviving spouse takes “an adequate share” before either the surviving parent or a surviving descendant takes any portion of the intestate estate.<sup>87</sup> The UPC drafters presumed that, in the case of a modest estate, the decedent would prefer that the surviving spouse receive some minimum level of financial security, and only at levels above that minimum should either a parent or a descendant of the decedent share in the estate.<sup>88</sup> In calculating what share is “adequate” for the surviving spouse, the UPC ignores will-substitute property passing to the surviving spouse on the death of the intestate decedent.<sup>89</sup> Arguably, however, the

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substitute beneficiary. In light of practical limitations on the scope of our study—principally cost, sample size, and the amount of time respondents would stay on the phone to complete a survey—we chose to focus the attention of our survey on other questions less informed by existing empirical research.

83. UNIF. PROBATE CODE § 2-102(1)(A), 8 U.L.A. 37 (Supp. 2009).

84. *Id.* § 2-102(1)(B).

85. *See id.* § 2-102(2)–(4).

86. *Id.* § 2-102(2). The UPC now indexes the dollar amounts stated in section 2-102 to the Consumer Price Index. *Id.* § 1-109.

87. *See* Waggoner, *supra* note 5, at 233 (“By [adequate share], the revised UPC does not mean to restrict the spouse's share to no more than necessary to provide him or her with the bare necessities of life, but rather to grant a share that is commensurate with the size of the estate and the circumstances of the family make-up.”).

88. *See id.* at 233–34 (“In the more sizeable intestate estates, infrequent though they may be, the revised UPC approach is predicated on the notion that wealthier intestate decedents would feel that some provision for their children would not deprive the surviving spouse of an adequate share.”).

89. *Id.* at 234 (“[T]he spouse's intestate share is in addition to any nonprobate property to which she might succeed by reason of the decedent's death such as joint tenancies, joint checking, savings or money-market accounts, life insurance, and pension benefits.”).

UPC's calculation of what "is commensurate with the size of the estate and the circumstances of the family make-up"<sup>90</sup> ought to consider property passing to the surviving spouse at the decedent's death by means of will substitutes. For example, a revised UPC section 2-102(2) might provide that where the decedent is not survived by any descendants, but is survived by a parent, "[t]he intestate share of a decedent's surviving spouse is . . . that amount which when added to the value of nonprobate transfers received by the decedent's surviving spouse equals [\$300,000], plus three-fourths of any balance of the intestate estate."<sup>91</sup>

The inclusion of will substitutes in the calculation of the spousal share of the probate estate warrants an increase in the minimum dollar amounts passing to the surviving spouse. The UPC drafters set those amounts in appreciation of the fact that the surviving spouse also likely would receive nonprobate property.<sup>92</sup> Inclusion of will substitutes in the computation without a concomitant increase in the dollar amount could result in a reduction of financial resources available to the surviving spouse. The advantage of inclusion of will substitutes in the calculation and an increase in the minimum dollar amount available to surviving spouses is that it provides greater consistency of treatment among surviving spouses. Those spouses who do not receive property through will substitutes will take a larger share of the probate estate to ensure they receive a minimum level of financial resources. The proposed reform will put them in parity with those spouses who do receive property through will substitutes and better accomplish the UPC drafters' goals of treating the surviving spouse as a preferred heir in recognition of the likely donative intent of intestate decedents. Although the proposed reform of section 2-102 of the UPC emerges out of our basic inquiry about the proper role of will substitutes in intestacy statutes, it goes beyond the issues raised in our empirical study. Policy makers should judge its merits without regard to whether will substitutes should affect the shares of the probate estate passing to a decedent's heirs other than a spouse.

## 2. Decedents Dying with Surviving Descendants

In general, the intestacy scheme should not take will-substitute beneficiary designations into account when a decedent dies leaving descendants. Empirical studies have demonstrated the strong desire of most people to have their descendants inherit any probate property that does not otherwise pass to a spouse.<sup>93</sup> Therefore, any statutory reform should ignore a will-substitute beneficiary designation in favor of someone other than a surviving descendant because it is an insufficient indication that the decedent would have wanted to alter the intestacy scheme favoring descendants.

Two situations arise, however, that warrant the state making an exception to the general rule to ignore will substitutes when a decedent dies leaving descendants. When a will-substitute beneficiary is also the parent of the decedent's children and neither the will-substitute beneficiary nor the decedent has nonmutual children, the intestacy

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90. *Id.* at 233.

91. Any spouse who receives more than \$300,000 through nonprobate transfers would receive only three-fourths of the probate estate.

92. Waggoner, *supra* note 5, at 234.

93. *See supra* note 15.

statute should allow the will-substitute beneficiary to be treated as an heir.<sup>94</sup> We have in mind particularly life partners who have had a child or children together, but do not otherwise have a right to inherit from each other under state laws.

This statutory reform is grounded in the “conduit theory,” which also informs the UPC’s existing intestacy provisions relating to spouses and children.<sup>95</sup> Under section 2-102 of the UPC, if a spouse and descendants survive the decedent, and if the decedent and the surviving spouse have only mutual descendants (that is, neither has a descendant from another relationship), the surviving spouse takes all of the intestate estate.<sup>96</sup> As Professor Waggoner has explained:

The 1990 UPC is predicated on the notion that decedents do not perceive their own children as losing [in this situation]. Rather, they see the surviving spouses as occupying somewhat of a dual role, not only as their primary beneficiaries, but also as conduits through which to benefit their children. If [the decedent] died prematurely, at a time when their children were still minors, [the surviving spouse] would be better equipped than their children to use [the decedent]’s property for the benefit of their children as well as for herself. If [the decedent] was older at death, when their children were middle-aged working adults, [the surviving spouse] would probably be older and have greater economic needs than their children. In this latter case, the conduit theory assumes that [the decedent]’s children will eventually inherit any unconsumed portion of his property from [the surviving spouse] upon her death.<sup>97</sup>

A decedent’s naming of a life partner who is the other parent of the decedent’s child or children as a will-substitute beneficiary provides strong evidence that the decedent viewed the surviving partner as a “conduit” with respect to their child’s or children’s inheritance. The decedent has indicated confidence that the life partner, who is also the other parent of the decedent’s child or children, will use the wealth inherited from the decedent for the benefit of their mutual child or children and, in time, will devise (or allow to pass by intestacy) that property to the surviving mutual child or children. This statutory reform finds support in an earlier empirical study.<sup>98</sup> As for implementation questions, this proposal notably does not require that a state define a “life partner” or otherwise provide for this status. It depends solely on the fact of a parent-child relationship and documentation of will substitutes naming the child’s surviving parent.

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94. The exception would also include grandchildren and other descendants of the unmarried parents.

95. See UNIF. PROBATE CODE § 2-102, 8 U.L.A. at 37 (Supp. 2009).

96. See *id.* § 2-102(1)(B).

97. Waggoner, *supra* note 5, at 232.

98. See Fellows et al., *supra* note 28, at 89 (“A substantial majority of the respondents in each sample group consistently preferred the [surviving life] partner to take a share of the decedent [life partner]’s estate.”); *id.* at 47 (reporting that “[t]he majority of respondents in each sample . . . gave the surviving partner some share of the estate” when the decedent was survived by a minor child from a prior relationship). The current empirical study also bolsters this statutory reform proposal. In 51% of the vignettes in which the surviving life partner is the decedent’s will-substitute beneficiary and is competing against the decedent’s sibling with respect to allocation of the probate estate, respondents chose to allocate half or more than half of the probate estate to the surviving life partner. See *supra* Table 2.

A remaining issue is how significant the evidence from the will substitutes must be before the surviving parent takes instead of the decedent's descendants. The will substitutes naming the surviving parent should represent a substantial value relative to the probate estate. Any percentage inevitably is arbitrary, but given the favored-heir status of descendants, the will substitutes naming the surviving parent should have to constitute at least one-third of the value of the probate estate and will substitutes combined. Also, the surviving parent should have to be named in a number of different will substitutes. The statute could set a minimum number, for example, three.

The current empirical study regarding other family situations supports the importance of the number of will substitutes.<sup>99</sup> When the will-substitute beneficiary was not otherwise an heir, for unmarried respondents, for childless respondents, and for respondents without a will, there was a positive effect of having three will substitutes, rather than one will substitute, on the odds of a will-substitute beneficiary getting any portion of the probate estate (that is, of being treated as a new heir). These demographic groups are also those most likely to be affected by intestacy reform. In sum, our study supports requiring multiple will-substitute beneficiary designations in favor of an individual before the law would make that individual a new heir.

The second possible exception to the general rule that will substitutes should not affect traditional intestacy schemes when the decedent dies leaving descendants arises when the will-substitute beneficiary is a descendant and heir of the decedent. The law could consider treating the will substitute proceeds as an advancement against the descendant's intestate share. Part IV.D discusses this potential reform.

### 3. Demographic Differences

If a consensus develops that, as we believe should be the case, intestacy reform to take account of will substitutes should not apply generally to married persons or persons with surviving descendants, the probable intent of unmarried decedents and childless decedents should become the central concern for policy makers. Future empirical studies investigating the relationship between will-substitute beneficiary designations and donative intent with respect to the probate estate might usefully oversample unmarried individuals and childless individuals.

Although relatively few respondents in our study were both unmarried and without living children,<sup>100</sup> the study shows that unmarried respondents differed significantly from married respondents, and childless respondents differed significantly from those with children in several ways relating to the distribution of the intestate estate. With respect to the new heir hypothesis vignettes, in which the will-substitute beneficiary was *not* also one of the decedent's two heirs, respondents with living children were less likely than people without living children to allocate any of the probate estate to the will-substitute beneficiary. This finding alone suggests that the case for intestacy reform to take account of will substitutes in creating new heirs is much stronger if that reform applies only to decedents who are not survived by descendants.

Also with respect to the new heir-hypothesis vignettes, we found that the effect of the number of will substitutes differed depending on whether a respondent was married

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99. See *supra* text accompanying notes 49–50; see also *supra* Table 5.

100. Twenty-four of the 190 respondents in our survey were both unmarried and childless.



or not and on whether a respondent had living children or not. The number of will substitutes had a positive effect for unmarried people as well as for childless people, but not for their married peers or peers with children. These findings also suggest that reform of the intestacy scheme to take account of will-substitute beneficiary designations generally should not apply to decedents survived by a spouse or descendants.

### *C. The New Heir Hypothesis*

#### 1. Identity of the Will-Substitute Beneficiary

As discussed above,<sup>101</sup> to test our new heir hypothesis, we presented respondents with vignettes in which the decedent died survived by a sibling, who would be the decedent's heir under all extant U.S. intestacy statutes, and also by a will-substitute beneficiary, who would not be the decedent's heir under any extant U.S. intestacy statute. The will-substitute beneficiary competing in the vignettes against the sibling for a share of the intestate estate was either (1) a charity (the local public library); (2) the decedent's niece, who was the child of the decedent's surviving sibling; (3) the decedent's cousin; or (4) the decedent's life partner. The survey results show that the identity of a will-substitute beneficiary significantly influenced the respondents' allocation of the probate estate between an heir and a will-substitute beneficiary.

The life partner was by far the most likely of the will-substitute beneficiaries to be treated as a new heir by the respondents. With respect to 57% of the vignettes in which the life partner was the will-substitute beneficiary, the respondent would make the life partner a new heir. Indeed, with respect to 51% of the vignettes in which the life partner was the will-substitute beneficiary, the respondent would give the life partner half or more of the probate estate. The odds of the life partner will-substitute beneficiary receiving any of the probate estate were 2.64 times as great as the odds of the niece will-substitute beneficiary (the second most favored nonheir will-substitute beneficiary) getting any of the probate estate. We speculate that this might be because the term *life partner* tells a story about a functional relationship much more so than do the terms *niece*, *cousin*, or *library*. Respondents might readily infer from the term *life partner* that the decedent and the survivor shared a life together as a committed couple. In contrast, the term *niece*, for example, tells us little about the nature and extent of the decedent's relationship with the will-substitute beneficiary.

The charity was by far the least likely of the will-substitute beneficiaries to be treated as a new heir by the respondents. Respondents in 70% of the vignettes in which the charity was the will-substitute beneficiary assigned none of the probate estate to the charity. Although respondents were willing to reduce the share of the probate estate going to a blood relative or equivalent (e.g., adoptive brother) when the will-substitute beneficiary was a family-like member (e.g., life partner), they were unwilling to do so for a charitable institution. Blood ties or their equivalent have substantial salience in public attitudes toward inheritance.<sup>102</sup>

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101. See *supra* Part II.B.

102. Indeed, our survey demonstrates the often-seen tendency to favor close blood relations over more distant relations with respect to inheritance. See *supra* Tables 2, 6. With the identity

The current study placed the charity in competition for a share of the probate estate with the decedent's brother—a relatively close blood relative. It is possible, however, that respondents who would not even partially disinherit a second-degree relation (a sibling) in favor of a charity that is a will-substitute beneficiary would be more willing to at least partially disinherit a fourth-degree relation (a cousin) in favor of such a will-substitute beneficiary. Moreover, if a decedent's estate otherwise would escheat, respondents may well favor a charity named in a will substitute. Additional empirical studies gauging public opinion on the relationship between will-substitute beneficiary designations to charities and traditional intestacy statutes could prove useful in determining the likely donative intent of decedents dying with will substitutes, but without wills.

## 2. Implementation Issues

If a state were to decide to consider creating new heirs based on a decedent's will substitute designations, it would face a number of implementation issues. Three critical questions are (1) how to determine the import of any will substitute designation for the purpose of creating a new heir, (2) how to divide the probate estate among new heirs, and (3) how to divide the probate estate between new heirs and otherwise existing heirs.

As to the first question, one approach would be to qualify a will-substitute beneficiary as a new heir only if the will-substitute beneficiary gets a certain percentage of the nonprobate assets. Such a rule, for example, would provide that only a will-substitute beneficiary (with some accommodation for class gift designations) who receives 75% of the nonprobate estate would qualify as an heir on account of the decedent's will-substitute beneficiary designations. The rationale for such an absolute-threshold approach would be that the larger the proportion of the nonprobate estate a

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of the heir who was not a will-substitute beneficiary as a sibling of the decedent held constant, in 77% of the relevant vignettes, respondents awarded a sibling will-substitute beneficiary half or more of the probate estate; in 57% of the relevant vignettes, respondents awarded a niece who was a child of the decedent's predeceased sibling half or more of the probate estate; in 47% of the relevant vignettes, respondents awarded a niece who was a child of the decedent's surviving sibling half or more of the probate estate; and in 35% of the relevant vignettes, respondents awarded a cousin will-substitute beneficiary half or more of the probate estate. More specifically, the odds of a cousin will-substitute beneficiary receiving any of the probate estate were 44% (1–558) lower than the odds of a niece (the child of the decedent's living sibling) will-substitute beneficiary getting any of the probate estate; this was marginally statistically significant ( $p = .071$ ). Thus, close blood relations did better than did more distant relations versus the sibling who was not a will-substitute beneficiary: the second-degree relation (sibling) did better than the third-degree relation (niece) who was inheriting through a predeceased second-degree relation (her predeceased parent who was the sibling of the decedent), who in turn did better than the third-degree relation (niece) who was not inheriting through a second-degree relation, who in turn did better than the fourth-degree relation (cousin). It is noteworthy that respondents did not treat the child of a predeceased sibling equal to a sibling. Sixty-eight percent of the responses to the relevant vignettes gave half the probate estate to the will-substitute beneficiary sibling, while 11% gave such a sibling none of the probate estate. Forty-five percent of the responses to the relevant vignettes gave half the probate estate to the child of a predeceased sibling, while 32% gave that child of a predeceased sibling none of the probate estate.

will-substitute beneficiary receives, the more confident we can be that the decedent would want that beneficiary to take from the intestate estate as well. Nevertheless, the absolute-threshold approach may be too inflexible, given the multitude of circumstances surrounding will-substitute beneficiary designations.<sup>103</sup>

An alternative response to the first question that avoids an arbitrary threshold amount and definitional issues concerning classes of beneficiaries and also addresses the second question of how to divide the probate estate among new heirs is what we call the *mirroring approach*. Under this approach each will-substitute beneficiary would take a percentage of the intestate estate going to new heirs that mirrors the beneficiary's percentage of the nonprobate estate. Thus, if a will-substitute beneficiary who takes 5% of the nonprobate estate would otherwise qualify under a statutory modification as an heir, that beneficiary would take 5% of the intestate estate that goes to such new heirs. The mirroring approach appreciates that the larger the proportion of the nonprobate estate a will-substitute beneficiary receives, the more confident we can be that the decedent would want that beneficiary to take from the intestate estate as well. The mirroring approach addresses that issue differently than the threshold approach. Under the mirroring approach, the risk and, indeed, the likelihood of making an incorrect decision with respect to the decedent's donative intent is inversely proportional to the consequences of making that wrong decision. Although we can be less certain that the decedent would want a beneficiary who was left only 5% of the nonprobate estate to take in intestacy (as opposed to our increased confidence when the decedent leaves 100% of the nonprobate estate to a will-substitute beneficiary), under the mirroring approach, that will-substitute beneficiary would take only 5% of the intestate estate going to new heirs.<sup>104</sup> Moreover, we would create a new heir and apply

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103. An alternative to a 75% threshold rule is for the state to establish presumptions based on a threshold amount. If a nonprobate taker (with some accommodations for class gift designations) took 75% or more of the nonprobate estate, the statute would presume receipt of a share in the probate estate, unless there is clear and convincing evidence to rebut decedent's intent to treat the will-substitute beneficiary as the primary object of her bounty. If the nonprobate taker received less than 75% of the nonprobate estate, the state would presume exclusion from a share of the intestate estate, unless there is clear and convincing evidence showing the will-substitute beneficiary was the decedent's primary object of her bounty. Such a threshold-presumption approach has the significant disadvantage of introducing uncertainty into the probate process and creating the potential for expensive litigation. These disadvantages have particular saliency in U.S. inheritance law, which strives for simplicity and certainty. *See* Spitko, *supra* note 1, at 1076 (identifying a desire for simplicity and certainty as one of the seven values that grounds the 1990 Uniform Probate Code).

104. *Cf.* E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255, 300–01 (2002). Professor Spitko proposes an accrual method for determining the size of a nonmarital committed partner's intestate share based on the duration of the cohabitation between the decedent and the survivor. He argues as follows:

[T]he accrual method reduces the likelihood of a court making a relatively costly "wrong" decision as to whether a qualifying committed cohabiting partnership existed. The determination as to whether a claimant was a committed partner such that she should share in the intestate estate will be more difficult—a closer call—in relationships of relatively short duration. In such relationships, however, even if the claimant qualifies as a surviving committed partner, she will take only a

the mirroring approach to determine that new heir's share of the intestate estate only if, as discussed above, the nonprobate estate is of a substantial value relative to the probate estate and only if the new heir were named in a minimum number of the decedent's will substitutes.

As to the third question of how to divide the probate estate between new heirs and existing heirs, our empirical study suggests that, at least when the existing heirs are close blood relations of the decedent, new heirs should not wholly displace otherwise existing heirs. Very few of the respondents in our survey awarded the entire probate estate to the nonheir will-substitute beneficiary.<sup>105</sup> Thus, our study does not support the notion of a new heir wholly displacing an otherwise existing heir as intestate taker.

Additional empirical studies would be useful, however, to explore whether the identity of the existing heirs might influence respondents' willingness to allocate the entire probate estate to the will-substitute beneficiary. In our study, the existing heir was the decedent's brother in six of the seven sets of vignettes, and was the decedent's child in the remaining set of vignettes. We wonder whether respondents would be more willing to allocate the entire probate estate to a will-substitute beneficiary when the existing heir is a more distant relation to the decedent, such as a cousin, or the state (by means of escheat). Our study itself demonstrates the tendency to favor close blood relations over more distant relations in that will-substitute beneficiaries who were more closely related to the decedent did better in competing for allocation of the probate estate against the decedent's brother and heir than did more distantly related will-substitute beneficiaries.<sup>106</sup> We think it reasonable, therefore, to hypothesize that respondents' willingness to allocate all of the probate estate to a will-substitute beneficiary would be affected not only by the identity of the will-substitute beneficiary (as our study shows), but also by the identity of the persons who would otherwise be the heirs. Given the substantial evidence that decedents prefer to avoid escheat and the results of our study providing some support for the creation of new heirs based on will-substitute beneficiary designations, we recommend that the law should begin to integrate will substitutes into the intestacy statute by making the decedent's will-substitute beneficiaries the heirs with respect to the entire intestate estate when that estate otherwise would escheat.<sup>107</sup> Indeed, we think states should consider that, when

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relatively small part of the decedent's intestate estate. Thus, the accrual method minimizes the consequence of a "wrong" decision. With respect to relationships of greater duration, in which a greater share of the intestate estate is at stake, the evidence that such a relationship existed should be far more compelling and, therefore, the judgment as to whether such a relationship existed should be in most cases a much clearer call for the court (and potential litigants) to make.

*Id.*

105. In only 9% of the vignettes in which the library was the will-substitute beneficiary did respondents award the library the entire probate estate. Similarly, in only 9% of the vignettes in which the cousin was the will-substitute beneficiary did respondents award the cousin the entire probate estate. In only 10% of the vignettes in which the niece was the will-substitute beneficiary did respondents award the niece the entire probate estate. The life partner did best among all will-substitute beneficiaries with respect to being allocated all of the probate estate. Still, in only 18% of the vignettes in which the life partner was the will-substitute beneficiary did respondents award the life partner the entire probate estate.

106. *See supra* Part III.A.2.

107. Evidence suggests that property owners have an aversion to having their estates escheat to the state. *See* Glucksman, *supra* note 64, at 276, 294 (reporting that only sixteen percent of

the probate estate would otherwise escheat, the law relax the prerequisites for creating new heirs. The decedent's will-substitute beneficiary arguably should succeed to the intestate estate even if the nonprobate estate is a relatively small, but nontrivial, portion of the total estate and even if the decedent died with only a single will substitute.

#### *D. The Advancement Hypothesis*

As discussed above, in three of the seven family situations presented in our vignettes, the decedent's will-substitute beneficiary was also one of the decedent's two heirs. These vignettes allowed us to investigate whether the will-substitute beneficiary designation in favor of an heir is evidence of a transfer that the decedent would want the law to credit against the will-substitute beneficiary in the distribution of the probate estate (i.e., an advancement that should reduce the intestate share going to the will-substitute beneficiary), would prefer the designation have no effect on the distribution of the probate estate, or would want the law to replicate the designation by giving the will-substitute beneficiary most or all of the probate estate.

Our study provides only modest support for the advancement hypothesis. In a majority of cases involving the advancement vignettes, respondents treated the heir who was a will-substitute beneficiary and the heir who was not a will-substitute beneficiary equally with respect to distribution of the probate estate (i.e., the results indicate that the law should not take will-substitute beneficiary designations into account). In the case of the child-child vignette, the sibling-sibling vignette, and the sibling-niece vignette, respondents allocated the probate estate equally between the two heirs in 56%, 68%, and 45% of the cases respectively. In those instances in which the respondent did not split the probate estate equally between the two heirs, however, respondents in far more cases treated the will substitute transfer as an advancement than as an indication that the beneficiary was a preferred heir. In the case of the child-child vignette, the respondents in 36% of the cases treated the will substitute as an advancement versus 8% of the cases in which the respondents treated the transfer as an indication of favored status. Similarly, in the case of the sibling-sibling vignette, the respondents in 23% of the cases treated the will substitute as an advancement versus 9% of the cases in which the respondents treated the transfer as an indication of favored status. In the case of the sibling-niece vignette, the respondents in 43% of the cases treated the will substitute in a manner consistent with viewing the transfer as an advancement versus 12% of the cases in which the respondents treated the transfer as an indication of favored status.<sup>108</sup>

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respondents who had favored family in an earlier hypothetical estate distribution favored escheat to the state when the hypothetical decedent's "closest living relative [was] so distantly related to the deceased as to have never heard of him"); Contemporary Studies Project, *supra* note 5, at 1118–19 (reporting that only ten percent of respondents gave hypothetical decedent's estate to a state education fund when decedent was survived by a stepparent and a distant relative and respondents were asked to assign the estate to the stepparent, the distant relative, the state education fund, friends, or "others").

108. We describe certain responses in the case of the sibling-niece vignette as "treat[ing] the will substitute in a manner consistent with viewing the transfer as an advancement" because such results might also simply be an indication that the respondent preferred to treat the sibling, who has a closer degree of relation to the decedent than does the niece, more favorably than the niece. This explanation obviously is not a possibility in the cases of the child-child vignette and

Additional support for the advancement hypothesis is found when one looks at the effect of the relative value of will substitutes on respondents' allocation of the probate estate in the advancement vignettes. We held the value of the probate estate constant at \$100,000. When the value of will substitutes was \$45,000, respondents in 22% of the cases involving advancement vignettes allocated some, but less than half, of the probate estate to the will-substitute beneficiary, while respondents in 5% of such cases allocated none of the probate estate to the will-substitute beneficiary. When the value of will substitutes was \$145,000, respondents in only 11% of the cases involving advancement vignettes allocated some, but less than half, of the probate estate to the will-substitute beneficiary, while respondents in 29% of such cases allocated none of the probate estate to the will-substitute beneficiary. This data provides strong evidence that most of the respondents who did not divide the probate estate equally tried as best they could to divide the total estate, both nonprobate and probate transfers, equally among the heirs.

The results of our empirical study strongly suggest that the will-substitute beneficiary designation in favor of a person who is otherwise an heir should not be viewed as an indication that the beneficiary is a decedent's preferred heir. In the case of the child-child vignette (the decedent was survived by two children as heirs, one of whom was a will-substitute beneficiary), the sibling-sibling vignette (the decedent was survived by two siblings as heirs, one of whom was a will-substitute beneficiary), and the sibling-niece vignette (the decedent was survived by a sibling and a niece (the child of the decedent's predeceased sibling) as heirs, and the niece was a will-substitute beneficiary), respondents viewed the will-substitute beneficiary as a preferred heir in only 8%, 9%, and 12% of the cases respectively. Thus, our study leads us to conclude tentatively that intestacy reform to take account of the will-substitute beneficiary designations should treat the will-substitute designation of an heir as an advancement and not evidence that the decedent favors that will-substitute beneficiary over other heirs of the decedent. Further studies investigating the relationship between will substitutes and intestacy statutes in circumstances in which the decedent's heirs are more distant relations than the first- and second-degree relations in our vignettes are needed. The studies could help determine whether a favored-heir rule might be appropriate when a decedent dies with more distant kin, such as aunts and uncles, nieces and nephews, and cousins. In sum, our survey results militate against treating as a favored heir a will-substitute beneficiary who is otherwise a decedent's heir. Rather, our survey results suggest that, if the law were to take into consideration a will-substitute beneficiary designation in favor of an heir, the will-substitute property should be treated as an advancement against the beneficiary's intestate share.

This study has produced new information that should inform consideration of the potential for will substitutes to improve state intestacy statutes. The results provide some support for the notion that will-substitute beneficiary designations in favor of nonheirs should be used to create new heirs. They provide significant support for the law to ignore will substitutes when the will-substitute beneficiary is otherwise an heir of the decedent. Additional empirical studies are needed to explore whether respondents would be more willing to allocate some or all of the probate estate to a will-substitute beneficiary if the existing heir is a more distant relation to the decedent, such as a cousin, or the state (by means of escheat), regardless of whether the will-

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the sibling-sibling vignette.

substitute beneficiary is a nonheir or heir. The studies could help determine whether a new-heir rule and a favored-heir rule are appropriate when a decedent dies with more distant kin, such as aunts and uncles, nieces and nephews, and cousins.

#### CONCLUSION

This Article changes how legislators will think about intestacy statutes. In addition to a will, will substitutes provide direct written evidence of a decedent's donative intent. Yet, no one has considered how to integrate will substitutes' individual expressions of donative intent into intestacy statutes. This Article represents a first effort to identify the potential, as well as the complexities, of using will substitutes in the design of an intestacy statute.

The injection of will substitutes into intestacy statutes should not create difficult administrative burdens either on the decedents' personal representatives or the courts. A personal representative currently has the duty to determine all of a decedent's will substitutes in order to resolve issues with creditors and to determine what state or federal transfer taxes, if any, are due at the decedent's death. Therefore, a legal reform requiring the personal representative to identify all will substitutes for the purpose of determining the distribution of the probate estate should not significantly increase the duties of the personal representative. Consideration of will substitutes in intestacy statutes also should not increase litigation. Probate courts will have the advantage of being able to rely exclusively on written documents, and any legal reform will rely on strict rules that will severely limit a court's discretion and the introduction of factual disputes. Questions may arise on the interpretation and construction of will-substitute designations, but those issues would have to be resolved regardless of whether a particular designation may affect the distribution of the probate estate. If the law increases the import of will-substitute beneficiary designations, because potentially they can determine the distribution of the probate estate, disappointed heirs may be more likely to challenge the will substitutes as a product of fraud or undue influence or argue that the decedent lacked donative capacity. The risk of increased litigation, however, has to be weighed against the benefit of the law furthering a decedent's donative intent.

The more serious problem raised by the introduction of will substitutes into inheritance law is that decedents execute will substitutes in a multitude of circumstances and for myriad reasons. This project goes a long way to identify the issues that must be resolved for will substitutes to play a role in the distribution of an intestate decedent's probate estate. In general, will substitutes should affect the distribution scheme of intestacy statutes only for decedents who die without a surviving spouse or a descendant. These decedents are the very people who we know least about in terms of their likely donative intent, and they should be the focus of any future empirical study regarding will substitutes and inheritance law. Although further study is warranted, based on our empirical study the more distantly related the decedent's heirs, determined under a traditional intestacy statute, the more likely a decedent would want a nonheir will-substitute beneficiary to be treated as a new heir and an heir will-substitute beneficiary to be treated as a favored heir. The results of our empirical study further suggest that the number of will-substitute designations and, to a lesser extent, the value of those will substitutes relative to the probate estate matter. Any law reform would have to establish some threshold number and value before taking into account

will substitutes in determining the distribution of a decedent's estate. This empirical study has opened up the possibility for significant reform of the intestacy statutes in this country. The work that remains to be done is to consider how, not whether, will substitutes should be integrated into intestacy schemes.