

# ARTICLE

## THE INHERITANCE PROCESS IN SAN BERNARDINO COUNTY, CALIFORNIA, 1964: A RESEARCH NOTE

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[I]n the event I shall marry JENNIE LIMA ELLIOT, and she shall survive my death, then I give, devise and bequeath unto her a sum of money equal to \$1,000.00 for each calendar year she shall treat me with conjugal kindness . . . .

—Signed Eber R. Hively<sup>1</sup>

Probate records are ubiquitous. Virtually every American county has records of estates of the dead. These records provide a rich source for any study of American legal and social history.<sup>2</sup> They have a lot to tell us about family life, about the economy, about love and death, and every aspect of life in America. Yet very few scholars have tried to tap these records. There are very few empirical studies that use as their main source probate records, probably no more than a dozen or so,<sup>3</sup> and even fewer in California.<sup>4</sup> This Research Note analyzes

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1. Codicil to Last Will and Testament, Prob. Rec. No. 33560, San Bernardino County, Cal. (1964) (in Stanford's Robert Crown Law Library collection). All probate documents cited in this Research Note are housed in Stanford's Robert Crown Law Library collection. See *infra* note 35.

2. See Lawrence M. Friedman, *Patterns of Testation in the 19th Century: A Study of Essex County (New Jersey) Wills*, 8 AM. J. LEGAL HIST. 34, 34 (1964). Forty years have passed since this study, and yet probate records remain a relatively untapped resource; few empirical studies have been conducted. See *infra* note 3 and accompanying text.

3. The following empirical studies on probate records have been published, with sample size and location in parentheses: James W. Deen, Jr., *Patterns of Testation: Four Tidewater Counties in Colonial Virginia*, 16 AM. J. LEGAL HIST. 154, 154 (1972) (canvassing all wills in four counties in Colonial Virginia from 1660 to 1719); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 241 (1963) (reviewing ninety-seven probate records in 1953 and seventy-three records in 1957 from Cook County, Illinois); 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, 321 (examining telephone surveys in five states concerning public opinion about intestate succession); Friedman, *supra* note 2, at 34 (analyzing 150 wills of Essex County, New Jersey—30 wills from 1850, 60 wills from 1875, and 60 wills from 1900); T. P. Schwartz, *Durkheim's Prediction About the Declining Importance of the Family and Inheritance: Evidence from the Wills of Providence, 1775–1985*, 37 SOC. Q. 503, 503 (1996) (analyzing 429 wills filed in the probate court of Providence, Rhode Island from 1775 to 1985); Edward H. Ward & J. H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393, 393 (investigating 415 probate proceedings in Dane County, Wisconsin, during the first half of the twentieth century); Joel R. Glucksman, Note, *Intestate Succession in New Jersey: Does It Conform to Popular Expectations?*, 12 COLUM. J.L. & SOC. PROBS. 253, 255 (1976) (sampling 100 randomly selected probate records in Morris County, New Jersey, from 1971).

4. The Authors found only one empirical study conducted in California. See Debra S. Judge & Sarah Blaffer Hrdy, *Allocation of Accumulated Resources Among Close Kin: Inheritance in Sacramento, California, 1890–1984*, 13 ETHOLOGY & SOCIOBIOLOGY 495 (1992). Judge and Hrdy analyzed 1,538 testate decedents in Sacramento, California, from 1890 to 1984. *Id.* at 495. In particular, they found:

513 probate records—both intestate and testate proceedings—of decedents who died in 1964 and whose probate proceedings took place in San Bernardino County, California.

The neglect of probate records is all the more surprising in light of the subject's importance. In the United States, trillions of dollars of wealth are owned by individuals.<sup>5</sup> In this free-market system, men and women (and some children) have control of enormous quantities of stocks and bonds, real estate, bank accounts, gold and silver, and every conceivable form of tangible and intangible property.<sup>6</sup> These assets are, for the most part, owned in "fee simple," to use lawyer's jargon. "Fee simple" means, basically, total control and dominion, theoretically forever. People, however, unlike diamonds, are definitely not forever. Every last one of us is going to die; and we can take nothing with us. Unlike the Pharaohs of ancient Egypt, we will go to the grave with only the clothes on our back, a casket, and perhaps a wedding ring or some small keepsake. The enormous stock of privately owned wealth, the trillions of dollars of assets, will (for the most part) turn over as generations die off.<sup>7</sup> What could be more important, then,

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Spouse and/or children received an average 92% of the estate. The few women who were survived by a spouse more often excluded their husbands in favor of their children than did husbands exclude wives. We explain this difference in spousal treatment in terms of the reproductive potential of the two sexes at the average age of death. Fathers and mothers without spouses bequeathed the majority of assets to children. Seventy-one percent of parents with two or more children treated them absolutely equally. Sex ratio among offspring was equal. There was no evidence of a general sex preference or a wealth by sex-preference interaction. Decedents with two or more daughters treated them more equitably than did decedents with two or more sons—additional evidence that treatment of daughters is less subject to environmental and individual variation than is the treatment of sons. Decedents without biological children treated adopted children like biological children. Smaller legacies to the few adopted children in families with biological children can be explained by increased sibship size.

*Id.*

5. Cf. Edward M. Gramlich, Governor, Fed. Reserve Bd., Remarks Before the International Bond Congress, Consumption and the Wealth Effect: The United States and the United Kingdom (Feb. 20, 2002), available at <http://www.federalreserve.gov/boarddocs/speeches/2002/20020220/default.htm> (noting that \$12 trillion was added to the wealth of United States households between early 1995 and early 2000).

6. See Edward J. Dodson, Wealth, Income and Race in the United States, [http://www.cooperativeindividualism.org/dodson\\_usa\\_wealth\\_distribution.html](http://www.cooperativeindividualism.org/dodson_usa_wealth_distribution.html) (last visited Jan. 10, 2007) (breaking down the median net worth for all households in 1984 into home equity, retirement accounts, vehicles, stocks and bonds, and interest-bearing assets); see also *infra* Table 3 (outlining the percentage of testate and intestate proceedings that involved cash, stocks, bonds, and notes; other personal property; and real estate).

7. See CAROLE SHAMMAS, MARYLYNN SALMON & MICHEL DAHLIN, INHERITANCE IN AMERICA: FROM COLONIAL TIMES TO THE PRESENT 3 (1987), hypothesizing that as much as 80% of America's wealth is acquired through inheritance, as opposed to participation in

socially and economically, than the process of channeling this enormous transfer of wealth?

Actual probate records are rarely analyzed, but the law and history of inheritance have not been totally neglected.<sup>8</sup> Some aspects even make an occasional headline. Among these are the controversies over the federal estate tax<sup>9</sup> or the state inheritance tax (California voters got rid of this in 1982<sup>10</sup>). These taxes, conveniently labeled “death taxes,” have been a particular *bête noire* of conservatives.<sup>11</sup> Naturally, there has been plenty of legal writing about the nuts and bolts of inheritance and succession law,<sup>12</sup> and a certain amount of comparative analysis as well.<sup>13</sup> Economists have tried to test the economic models of bequest patterns and lifetime savings estimates.<sup>14</sup> A few anthropologists have analyzed succession

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the labor force.

8. For general historical accounts of inheritance in America, see REMI CLIGNET, *DEATH, DEEDS AND DESCENDANTS: INHERITANCE IN MODERN AMERICA* (1992); SHAMMAS ET AL., *supra* note 7; and MARVIN B. SUSSMAN, JUDITH N. CATES & DAVID T. SMITH, *THE FAMILY AND INHERITANCE* (1970).

9. See 26 U.S.C. §§ 2001–2209 (2000 & Supp. 2004) (outlining the provisions of the estate tax in Chapter 11 of the Internal Revenue Code).

10. CAL. REV. & TAX. CODE § 13301 (West 1994) (added by Initiative, June 8, 1982) (“Neither the state nor any political subdivision of the state shall impose any gift, inheritance, succession, legacy, income, or estate tax, or any other tax, on gifts or on the estate or inheritance of any person or on or by reason of any transfer occurring by reason of a death.”).

11. For a compilation of conservative perspectives on the “death tax,” see websites such as <http://www.deathtax.com> and <http://www.nodeathtax.org> (last visited Jan. 10, 2007).

12. See, e.g., Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 73 (1990); Judith N. Cates & Marvin B. Sussman, *Family Systems and Inheritance*, in FAMILY SYSTEMS AND INHERITANCE PATTERNS 1, 2 (Judith N. Cates & Marvin B. Sussman eds., 1982) (exploring inheritance patterns in the United States); Frederick R. Schneider, *A Kentucky Study of Will Provisions: Implications for Intestate Succession Law*, 13 N. KY. L. REV. 409, 410 (1987); Carolyn R. Glick, Note, *The Spousal Share in Intestate Succession: Stepparents Are Getting Shortchanged*, 74 MINN. L. REV. 631, 634 (1990).

13. See, for example, Kris Bulcroft & Phyllis Johnson, *A Cross-National Study of the Laws of Succession and Inheritance: Implications for Family Dynamics*, 2 J.L. & FAM. STUD. 1, 1 (2000), comparing the estate and succession laws in British Columbia and Washington State; Edward V. Carroll & Sonya Salamon, *Share and Share Alike: Inheritance Patterns in Two Illinois Farm Communities*, 13 J. FAM. HIST. 219, 219 (1988).

14. See, e.g., Gerald Auten & David Joulfaian, *Charitable Contributions and Intergenerational Transfers*, 59 J. PUB. ECON. 55, 55 (1996) (“[I]nvestigat[ing] the effects of bequest taxes and the income of children on the lifetime charitable contributions of parents.”); B. Douglas Bernheim, Andrei Shleifer & Lawrence H. Summers, *The Strategic Bequest Motive*, 93 J. POL. ECON. 1045, 1045 (1985) (demonstrating empirically that “bequests are often used as compensation for services rendered by beneficiaries”); N.S. Blomquist, *The Inheritance Function*, 12 J. PUB. ECON. 41, 42 (1979) (“Even though inheritances seem to be of great interest, little research has so far been done on the factors determining the size of inheritances. . . . The present study estimates an inheritance function for Sweden.”); see also Michael D. Hurd, *Savings of the Elderly and*

patterns and property transfers in various societies.<sup>15</sup> And some social scientists have looked at the family dynamics that surround the inheritance process.<sup>16</sup>

Inheritance and succession laws have been vital parts of American law and history since colonial times. English law was, of course, the major influence.<sup>17</sup> There have been literally millions of probate proceedings in the United States since the seventeenth century. Probate records can be found in virtually every courthouse across America. As we said, there has been surprisingly little systematic research on how the probate system works on the ground, how it has changed over the years, who uses it, and why, and for what purposes. This Research Note is a modest attempt to add to the stock of knowledge, and to document some basic facts about the probate system at work in one place and at one time (San Bernardino, California, 1964).

Part I of this Research Note provides a brief historical background on San Bernardino County and the state of probate law in California in the 1960s. Part II then describes the research methodology: the sample, the data collection process, and the typical testate and intestate files. Part III outlines the findings of this research, both with respect to intestate and testate proceedings.

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*Desired Bequests*, 77 AM. ECON. REV. 298, 298 (1987) (examining wealth data of the elderly); Melvin L. Oliver & Thomas M. Shapiro, *Wealth of a Nation: A Reassessment of Asset Inequality in America Shows at Least One Third of Households Are Asset-Poor*, 49 AM. J. ECON. & SOC. 129, 129 (1990) (examining the distribution of wealth in America).

15. See, e.g., John Hartung, *On Natural Selection and the Inheritance of Wealth*, 17 CURRENT ANTHROPOLOGY 607, 607 (1976); Lala Carr Steelman & Brian Powell, *Acquiring Capital for College: The Constraints of Family Configuration*, 54 AM. SOC. REV. 844, 844 (1989).

16. See Jeffrey P. Rosenfeld, *Disinheritance and Will Contests*, in FAMILY SYSTEMS AND INHERITANCE PATTERNS, *supra* note 12, at 75–76; Jeffrey P. Rosenfeld, *Will Contests: Legacies of Aging and Social Change*, in INHERITANCE AND WEALTH IN AMERICA 173, 173–74 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998) [hereinafter *Legacies of Aging*] (finding that the causes of will contests and disinheritance are changing along side social and demographic change); Stephen J. McNamee & Robert K. Miller, Jr., *Estate Inheritance: A Sociological Lacuna*, 59 SOC. INQUIRY 7, 7 (1989) (examining estate inheritance as part of social stratification); Jeffrey P. Rosenfeld, *Old Age, New Beneficiaries: Kinship, Friendship and (Dis)Inheritance*, 64 SOC. & SOC. RES. 86, 87 (1979).

17. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 29–31 (3d ed., 2005). In general, the probate process was carried over from England to the colonies. After 1837, American states generally followed one or both of the statute of frauds (1677) and the Wills Act (1837), both of these English statutes. *Id.* at 181–83.

## I. SAN BERNARDINO COUNTY

San Bernardino County is located in southeast California, to the east of Los Angeles. The county was established in 1853, carved out of pieces of Los Angeles, San Diego, and Mariposa Counties. It is beautiful desert and mountain country—much modified (and perhaps spoiled) as the incredible sprawl of the Los Angeles megalopolis has gobbled up more and more of the countryside of southern California. The county itself stretches from the outskirts of Los Angeles to the Nevada border and the Colorado River; it is the largest county in California, in area, and the largest county, in area, in the continental United States.<sup>18</sup>

San Bernardino was originally settled as a Mormon colony in 1851. The Mormons, however, left within five years. Scattered settlers filled in the vacuum, drawn in part by gold discoveries in the San Bernardino mountains in the 1860s and by the arrival of the railroad in the 1880s.<sup>19</sup> A few towns and small cities began to develop, mostly in the western part of the county.

By the 1960s, the demographics of San Bernardino County had changed dramatically, as a result of spillover from Los Angeles. In 1960, the county had a population of 503,591, about three percent of California's total population of 15,717,204.<sup>20</sup> The county's 1960 population was predominantly white (95.8%); African-Americans (3.4%) were the largest minority group.<sup>21</sup> The population was both rural and urban—the western part of the county was part of the greater Los

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18. See Steve Lech, American Local History Network, The History of San Bernardino County, <http://www.usgennet.org/usa/ca/county/sanbernardino> (last visited Jan. 10, 2007).

19. For accounts of the settlement and early development of San Bernardino, see GEORGE W. BEATTIE & HELEN PRUITT BEATTIE, *HERITAGE OF THE VALLEY* (1939); Nicholas Cataldo & Arda M. Haenszel, *Pioneers of San Bernardino, 1851–1857*, 48 *SAN BERNARDINO COUNTY MUSEUM ASS'N Q.* 1 (2001); R. Bruce Harley, *From New Mexico to California: San Bernardino Valley's First Settlers at Agua Mansa*, 47 *SAN BERNARDINO COUNTY MUSEUM ASS'N Q.* 2 (2000). No in-depth history of twentieth-century San Bernardino County has been published to date.

20. Geospatial & Stat. Data Ctr., Univ. of Va. Library, Historical Census Browser, <http://fisher.lib.virginia.edu/collections/stats/histcensus/index.html> (click the "1960" hyperlink; choose "total population," click "Submit Query"; chose "California," click "Retrieve County-Level Data") (last visited Jan. 10, 2007) [hereinafter Historical Census Browser] ("The original source of the each decade's data is the decennial census conducted by the U.S. Census Bureau. The source of the electronic data presented here was compiled by the Inter-university Consortium for Political and Social Research (ICPSR) under a grant from the National Science Foundation.").

21. *Id.* Of the 503,591 residents in San Bernardino County in 1960, the U.S. Census reports that 482,195 (95.8%) were white, while 17,234 (3.4%) were African-American. California, as a whole, was 92.0% white and 5.6% African-American in 1960. *Id.*

Angeles metropolitan area; the eastern part was dry and sparsely populated.<sup>22</sup>

Since the late nineteenth century, the basic trial court in California's counties has been the Superior Court. This court has traditionally had jurisdiction over civil, criminal, and probate actions. In the smallest counties, the superior court was literally a single court. In counties with large populations, the superior court would be divided into "departments," and judges might specialize in civil, criminal, or probate actions. There was in fact a Probate Department and also a probate commissioner in San Bernardino County during the 1960s.<sup>23</sup> The commissioner's duties involved hearing uncontested probate and guardianship matters "on Friday morning of each week at 9:30 a.m."<sup>24</sup> Contested matters would be transferred to a presiding judge for trial.<sup>25</sup>

The probate docket in California was made up mostly of estates of the dead, both testate and intestate. Probate judges also heard cases involving guardianships of "incompetents" and minors,<sup>26</sup> and conservatorships of those (mostly elderly) people who could not handle their own affairs.<sup>27</sup> But the bread and butter of the Probate Department was inheritance and succession, as Arthur K. Marshall put it:

Several things are accomplished in the Probate Court: The creditors of the decedent are protected by means explained in detail in Chapter 16; a determination is made as to what, if any, taxes are due and owing from

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22. For instance, 24.3% of the San Bernardino County population was considered "rural nonfarm," in comparison to the 11.5% statewide rural nonfarm population in 1960. *Id.* The population would also be typified as relatively mobile. For example, 35.7% of residents in the county had moved to their present house within the last two years (after 1958); similarly, the statewide figure in 1960 was 34.1%. *Id.*

23. See SAN BERNARDINO COUNTY PROBATE POLICY MEMORANDA, reprinted in ARTHUR K. MARSHALL, CALIFORNIA PROBATE HANDBOOK (1962), at 275-316 [hereinafter PROBATE POLICY MEMORANDA]. Section 102 indicates that "[a]ll uncontested probate and guardianship matters are heard by the commissioner on Friday morning of each week at 9:30 a.m. in the Probate Department, courthouse, San Bernardino, California." *Id.* § 102. Similarly, section 104 defines the duties of the commissioner: "The court commissioner is assigned to handle general probate and guardianship matters and calendar items for the Probate Department." *Id.* § 104.

24. *Id.* § 102. Similarly, section 104 defines the duties of the commissioner: "The court commissioner is assigned to handle general probate and guardianship matters and calendar items for the Probate Department." *Id.* § 104.

25. *Id.* § 110.

26. See *id.* §§ 901-1111 (describing the law in San Bernardino with respect to guardianship over "incompetents" and "minors"). The Probate Department also dealt with claims of minors. See *id.* §§ 1201-1204.

27. See *id.* §§ 1301-1305 (describing the law in San Bernardino with respect to conservatorships).

the estate and are paid; the rights of the heirs, legatees or devisees of the decedent are established and the court pronounces how the title “devolves.”<sup>28</sup>

The governing law of inheritance and succession in the 1960s was the California Probate Code, as codified in 1931.<sup>29</sup> The California Law Revision Commission has presented bills to the legislature in the last twenty-five years that have completely rewritten the Probate Code, and Chapter 79 was recodified in 1990.<sup>30</sup> The Code, now and then, contains the basic rules about wills, trusts, intestate succession, and related issues. Much has changed since 1960, but a modern estate lawyer would nonetheless find both the rules and procedures of the 1960s reasonably familiar. The changes since then have hardly been revolutionary.

In the 1960s records from San Bernardino, attorneys often referred to a 1960 version of the *Probate Policy Memoranda of San Bernardino County* in their briefs, motions, and other filings.<sup>31</sup> This was a manual of local rules, issued by the superior court, to “guide attorneys in preparing and presenting matters and to promote uniformity of procedure in [the] Probate Department.”<sup>32</sup> Much of the material in the manual derives from the Probate Code; but some of it was strictly local—for example, any order or document needing the judge’s signature “must first be submitted to the probate procedures clerk.”<sup>33</sup> There are also a few rules of decorum—for example, “[a]ttorneys should not converse with or disturb the clerk while court is in session,” and “[a]ll attorneys appearing at probate hearings are requested to announce their names and

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28. MARSHALL, *supra* note 23, at 1. Arthur K. Marshall authored the 1962 Probate handbook and served as a Los Angeles Superior Court judge for twenty-five years before he died in 1999.

29. See CAL. PROB. CODE app. §§ 1–21541 (West 1991) (containing all the provisions of the “old law” repealed in 1990); see also 14 WITKIN, SUMMARY OF CALIFORNIA LAW 10TH, *Wills* § 21 (2005).

30. See CAL. PROB. CODE §§ 1–21541 (West 2002). See generally 14 WITKIN, *supra* note 29, *Wills* §§ 38–47.

31. The text of the *San Bernardino County Probate Policy Memoranda* has been reprinted in MARSHALL, *supra* note 23, at 275–316. Marshall’s book contains probate memoranda from four counties in California (Los Angeles, San Diego, Alameda, and San Bernardino Counties). The San Bernardino Memoranda are not dated, but they are most likely the same 1960 memoranda mentioned by the attorneys in the probate records. A few of the manuals are dated; the Los Angeles Manual, for example, is in fact dated 1960. See *id.* at 189 (indicating that this version of the *Los Angeles County Probate Policy Memoranda* was last revised on April 1, 1960).

32. PROBATE POLICY MEMORANDA, *supra* note 23, at 273 (quoting the Foreword).

33. *Id.* § 109.

identify their status when they first speak.”<sup>34</sup> The Probate Department’s practices and procedures structured the way in which probate matters were adjudicated.

## II. METHODOLOGY

The data in this study were drawn from twelve boxes of 1960s probate records from San Bernardino County. These records, which had been slated for destruction, are now housed in Stanford’s Robert Crown Law Library.<sup>35</sup>

The twelve boxes contained probate files numbered 33,305 to 33,834. Of the 530 potential files, 17 were missing or had been transferred elsewhere. The remaining 513 records dealt with a six-month span of deaths starting on January 13, 1964 and ending on July 31, 1964. There were 342 testate files and 171 intestate files. Six of the testate files did not contain a copy of the will, for some reason. The decedents were 298 men and 215 women. Table 1 breaks down the sample in further detail.

	Male	Female	Total
Testate	193	149	342
Intestate	105	66	171
Total	298	215	513

The files, of course, varied in size and content; simple estates produced less paper than complicated estates. California law, and local probate practice, dictated the normal life cycle of an estate.<sup>36</sup> Figure 1, on the following page, sets out the contents of a typical testate file.

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34. *Id.* § 114.

35. In January 2005, a notice from the Superior Court of San Bernardino County was sent out to inform the public that a large number of twentieth-century conservatorship, guardianship, and probate records would be destroyed unless some institution objected or requested the records. The Authors agreed to take some of these records. The deputy court clerk, Diane Melendez, arranged for them to be shipped to the Robert Crown Law Library at Stanford Law School.

36. See *supra* notes 23–34 and accompanying text, which describe the interplay between the California Probate Code and the *San Bernardino County Probate Policy Memoranda*.

**Figure 1. Typical Testate Record**

1. Final Discharge of Executor (Affidavit / Court Record)
2. Receipts of Distribution
3. Petition for Payment of Executor's Commission and Attorney's Fees (sometimes request for special fees)
4. Judgment Settling First and Final Account of Executor and Decree of Final Distribution (sometimes second, third, etc.)
5. Receipt for Inheritance Tax
6. Notice of Hearing Final Account and Petition for Final Distribution (half sheet form)
7. Inventory and Appraisement Form (declaration of amounts, appraisals, taxes)
8. Order Fixing Inheritance Tax (form that documents who receives what and what taxes each will pay)
9. Report of Inheritance Tax Appraiser (form that appraises inventory and provides taxes due)
10. Notice of Filing Report of Inheritance Tax Appraiser (half sheet form)
11. Return of Sale of Real Property and Petition for Confirmation (if any)
12. Return of Sale of Depreciable Personal Property and Petition for Confirmation (if any)
13. Order Appointing Appraiser (half sheet form)
14. Rules/Orders on Creditor Claims (whether accepted or rejected)
15. Creditor Claims Against Estate (if any)
16. Proof of Publication (of Notice to Creditors) (form that has newspaper advertisement pasted thereon)
17. Letters Testamentary (form that includes testimony of executor and witnesses about fiduciary duties)
18. Order Admitting Will to Probate and for Letters of Testamentary (form #)
19. Affidavit of Subscribing Witness to Will (form includes will information, including age, etc.)
20. Copy of Last Will and Testament
21. Notice of Hearing on Petition for Probate of Will and for Letters Testamentary (half sheet)
22. Affidavit of Mailing Notice to Heirs
23. Proof of Publication (of Notice of Hearing) (form that has newspaper advertisement pasted onto it)
24. Petition for Probate of Will and for Letters Testamentary (form)

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## INHERITANCE PROCESS

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These documents roughly track the forms listed in the *San Bernardino County Probate Policy Memoranda*.<sup>37</sup> Only 5.0% (17 of 342) of the records of testate estates included provisions for a trust. Where there was a trust, typically there were financial statements that spanned the entire lifetime of the trust.

The typical intestate record parallels the testate one, but obviously does not include any will. Instead, it includes documents identifying and determining intestate heirs. Additionally, about three of every ten (32.7%) intestate records included a copy of the death certificate; no testate records included a death certificate. A local rule indicates that the administrator of an intestate has to prove the fact of death; the executor of a will has no such requirement.<sup>38</sup>

For each record, the following data were collected:

- Case Number
- Record Date (when the file was opened, and when it was closed)
- Gender of Decedent
- Age at Death
- Decedent's Marital Status (single, married, divorced, or widowed)
- Number of Children
- Type of Proceeding: Testate or Intestate
- Identification of Heirs (spouse, children, relatives, strangers, and charity)
- Indication of Trust (if any)
- Type of Property (cash/stocks, real property, and personal property)
- Appraised Monetary Value of Estate
- Information About the Will (for testate files):
  1. Is there a will?
  2. Was it witnessed or was it a holographic will?
  3. Was the will contested?
  4. Was the will professionally drafted?

In addition, information about executors and administrators was collected for a sub-sample (199 records). Notes were also taken of other noteworthy aspects of the files.

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37. See PROBATE POLICY MEMORANDA, *supra* note 23, § 201 (listing the three dozen standardized forms available for distribution at the county clerk's office).

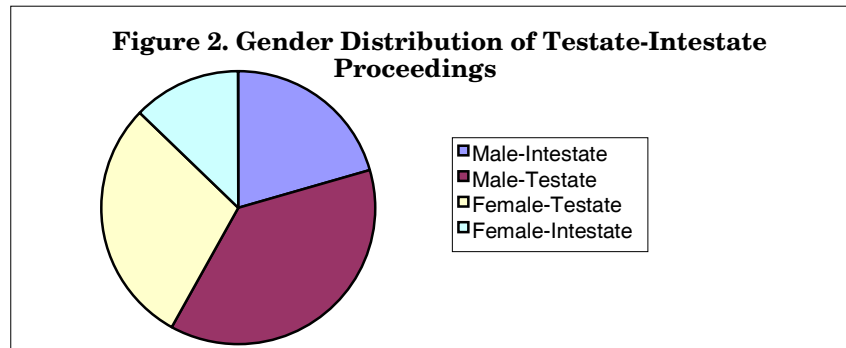
38. *Id.* § 420.

## III. FINDINGS &amp; DISCUSSION

A. *General Findings*

Of the 513 probate records, most (342) were testate, as 171 were intestate—a two-to-one ratio. The superior court did not handle estates, of course, for everyone who died in the county, but only those who left an “estate”;<sup>39</sup> and these were primarily men and women who had executed a will. Testate estates were, as expected, bigger than intestate estates, on average. These findings are consistent with other studies of wills and estates.<sup>40</sup>

1. *Did Gender Matter?* More men than women had estates that passed through the superior court. Males made up 193 (56.4%) of the 342 testate decedents, and 105 (61.4%) of the 171 intestate files. Clearly, women were almost as likely as men to make out a will, but less likely to have an estate that passed through probate in the first place. In all, males were the decedents in 298 of the 513 records (58.1%). Figure 2 illustrates these findings in more detail. This gender gap cannot be explained by the demographics of San Bernardino County. According to the 1960 U.S. Census, the population of San Bernardino County was just about evenly divided between men (50.2%) and women (49.8%).<sup>41</sup> Obviously, women simply had fewer assets, on average, to distribute at death than men; and hence produced fewer estates of any kind.



39. One exception to this statement was the estate of Leon Fortner. Fortner was killed in an automobile accident. He died intestate, and essentially broke. Two people, injured in the same accident, filed suit against him, and an administrator was appointed, solely “in connection with claims for personal injuries arising out of the accident.” The claims were settled by the insurance carrier, and the estate was closed. The administrator explained that the estate had absolutely nothing in it. Prob. Rec. No. 33587, San Bernardino County, Cal. (1964).

40. Compare Dunham, *supra* note 3, at 247 n.14, with Friedman, *supra* note 2, at 34–35.

41. See Historical Census Browser, *supra* note 20.

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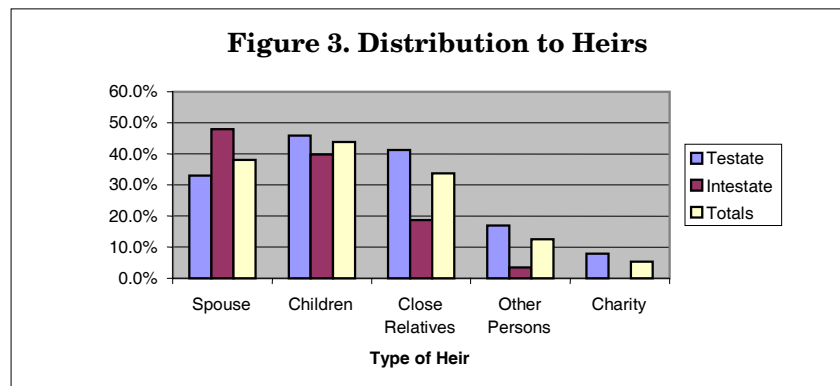
*INHERITANCE PROCESS*

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2. *To Whom Did the People in San Bernardino Leave Their Money?* Table 2 provides the answer to this question:

	Spouse	Children	Close Relatives	Other Persons	Charity
Testate	33.0% (113)	45.9% (157)	41.2% (141)	17.0% (58)	7.9% (27)
Intestate	48.0% (82)	39.8% (68)	18.7% (32)	3.5% (6)	0.0% (0)
Totals	38.0% (195)	43.9% (225)	33.7% (173)	12.5% (64)	5.3% (27)

Some of the results seem obvious. Intestate succession keeps estates within the family.<sup>42</sup> At first glance, it also appears that those who died with wills were less likely to provide for their spouses (33.0% to 48.0%) and other relatives except children (18.7% to 41.2%), and more likely to provide for their children (45.9% to 39.8%) than those who died intestate. However, only 37.1% (127 of 342) of those who died with wills were married at the time of death, while 50.3% (86 of 171) of those who died intestate were married. Hence, intestate estates were more likely to be distributed to a surviving spouse, and less likely to be distributed to relatives other than a spouse or children. The testate–intestate difference in providing for children becomes insignificant when the testate–intestate marriage difference is controlled for. Figure 3 visually breaks down these findings.



42. The six intestate distributions to “other persons” were actually made to relatives (nephews, nieces, etc.) that do not qualify as “close relatives.” This occurs when a decedent has no surviving immediate relatives. This was the case in only 3.5% of the intestate proceedings in this sample.

In the sample, 52.5% of male decedents were married at the time of death, while only 26.5% of female decedents were married. Women live longer than men, and wives are usually younger than husbands. More women than men were widowed at the time of death (53.5% to 31.9%). Married women who died were also somewhat less likely to provide for their husbands (48 of 57, or 84.2%) than married male decedents (142 of 156, or 91.7%), with regard to wives. No surprises here; earlier studies of inheritance have similar findings.<sup>43</sup> Women were more likely to be widowed at the time of their death, and those women who had surviving husbands were slightly less likely to provide for them than similarly situated men. These findings are explored in greater detail later in this Part.

3. *What Was Distributed?* Table 3 outlines the percentage of testate and intestate proceedings that involved cash, stocks, bonds, and notes; other personal property; and real estate.

Table 3. Property Distributed				
	Cash, Stocks & Notes	Other Personal Property	Real Property	Average Value
Testate	92.7% (317)	53.5% (183)	64.9% (222)	\$71,406
Intestate	66.7% (114)	34.5% (59)	69.6% (119)	\$25,109
Total	84.0% (431)	47.2% (242)	66.5% (341)	\$57,603

One might imagine that people who owned land or a house would be more likely to execute a will. But as Table 3 and Figure 4 show, roughly the same percentage of those who executed wills as those who did not left behind some real property—indeed, the intestate were actually slightly *more* likely than the testate (testate: 64.9%; intestate: 69.6%) to distribute real estate. Thus, possessing real property did not appear to encourage people to draft wills. Additionally, a great deal of property was held by husbands and wives as joint tenants. This property passed to the survivor automatically. The survivor would file a “Petition to Establish Death of Joint

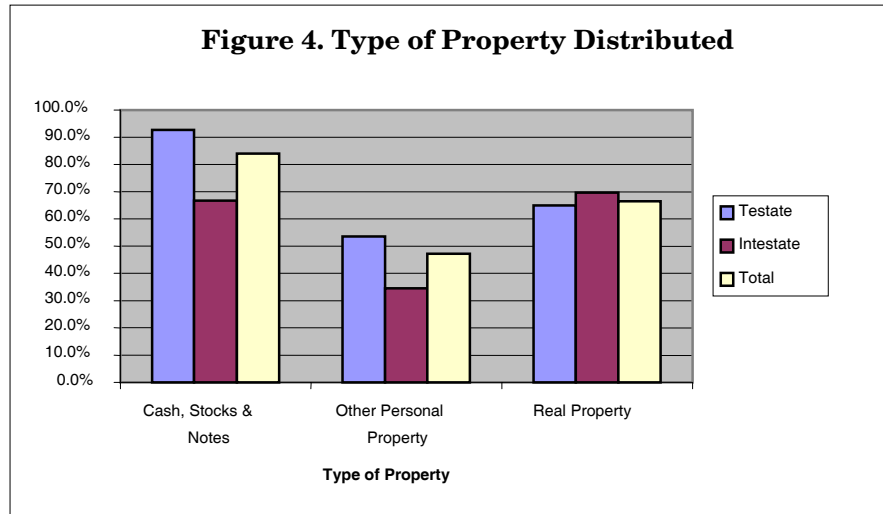
43. See, for example, Friedman, *supra* note 2, at 37: “Of the twenty-four women testators [in Essex County, New Jersey] of 1900, only six made provision for husbands . . . ; and of the thirteen women testators of 1875, only two. On the other hand, nineteen of the male testators (out of 36) in 1900, and forty out of the forty-seven in 1875 made some provision for surviving wives. Undoubtedly most of the female testators were widows or spinsters.”

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Tenant,”<sup>44</sup> which was followed by a “Decree Establishing Death of Joint Tenant.”<sup>45</sup> There are many, many examples in the files of these joint-tenancy petitions.

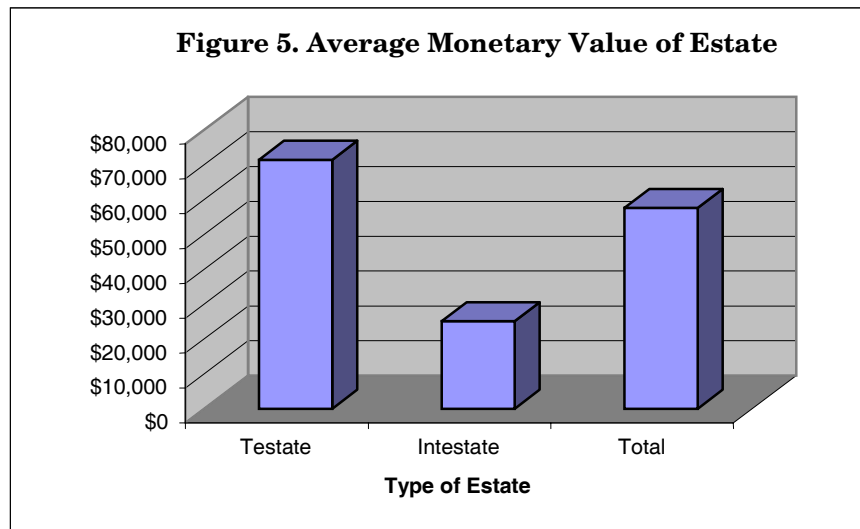


There were, however, systematic differences between testate and intestate estates. Figure 4 reveals that testators were more likely to distribute personal property (cash and securities) than intestate estates (92.7% to 66.7%). This is also true for other personal property (53.5% to 34.5%). The testators were also richer, as shown on the following page in Figure 5. The average value of a testate estate was \$71,406, while the average value of the intestate estate was less than half of this—\$25,109.

44. Section 801 of the PROBATE POLICY MEMORANDA, *supra* note 23, states:

Although § 1171 of the Probate Code [CAL. PROB. CODE § 1171 (West 1960)] authorizes a petition to establish fact of death to be included in a verified petition for probate of a will or for letters of administration (but does not authorize a petition to establish fact of death to be included in any other petition, such as petitions for final distribution), the administrative difficulties in handling the petition in this manner are considerable and whenever possible attorneys should be encouraged to file separate petitions under the same number, but no such separate petition may be filed after the filing of a petition for final distribution, and if a petition to establish fact of death is then filed it should be in a new proceeding under a new number.

45. *See id.* § 805 (“In a proceeding to establish fact of death, the decree may recite that the interest of the dead person in the property therein described has been terminated.”).



### B. Testate Dispositions

As already mentioned, men were more likely to provide for a spouse than women. Table 4 shows the data, with respect to testate proceedings:

	Spouse	Children	Close Relatives	Other Persons	Charity
Female	17.4% (26)	53.0% (79)	49.0% (73)	17.4% (26)	9.4% (14)
Male	45.1% (87)	40.4% (78)	35.2% (68)	16.6% (32)	6.7% (13)
Totals	33.0% (113)	45.9% (157)	41.2% (141)	17.0% (58)	7.9% (27)

The reasons are fairly obvious. As we noted, 52.5% of male decedents were married at the time of death, but only 26.5% of the female decedents were married. More women were widowed (53.5%) than men (38.9%). But even when we control for this fact, it is still the case that married women were somewhat less likely to provide for their husbands than married men were to provide for their wives. Here, too, the reasons seem fairly obvious. Some husbands no doubt could provide for themselves, and women preferred to leave money to children and grandchildren. For example, one woman, who was sixty-one, noted in her will that her husband had “ample funds

and property to cover his living expenses.”<sup>46</sup> Men of the 1960s tended to be the bread-winners; dependence on a woman was unusual.

Historically, men often left their wives money in trust, providing a widow with income but no ultimate control over the estate.<sup>47</sup> Restraints on remarriage were common.<sup>48</sup> Women, however, hardly ever put restraints on remarriage, though men did so frequently. Wills rarely explicitly stated that a widow who remarried forfeited her money. Testators put the matter more gently: they limited the widow’s right (to trust income, for example) to the period of widowhood. By 1964, such restraints were rare. One testator, however, who was eighty-two years old, left his estate to his wife, unless she remarried, or “consort[ed] with any other man after my death, and before final distribution.”<sup>49</sup> “Consorting” was not defined.

Eber Hively had an unusual codicil to his will. The will (of 1946) had left his (sizeable) estate to his wife and children.<sup>50</sup> In 1953, Hively, now a widower, added a codicil:

[I]n the event I shall marry JENNIE LIMA ELLIOTT, and she shall survive my death, then I give, devise, and bequeath unto her a sum of money equal to \$1,000.00 for each calendar year she shall treat me with conjugal kindness and which we live happily together as husband and wife.<sup>51</sup>

If the marriage lasted ten years, this gift was to be replaced by a tract of land in Los Angeles County.<sup>52</sup> How one was supposed to test “conjugal kindness” and a happy marriage was never specified.<sup>53</sup> In any event, Jennie died first, so the issue never arose.

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46. Will, Prob. Rec. No. 33592, San Bernardino County, Cal. (1964).

47. SHAMMAS ET AL., *supra* note 8, at 7–8 (noting testamentary studies of late eighteenth-century husbands putting “restrictions on their wives’ ability to control property in their wills”).

48. *See id.* at 98–99 (noting the courts’ and legislature’s refusal to outlaw marriage restriction clauses).

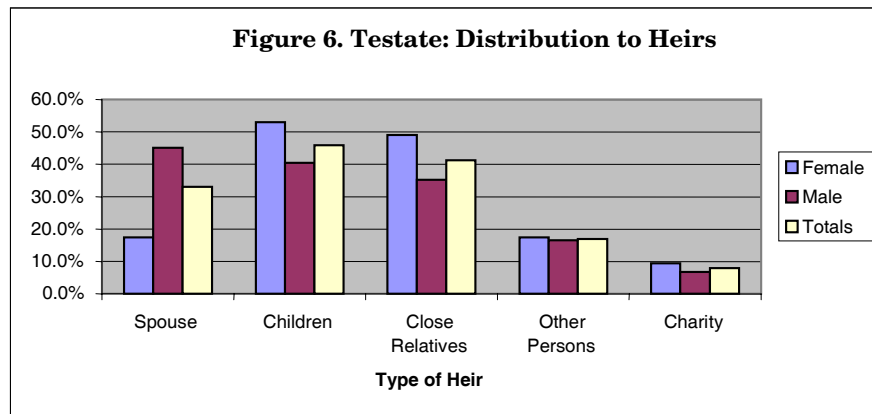
49. Will, Prob. Rec. No. 33671, San Bernardino County, Cal. (1964).

50. Will, Prob. Rec. No. 33560, San Bernardino County, Cal. (1964).

51. *Id.*

52. *Id.*

53. *Id.*



As shown above in Figure 6, women were more likely than men to provide for children and other relatives in their wills. Married men typically left everything to their wives, no doubt expecting them to provide for the children later on. Mike Schiro, who left a large estate, was explicit on this point: he left everything to his wife Jennie, and added: "I leave nothing to our four children, as I know their mother will take care of them. . . ."<sup>54</sup>

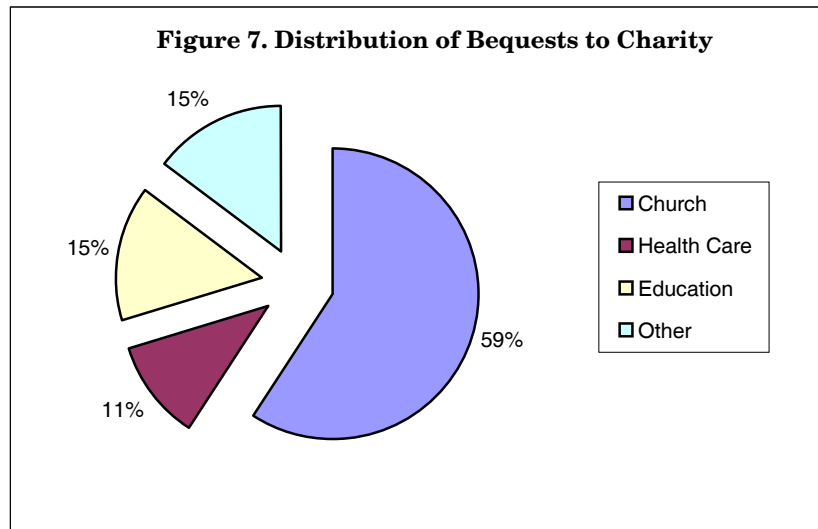
Testate and intestate estates, as we have seen, differed somewhat in the type of property left behind. Gender, however, did not seem to make much difference. Male decedents were slightly more likely to distribute real property than females (67.4% to 61.7%); the same was true of non-cash personal property (56.5% to 49.7%). Female decedents were slightly more likely to distribute cash, stocks, and notes (94.0% to 91.7%). The differences here are not statistically significant. But, as Table 5 shows, there was a gender difference in the *size* of testate estates, and this difference is statistically significant. Male testators had larger estates than females, by about 14% on average (\$75,482 to \$66,082).

	Cash, Stocks, & Notes	Other Personal Property	Real Property	Monetary Value
Female	94.0%(140)	49.7%(74)	61.7%(92)	\$66,082
Male	91.7%(177)	56.5%(109)	67.4%(130)	\$75,482
Total	92.7%(317)	53.5%(183)	64.9%(222)	\$71,406

54. Will, Prob. Rec. No. 33804, San Bernardino County, Cal. (1964).

1. *Gifts to Charity.* In San Bernardino, relatively few testators left money to charities.<sup>55</sup> This was the finding in other studies as well.<sup>56</sup> Only twenty-seven of the 342 wills in the sample (7.9%) made any provision for charity. In other words, charities figured in the estates of only 5.3% of the decedents, testate and intestate estates.

Figure 7 shows that most charitable gifts were to churches (59%). Sixteen of the twenty-seven testators left money to churches or other religious organizations.<sup>57</sup> For instance, Anna M. Eyer left \$2,000 to the Brethren in Christ World Missions, to be used for memorials at missions in Rhodesia.<sup>58</sup> There were four educational gifts (colleges, libraries, and a high school scholarship trust). Healthcare charities—hospitals and care centers—received three contributions. The four other contributions were to non-profit organizations in the community.



55. See *supra* Table 4 (revealing that charitable bequests were included in less than 10% of the testate proceedings).

56. See, e.g., Friedman, *supra* note 2, at 47. “[In Essex County, New Jersey,] [c]haritable gifts were not common in any of the three periods. The 1850 wills included only one gift to charity. In 1875, six of the sixty wills had charitable bequests (including one bequest for Masses, and one charitable gift that was contingent only). Only one of the six was a residuary charitable gift. In 1900 there were only two charitable gifts.” *Id.* (internal citations omitted).

57. Of these sixteen religious bequests, three were made to the Church of Jesus Christ of Latter Saints (the Mormons), while three were made to the Christian Scientists. The rest were scattered among various other Christian denominations.

58. Will, Prob. Rec. No. 33726, San Bernardino County, Cal. (1964).

Many of the gifts to charity were contingent gifts. Ella Chapman, for example, left her estate to two relatives; but if neither of them survived her (they did), then she left her estate to charity—half to the Grace Episcopal Church of Colton, California and an eighth to each of four other charities.<sup>59</sup> In this kind of situation, of course, the charity actually inherited nothing. Occasionally, the contingency came to pass. The estate of Reverend Hugh Kerr Fulton, who died at a very ripe old age (just short of ninety), left everything to his sister Eleanore, if she survived; but if she predeceased him, then the entire estate went to the First Presbyterian Church of San Bernardino.<sup>60</sup> The sister did not survive, and the church took the estate, valued at some \$40,000.

2. *San Bernardino Wills.* San Bernardino wills in the 1960s were longer and more carefully drafted than their nineteenth-century New Jersey counterparts.<sup>61</sup> Wills in nineteenth-century New Jersey were typically quite short and lacking in detail. In those “days before typewriters and carbon paper,” almost all wills sampled were one or two pages long; no will was longer than five pages.<sup>62</sup> Still, very few wills in San Bernardino were more than five pages long, and short wills (one or two pages) were quite common. Over 80% of the wills (279 out of 342) showed signs of professional draftsmanship and were typed.<sup>63</sup> The will of Berta Sans was exceptional: it was entirely handwritten, but was nonetheless a witnessed will, rather than a holograph; it was written in conventional legal language, perhaps copied from a form book.<sup>64</sup>

A certain number of files also contained codicils (amendments to wills). A small number of wills were clearly amateur jobs. Some of these were holographs; others were not. Alice Pine’s will was a typed form in which she filled in the blanks.<sup>65</sup> Clifford Gordon Brown’s will, despite some legal language, was clearly copied mostly from a form book; it is one-page long and has many misspelled words.<sup>66</sup> It was also a “mutual last will and testament,” covering both Clifford and his wife Xenia.<sup>67</sup> The will left to a niece, Delia

59. Will, Prob. Rec. No. 33809, San Bernardino County, Cal. (1964).

60. Will, Prob. Rec. No. 33392, San Bernardino County, Cal. (1964).

61. See generally Friedman, *supra* note 2 (studying the testation patterns in a nineteenth-century New Jersey county).

62. *Id.* at 40 (alluding to the technological influences that may have contributed to the brevity of the wills in Essex County).

63. See *infra* Table 6 (indicating that 81.6% of the wills were professionally drafted). Six wills (1.8%) were missing from the files and could not be classified.

64. See Will, Prob. Rec. No. 32812, San Bernardino County, Cal. (1964).

65. Will, Prob. Rec. No. 33394, San Bernardino County, Cal. (1964).

66. See Will, Prob. Rec. No. 33711, San Bernardino County, Cal. (1964).

67. *Id.*

Brown, “all the jewellery [sic] and personal nic-nacks [sic] of Xenia May Brown;” a nephew, Douglas, received “all my guns and personal collection of male items.”<sup>68</sup> The will had been executed “mindfull [sic] of the uncertainties of life and the certainty of death, and in anticipation of death by a common disaster,” which, despite their “anticipation,” did not in fact occur.<sup>69</sup> Table 6 provides a further breakdown of the types of wills uncovered in this study.

Table 6. Type of Will		
	Number of Wills	Percent of Total Wills
Professionally Drafted	279	81.6%
Holographic Will	37	10.8%
Other Personally Drafted Will	20	5.8%
Missing Wills (from file)	6	1.8%
Total	342	100.0%

California is one of nineteen states that recognized the holographic will during the mid-20th century.<sup>70</sup> A holographic will is entirely in the handwriting of the testator and does not need any witnesses.<sup>71</sup> Holographic wills are supposedly more litigation-prone than regular witnessed wills.<sup>72</sup> There are, in any event, many colorful and even weird examples in the reported cases about these homemade wills.

California, as we said, recognizes the holograph: but do *Californians* recognize it? How many people have even heard

68. *Id.*

69. *Id.*

70. See Victor R. Hansen, *Holographic Wills*, 95 TR. & EST. 875, 875 & n.1 (1956). For a general overview, see John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975), explaining that the number of states recognizing holographic wills is likely to increase as states continue to adopt the “Uniform Probate Code, which makes liberal provision for holographs.”

71. See PROBATE POLICY MEMORANDA, *supra* note 23, § 403 (“When a holographic will is filed for probate, if a photostatic copy of such will is attached to the petition for the probate thereof, a typewritten copy of the will shall also be attached to the petition to assist the court in the processing thereof.”). Local rules indicate that holographic wills must be authenticated and that they “may be proved by an appropriate affidavit or declaration.” See *id.* § 210. See generally Kevin R. Natale, Note, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 HOFSTRA L. REV. 159 (1988).

72. See, e.g., Gail Boreman Bird, *Sleight of Handwriting: The Holographic Will in California*, 32 HASTINGS L.J. 605, 605–07 & nn.8–9 (1981); Robert P. Kirk, Jr., Comment, *The New Holographic Will in California: Has It Outlived Its Usefulness?*, 20 CAL. W. L. REV. 258, 258–59 & nn.1–2 (1984); L.H.H., Jr., Note, *Holographic Wills in Virginia: Problems at Probate*, 45 VA. L. REV. 613, 613 (1959).

of the holographic will? There is no way to tell. Clearly, the holograph is unsuitable for estate plans of any complexity. Nobody would go to the trouble of writing out a ten-page will in long-hand. Holographs are, therefore, short and sweet. They are also fairly uncommon in the San Bernardino sample. But they do exist. A mere tenth or so of the wills in the sample (thirty-seven out of 342) were holographs.

Some of the holographs were informal indeed: two wills written by men who died in their seventies consisted of a couple of sentences on a napkin.<sup>73</sup> No holographs were more than a few paragraphs long. Some people obviously used holographs as stop-gap wills. R. L. Farrar, who was sixty-eight, executed a holograph in which he said: "Until I can make a will this will have to do."<sup>74</sup> Many of the holographs were written within days of death—they were almost literally death-bed wills, which may explain why there was no time for lawyers, witnesses, or typewriters. But not all holographs were of this type. Curtis Flint's holograph, dated February 3, 1963, left everything to his "loving wife;" but the language was careful and formal; Curtis either knew some law, or used a form book.<sup>75</sup>

A holographic will, since it had no witnesses, needed proof of the decedent's handwriting.<sup>76</sup> Flint's wife, Mary Lou, filled out the form "Affidavit of Witness in Proof of Holographic Will."<sup>77</sup> The form states: "I am familiar with the handwriting of said decedent and . . . acquired a knowledge of his handwriting in the following manner."<sup>78</sup> Here she stated that "[d]uring the years of our marriage," she had "observed his handwriting and signature on innumerable occasions."<sup>79</sup>

Specific legacies were fairly frequent in wills. For instance, Elizabeth Roblee Peers left to her niece, Barbara Gordon, "eight place settings . . . of flat silver, Candlelight pattern," and an "eighteen piece dessert set of antique pink and blue china."<sup>80</sup> Another niece got a "diamond ring, which formerly belonged to my grandmother"; other legatees got a

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73. See, e.g., Holographic Will, Prob. Rec. No. 33418, San Bernardino County, Cal. (1964); Holographic Will, Rec. Prob. No. 33595, San Bernardino County, Cal. (1964).

74. Holographic Will, Prob. Rec. No. 33787, San Bernardino County, Cal. (1964).

75. Holographic Will, Prob. Rec. No. 33721, San Bernardino County, Cal. (1964).

76. See PROBATE POLICY MEMORANDA, *supra* note 23, § 210.

77. Holographic Will, *supra* note 75.

78. See PROBATE POLICY MEMORANDA, *supra* note 23, § 201 (listing "Affidavit in Re: Proof of Holographic Will" as Probate Form No. 9).

79. Holographic Will, *supra* note 75.

80. Will, Prob. Rec. No. 33715, San Bernardino County, Cal. (1964).

“star sapphire ring” and a “gold chain bracelet.”<sup>81</sup> A nephew was given “such of my furniture, furnishings, jewelry and personal effects as he may select.”<sup>82</sup> Wills frequently included no-contest clauses; Elizabeth Peers, for example, left one dollar to any relative not provided for, who “shall claim and be judicially established to be my heir, or to be entitled to distribution of any portion of my estate.”<sup>83</sup> Quite a few of the wills dealt with the problem of the common disaster, by requiring heirs to survive a certain length of time in order to inherit. William Compton, Jr. left everything to his wife, Hilda, provided she was “surviving on any part of the 170th day next succeeding the day on which I die.”<sup>84</sup> Berta Sans left her money to her husband, but only if he survived her or did not “die within one month after [her] demise.”<sup>85</sup> Garnet James Dixon, who, unlike most testators, had a very old will (dated January 1946), left everything to his wife, but she had to survive “the distribution of my estate.”<sup>86</sup> His wife died a year later, the estate had not been distributed, and his two children inherited.

Every study of the probate process has found that will contests are quite rare events.<sup>87</sup> Will contests produce trials, trials produce a certain number of appeals, and appeals generate reported cases. Hence the case law of wills, the material found in treatises and casebooks, is tilted heavily toward will contests.<sup>88</sup> But the overwhelming majority of estates sail through probate without any real objection.

The San Bernardino sample was no exception. There are only seven instances in the whole sample in which some attempt was made to contest a will. One of these concerned the estate of Maude Straisinger, an elderly widow.<sup>89</sup> Mrs. Straisinger executed a will in February 1962, leaving essentially everything to her husband; if he predeceased her, she left her money to “Elim Missionary Assemblies” of New York.<sup>90</sup> The will had a “no contest clause” and a

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81. *Id.*

82. *Id.*

83. *Id.*

84. Will, Prob. Rec. No. 33813, San Bernardino County, Cal. (1964).

85. Will, Prob. Rec. No. 32812, San Bernardino County, Cal. (1964).

86. Will, Prob. Rec. No. 33718, San Bernardino County, Cal. (1964).

87. *See, e.g., Legacies of Aging, supra* note 16, at 174.

88. Marshall spends only six pages on will contests in his 1962 treatise on California probate law. *See* PROBATE POLICY MEMORANDA, *supra* note 23, at 25–30. There does not appear to be much case law on will contests in the 1960s.

89. Will, Prob. Rec. No. 33513, San Bernardino County, Cal. (1964).

90. *Id.*

statement that she had “intentionally omitted all my heirs who are not specifically mentioned herein.”<sup>91</sup> Later that year, her husband in fact died; and in October, she executed another will. It was handwritten but witnessed.<sup>92</sup> In this will, she left everything to Lewis W. Cunningham and Gladys Uldene Cunningham.<sup>93</sup> She also gave them property and money before she died. At her death, the charity contested the will, but, as is usually the case, it was unsuccessful.<sup>94</sup>

In the file, there is a letter, dated February 7, 1966, from Mrs. Ester Moster, of Rushville, Indiana, a niece of Maude Straisinger, and one of the heirs-at-law.<sup>95</sup> The letter is addressed to the County Clerk.<sup>96</sup> Mrs. Moster wrote:

We live on a farm and I work at the Hospital which makes it impossible . . . to be present for the hearings. We feel we have been deprived of what should be ours, and feel pressure was exerted some where to get her to make such a will, if she did.<sup>97</sup>

Mrs. Moster goes on to say that her aunt had written to her “stating she would help us in any way she could to get out there to be with her, we had planned to go there to live this year.”<sup>98</sup> The aunt also promised “some Bird plates she prized as they came from Indiana. . . . Also some quilts made by Grandmother Lyons. She also states she would sell her property and tells what a nice house it is, does this sound like she knew she had willed it to someone else?”<sup>99</sup>

There is no record in the file of any reply or any further move by Mrs. Moster. If she had consulted a lawyer, he would have had to tell her that she had no case. It would be hard to overturn the October will, and even if she could somehow convince the court that the will was invalid, this would most likely vest the estate in the missionary group. Mrs. Straisinger

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91. *Id.* See generally Sharon J. Ormond, Note, *No Contest Clauses in California Wills and Trusts: How Lucky Do You Feel Playing the Wheel of Fortune?*, 18 WHITTIER L. REV. 613, 614 & n.8 (1997).

92. Handwritten Will, Prob. Rec. No. 33513, San Bernardino County, Cal. (1964).

93. *Id.*

94. *Cf.* Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 626–27 (1987).

95. See Letter to County Clerk, Prob. Rec. No. 33513, San Bernardino County, Cal. (Feb. 7, 1966).

96. See *id.*

97. *Id.*

98. *Id.*

99. *Id.*

had also been very explicit about cutting out her heirs.<sup>100</sup> The niece's disappointment is the stuff that family quarrels are made of, but it had little or no resonance in law.

3. *The Executors.* Simply put, the executor carries out the provisions of the will. The individual, group, or institution named as executor collects the assets of the estate, acts as the estate's representative to the court, and, after the debts have been paid, distributes the remaining assets. Not surprisingly, one of a testator's most important decisions is the choice of an executor.<sup>101</sup>

We looked at a sample of 119 files for information about executors. All but one testate estate named an executor.<sup>102</sup> Almost all the estates sampled named just one executor. The vast majority (68.9%) named family members.<sup>103</sup> While children were more often named as the executors, grandchildren, nieces, nephews, cousins, and great-grandchildren also crop up as executors.<sup>104</sup> In only 13% of the testate estates was a financial institution appointed.

Sometimes a will names an executor who is unable and unwilling to carry out the wishes of an estate.<sup>105</sup> In these cases the court appoints an "administrator with the will annexed."<sup>106</sup> During the distribution of the estate of Elfreda Wemmer, the named executor, Fred P. Foy, died. Ms. Wemmer, in her holographic will, named Foy, her nephew, as executor of her estate, but she failed to designate a successor.<sup>107</sup> Foy died testate naming his wife, Berniece Powers Foy, as *his* executor.<sup>108</sup> Mrs. Berniece Foy applied for the right to serve as administrator of

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100. Will, Prob. Rec. No. 33513, *supra* note 89.

101. See S.F. BAR ASS'N, HOW TO LIVE—AND DIE—WITH CALIFORNIA PROBATE 83–89 (Harold I. Boucher ed., 1970) (providing a guide to selecting an executor).

102. See Handwritten Will, Prob. Rec. No. 33655, San Bernardino County, Cal. (1964).

103. For the purposes of the executor sample, all blood relatives, including aunts, uncles, cousins, grandchildren, and great-grandchildren, were considered family.

104. In the only estate in the sample in which three executors were named, Emma C. Hirschler named all three of her living children as executors. See Will, Prob. Rec. No. 33569, San Bernardino County, Cal. (1964). For an example of the appointment of an extended relative, see Prob. Rec. No. 33639, San Bernardino County, Cal. (1964), in which the testator named his niece as executor.

105. See PROBATE POLICY MEMORANDA, *supra* note 23, at 16, offering a concise explanation of defections that "may disqualify a named executor and enable a third party to petition the Court to become Administrator with [the] Will Annexed."

106. 1 CALIFORNIA DECEDENT ESTATE ADMINISTRATION § 7.98 (Victor L. Chuan & Irving Slater eds., 1971).

107. Will, Prob. Rec. No. 33481, San Bernardino County, Cal. 2 (1964).

108. See Petition for Settlement of First Current Account and Report by Legal Representative of Deceased Executor, Prob. Rec. No. 33481, San Bernardino County, Cal. (1964).

Ms. Wemmer's estate, and the court granted her this right; she was thus "administratrix with the will annexed."<sup>109</sup> Of the testate estates sampled, 7.4% ended up with an administrator with the will annexed.<sup>110</sup>

### C. Intestacy

We have already alluded to some salient features of intestate succession. Since many women who died intestate were widows, spouses of women inherited in intestacy much less than spouses of men who died intestate (33.3% to 57.1%). For the same reason, children inherited a greater portion of the estates of women than of men (50% to 33.3%). Table 7 breaks down the distribution of intestate property by gender, and Figure 8 gives the average monetary value of the intestate estate. There is no significant gender difference with respect to the type of property distributed.

	Spouse	Children	Close Relatives	Other Relatives*
Female	33.3%(22)	50.0%(33)	21.2%(14)	6.1%(4)
Male	57.1%(60)	33.3%(35)	17.1%(18)	1.9%(2)
Totals	48.0%(82)	39.8%(68)	18.7%(32)	3.5%(6)

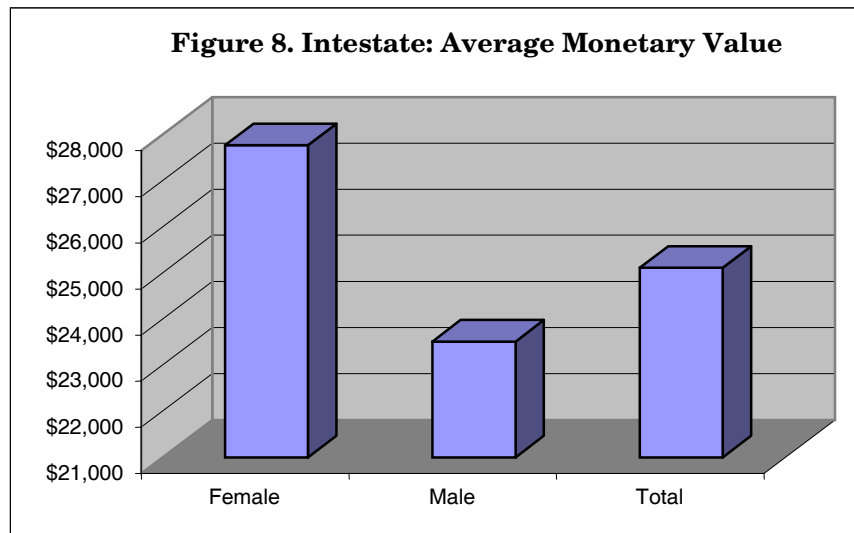
\* "other relative" here is a relative that is not within the nuclear family<sup>111</sup>

Somewhat surprisingly, the average value of the intestate estate of women was somewhat greater than the value of the estates of intestate men (\$27,770 to \$23,513). Wealthier men were, perhaps, more likely to execute a will and were, perhaps, more sophisticated in financial affairs, which might lead them to plan their estates more carefully.

109. See Letters of Administration with the Will Annexed, Prob. Rec. No. 33481, San Bernardino County, Cal. (1964).

110. See Will, Prob. Rec. No. 33466, San Bernardino County, Cal. (1964) (requesting that Hilda T. Gibson be appointed as executrix and, in the event that she is unable to assume the duties involved, appointing Roger J. Williams as her successor); Letters of Administration with the Will Annexed, Prob. Rec. No. 33628, San Bernardino County, Cal. (1964) (declaring the named executor incapable and appointing Thomas Milton Holmes as the administrator with the will annexed for the estate of Lucy B. Gillett).

111. These are nieces, nephews, and more remote relations.



#### IV. CONCLUSION

Legal education is centered on conflict—on contested cases, borderline cases, gray areas, and subjects that give rise to wild controversy. But the legal system is not only a system for resolving conflicts and disputes; it is also an engine of governance. And, in many vital areas, the machine functions smoothly, efficiently; the wheels turn, the gears mesh, and the machine produces its output without undue friction. Millions of social security checks are mailed every month. Millions of traffic tickets are given out and paid. Governments issue marriage licenses, dog licenses, and hunting licenses. Television sets are repossessed, deeds are recorded, divorces are granted, and children are adopted—all of these in vast numbers, and without much in the way of conflict or dispute.

We can add the probate process to this list. Of course, anything that involves money and family is a rich source of fighting and squabbling. Families by the thousands break into pieces over questions of wills and inheritances. But very little of this reaches the courtroom. The process itself is highly formal and technical; the probate machine whirrs and buzzes, impervious to emotional storms, like a robot programmed for a particular task. In fact, the very formality of the process acts as a kind of insulation against conflict. Recall the niece who found it hard to believe her aunt had excluded her from her will. One can imagine a system where the basic rule of inheritance was to honor the wishes of the dead—however those wishes were expressed, and using whatever evidence a court found useful. Under such a system, the niece might have had a case. But the iron rules of testamentary formality cut off any

chance she might have had to inherit. What the *will* says governs; and outside evidence of what the dead really would have preferred cannot be used in court.

There are, of course, exceptions to the general statements just made—rules about undue influence and testamentary capacity, and a flock of doctrines that nibble away, however slightly, at the smooth body of the formal law of wills and estates. But the evidence in this study, and other studies of the probate process, show that these doctrines, like will contests themselves, are rarely used. Fundamentally, they make no difference in the world. Billions of dollars change hands, across generations, through a process that is both voluntary and highly formal. Nor is this likely to change.

To say that a system works efficiently and allows very little in the way of controversy is not the same as to say that it is right or just. Still, on the whole, the system conforms more or less to what people want and expect. This is probably true of intestate succession as well. The laws give the estate to spouse and children. This suits the typical estate and the typical decedent. The less typical estate is another story. Take, for example, a man who gets a divorce, remarries, and dies intestate, leaving behind a new wife, and children from a prior marriage. Does intestate succession fit this situation?

California probate law has changed considerably over the last century; and there have been changes, too, since the 1960s. To measure these changes, it is important to do what we have done: to examine the actual probate records.<sup>112</sup> It would be interesting to compare the 1960s records with earlier and later records. This is only, after all, one snapshot of one place at one moment in time.

One thing that has probably changed, at least somewhat since 1960, would make comparisons more difficult. The importance of will substitutes has undoubtedly increased.<sup>113</sup> Life-time transfers are surely more significant than ever before.<sup>114</sup> People are living longer, and this means that their heirs inherit later. To get a share

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112. As one of the Authors noted four decades ago about nineteenth-century wills in New Jersey:

Many of the conclusions reached here are naturally tentative; but careful use of the evidence of nineteenth century wills might well shed great light on the course of the nineteenth century estate law and indirectly on social phenomena relating to the family and the transmission of wealth from generation to generation.

Friedman, *supra* note 2, at 53. The same can be said about analyzing probate records in the twentieth-century.

113. See John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108–09 (1984).

114. See *id.* at 1114.

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of a parent's estate when you are sixty-five does not have the same social and economic meaning as getting it at thirty. There are also probably more living trusts, more pension arrangements, and other devices that make wills and the probate process less central to the transmission of wealth from generation to generation.<sup>115</sup>

But one basic fact remains: succession—whether *inter vivos* or at death—is crucial to the economy, the culture, and the family structure of any society.<sup>116</sup> It would be a pity if legal scholars and social scientists did not pay more attention to this most significant legal process.

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115. See John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 748–49 (1988).

116. See *id.* at 722–23, 725–26, 737–38.