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### Rules or Standards for Intestate Succession?

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## Rules or Standards For Intestate Succession?

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Susan Gary, [\*The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy\*](#), 45 *U. Mich. J.L. Reform* 787 (2012).

Intestate succession law has traditionally been directed toward accomplishing two objectives: effectuating the likely intent of intestate decedents and minimizing administrative costs. Within the so-called “traditional” family, those objectives are rarely at odds. As a result, intestate succession law has traditionally been relatively simple: the decedent’s property is distributed to the decedent’s spouse and issue, and the only areas of controversy surround how much the spouse should take, and whether distribution to issue should be per stirpes, per capita, or by the UPC’s more refined “by representation” scheme.

In her recent article, however, Professor Susan Gary identifies the growing complexity in intestate succession law. That complexity is a response to increasing recognition that intestate succession statutes designed for the traditional family often frustrate the intent of decedents whose family is not traditional. To deal with non-traditional families, Professor Gary notes that a number of states have attempted to bring domestic partners, children born through assisted reproduction, stepchildren, and even informally adopted children within the intestate succession scheme, and cites a variety of scholarship supporting this expansion. Similarly, she identifies statutory provisions designed to disinherit intestate heirs when it would appear that the decedent would not want those heirs to take; in addition to slayer statutes, she discusses cases of child or spousal abandonment, and cases of elder abuse. These refinements of more traditional intestate succession statutes presumably increase the number of cases in which intestate succession doctrines effectuate the intent of intestate decedents, but, as Professor Gary observes, they are not perfect; they do not anticipate all of the circumstances in which a decedent might want to vary the most common patterns of distribution.

That leads to Professor Gary’s suggestion: we should focus less on fine-tuning intestate succession provisions, and more on giving courts discretion to consider how individual decedents might have wanted their assets distributed. Professor Gary recognizes that the idea is not revolutionary. She points out that some states already confer limited discretion on judges, and she emphasizes that family maintenance provisions in force in a number of Commonwealth countries operate, apparently successfully, even though they give judges even greater discretion in distributing estate assets.

Professor Gary’s article essentially raises a now familiar question in the intestate succession context: if we want to effectuate the intent of intestate decedents, should we do so through a regime of rules or a regime of standards? The prevailing approach to intestate succession law has been to use rules. Rules tend to be preferable when the legal problem at hand involves deciding a large number of cases, most of which fall into a much smaller number of patterns. In those circumstances, the investment in refined rules, which then can be inexpensively applied to individual cases, seems optimal. By contrast, when the number of patterns approaches the number of cases, the *ex ante* investment in rulemaking seems counterproductive, and we gravitate toward standards. Professor Gary’s thesis—and she may be right—is that as the number of family situations expands, intestate succession law should move in the direction of standards.

Of course, Professor Gary is fully aware of the most significant question about intestate succession law: how important is it to effectuate the decedent’s intent—especially when too much investigation into the issue could eat up much of the estate? People who expect their preferences to depart from legal norms always have the option to draft wills and

revocable trusts that make intestate succession largely irrelevant. But, as Professor Gary points out, most people don't write wills, making it at least somewhat important to try to have intestate succession doctrine reflect our best guess about a decedent's intent.

Professor Gary nevertheless recognizes that if we move from rules to standards, we should at least have presumptive rules, and we should place obstacles in front of claimants who seek to rebut the presumption. She suggests, for instance, permitting judges to assess costs against the petitioning heir in order to discourage frivolous claims. Obstacles like these would go a long way towards making Professor Gary's proposal workable; here, though, I might prefer an absolute rule depriving courts of any discretion, and requiring the claimant to post a bond as an admission ticket to any litigation. The bond would cover reasonable costs and attorneys' fees of the presumptive heirs as well. That might discourage claimants from filing suit just to obtain leverage in any settlement discussions with the presumptive heirs.

In short, as always, Professor Gary has produced a thought-provoking article.

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