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Utilizing Estate Plans to Achieve Economic Justice

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I. INTRODUCTION

During my first clerkship at a legal aid organization in Bayview, San Francisco, I became aware of the displacement faced by low-income communities of color. It was frustrating to hear that title-holders who had worked hard to obtain property were not able to leave it with their families due to not having executed a distribution plan prior to their death. However, it gave me hope knowing there is a simple solution to this problem. I learned what is arguably one of the most creative ways of advocating for economic justice: drafting estate plans. Unbeknownst to many people within low-income communities of color, estate plans save people stress, tens of thousands of dollars, and allow people to secure their assets by distributing their estates to their loved ones upon death. Additionally, it takes a skilled lawyer no more than about four to five hours to accomplish this.

Bayview has been the home to many black families for decades. However, the inability of title-holders to create distribution plans for their estate before their death has contributed to their ultimate displacement. When a title-holder of property dies, their property is required to go through a court system known as probate. The probate court system has various functions ranging from identifying assets, calculating any owed taxes and fees, and distributing property. The only way to avoid probate is through the execution of a probate-avoidance distribution document, which is mentioned in further detail below. The probate court system, to say the least, is complex and expensive. Apart from the difficulty of having to navigate the probate court system, there are various additional consequences that come with a title-holder not having a distribution plan for their assets at all. Furthermore, recent studies have shown that the issue of dying without having a distribution plan is more common for low-income black homeowners than their white counterparts.

This paper discusses how the lack of distribution plans has resulted in the displacement of many low-income black residents and what can be done to address this ongoing issue. Part II of this essay describes the relevant demographic history of Bayview, San Francisco, California. Part III provides details about the probate court system. Part IV expands on specific challenges that entail conducting transfers of wealth. Part V touches on the role that race and class have on one's ability to conduct transfers of wealth. Lastly, Part VI presents various ideas for achieving economic justice in both legal education and practice.

II. BAYVIEW'S RELEVANT DEMOGRAPHIC HISTORY

For purposes of this paper, the population of focus is San Francisco's low-income black residents with property in the Bayview. The San Francisco Naval Shipyard was once a commercial shipyard located in Bayview and was acquired by the Navy.¹ Located on 638 acres of waterfront, the shipyard employed as many as 8,500 people at first and then up to 18,500 during the beginning of World War II.² Many of those employed were black workers who had migrated from the South in search of social and economic mobility.³ As a result of this migration, San Francisco's black population substantially expanded from about 5,000 before the war to approximately 32,000 in 1945.⁴

However, in the last two decades, black families have been forced out of the Bayview community due to the cost and fees that come with navigating the probate court system. As

¹ *Hunters Point Naval Shipyard*, Military Museum, <http://www.militarymuseum.org/HuntersPointNSY.html>

² *Id.*

³ Gretchen Lemke-Santangelo & Charles Wollenberg, *A Day's Work: Hunters Point Shipyard Workers, 1940-1945*, Found SF, http://www.foundsf.org/index.php?title=A_Day%27s_Work:_Hunters_Point_Shipyard_Workers,_1940-1945

⁴ *Id.*

mentioned before, this is an issue that is unique to low-income black homeowners and not their white counterparts. As time has passed, black title-holders of San Francisco property have gotten older and died of natural causes. Because the title-holders died without having established a distribution plan for their property, Bayview residents who stay with the property have been required to navigate the probate court system and incur all the expenses it includes. At the same time, there has been a rise in projects to revitalize the Bayview and housing rates have risen dramatically.⁵ Both the inability to afford probate expenses, along with rising housing rates has contributed to the overall decrease in black homeownership in the Bayview area.⁶ Consequently, the percentage of black residents in the Bayview declined from 77% to 33% by 2010.⁷

III. THE LAW ON INTERGENERATIONAL TRANSFERS OF WEALTH

Once a title-holder of property dies, probate courts require that the individual who wants a share of the property begin court proceedings so the court can, in simple terms, decide who gets what. As mentioned before, if a title-holder dies with a probate-avoidance distribution document to distribute their assets, the person who stays with the property is not required to report to the probate court.⁸ However, if a title-holder dies without a probate-avoidance distribution document, the property must be reported to probate so the court can decide how the property will be distributed.⁹ This may come as a surprise to many, considering the

⁵ *Bayview Hunters Point Area Plan*, San Francisco General Plan, https://generalplan.sfplanning.org/Bayview_Hunters_Point.htm

⁶ Erin McCormick. *Bayview Revitalization Comes with Huge Price to Black Residents*, SF Gate, <https://www.sfgate.com/bayarea/article/Bayview-revitalization-comes-with-huge-price-to-3298240.php>

⁷ *History of Bayview Hunters Point*, Bayview Operahouse Ruth Williams Memorial Theatre, <http://bvoh.org/culturehub/history-bvhp/>

⁸ California Probate Code (Cal. Prob. Code) § 5000

⁹ Cal. Prob. Code § 240

misconception people have that a dead title-holder's property will automatically go to "the next of kin."

Probate courts in California have various functions ranging from figuring out how much a piece of property is worth, to taking care of the dead title-holder's financial responsibilities and identifying who are heirs or beneficiaries.¹⁰ If a title-holder dies without a having established a distribution plan prior to death, the probate court will dispense estate assets using their default rules of distribution (see "Intestacy and the Issues that Entail" below).

IV. CHALLENGES THAT COME WITH THE FAILURE TO CONDUCT INTERGENERATIONAL TRANSFERS OF WEALTH

There are a range of issues that a family faces when the title-holder of a property dies without having executed a distribution plan for their assets. The first issue is the cost that comes with navigating the probate court system. Due to court costs, attorney fees, and other similar expenses, families are required to pay costs that eventually dissipate the total worth of the estate. The second issue is the title-holder dying without having prepared a probate-avoidance distribution plan and all the challenges that follow from that.

a. Costs of Navigating the Probate Court System

The average cost of probate is somewhere in between 4% to 7% of the total estate value.¹¹ For example, the probate cost for a million-dollar property is likely to range between \$40,000 and \$70,000. The cost of probate includes, but is not limited to, appraisal costs, executor's fees, court filing and certified copies fees, surety bonds, and any accounting and legal

¹⁰ *Wills, Estates, and Probate*, California Courts: The Judicial Branch of California, <https://www.courts.ca.gov/8865.htm?rdeLocaleAttr=en>

¹¹ *About Probate – How to Probate a Decedent's Estate*, The Superior Court of California: County of Santa Clara, http://www.sccscourt.org/self_help/probate/property/probate_overview.shtml#cost

fees.¹² In the occurrence of a challenge to an existing will, one may be required to pay thousands of dollars in litigation costs.¹³

Additional costs include taxes, which are required to be paid by either the person left in charge of the estate or the taxes may be taken out of the estate itself. Taxes most commonly required to pay are: state income tax, state fiduciary tax, estate tax, local real estate and personal property taxes, business taxes, and any other special state taxes.

Receiving assistance from a lawyer to navigate the probate court system may also come with a substantial financial cost. The California Legislature has established the attorney fees for the administration of property going through the probate court system. The compensation of an attorney for ordinary probate services are established in Probate Code § 10810, which lays out the amount of compensation an attorney receives based on the value of the estate. More specifically, compensation is based as follows:

“An attorney is entitled to (1) four percent on the first one hundred thousand dollars, (2) three percent on the next one hundred thousand dollars, (3) two percent on the next eight hundred thousand dollars, (4) one percent on the next nine million dollars, (5) one-half of one percent on the next fifteen million dollars, and (6) for all amounts above twenty-five million dollars, a reasonable amount to be determined by the court.”¹⁴

In addition to this, if the dead title-holder had unpaid debts, creditors are able to file a claim with the probate court for amounts owed and may have their bill paid with money from the

¹² *Id.*

¹³ *Id.*

¹⁴ Cal. Prob. Code § 10810

estate.¹⁵ For this reason, costs and fees against the estate may result in the value of the estate dissipating.¹⁶

i. Displacement due to the Inability to Pay Costs

Families unaware and financially unprepared to take on the required costs and fees could end up losing the home that was once meant to be passed down for generations. This is especially harmful to low-income families living on estates of high value. Due to the complexity that comes with navigating probate, most families with property are encouraged to prepare an estate plan to ensure that the property does not eventually lose its value. However, people who are new to home ownership after inheriting property are unaware of the problems that may arise when having to navigate the probate court system. This lack of awareness, on its own, has its consequences.

b. Intestacy and the Issues that Entail

If a decedent dies without a distribution plan, the probate court will distribute their property using the default rules of distribution known as intestacy. According to California laws of intestacy, property shall be divided:

“Into as many equal shares as there are living members of the nearest generation of issue, then living and deceased members of that generation who leave issue then living, each living member of the nearest generation of issue then living receiving one share and the share of each deceased member of that generation who leaves issue then living being divided in the same manner among his or her then living issue.”¹⁷

¹⁵ *About Probate – How to Probate a Decedent’s Estate*, The Superior Court of California: County of Santa Clara, http://www.sccourt.org/self_help/probate/property/probate_overview.shtml#cost

¹⁶ Kaycee Cuaira, *How to Minimize Inheritance Costs*, Tomorrow, <https://tomorrow.me/trust-worthy/financial-fitness/wealth-transfer-how-to-minimize-inheritance-costs/>

¹⁷ Cal. Prob. Code § 240

Under the California rules of intestacy, the principal heirs are a surviving spouse and/or the children of the dead title-holder. Without having made a distribution plan to devise an estate, a title-holder is at risk of having their property lose value in various amounts of circumstances.¹⁸ For example, there can be the issue of forced sales due to a family rivalry or the difficulty of the default rules distributing the property to minors.¹⁹ However, for purposes of this paper, the consequence discussed below is one that is unique to low-income individuals: the loss of government benefits after receiving an inheritance under the default rules of intestacy.

i. The Loss of Government Benefits

If a person of low-income suddenly inherits money and they were on government benefits, the inheritance can have devastating effects on their eligibility to continue receiving those benefits. The Aids Legal Referral Panel (ALRP) released a legal Q&A document to discuss how an inheritance can affect SSI or Medi-Cal Benefits. According to ALRP, any person who receives government benefits, specifically SSI, SSDI, Medi-Cal or Medicare, cannot have more than \$2,000 in assets.²⁰ With that said, if a person has more than \$2,000 in assets when they are to receive government benefits, they will no longer become eligible to receive them.²¹ ALRP then presents two (2) approaches to address this issue. People on government benefits who will receive an inheritance can “disinherit” the funds and give them to a close relative.²² A second

¹⁸ Danaya C. Wright, *Disrupting the Wealth Gap Cycles: An Empirical Study of Testacy and Wealth*, Wis. L. Rev. 295, 297 (2019).

¹⁹ *Id.*

²⁰ *Will My Inheritance Ruin My SSI & Medi-Cal?*, Aids Legal Referral Panel, 2011.

²¹ *Id.*

²² *Id.*

option would be to create a special needs trust prior to the death of the person whose assets will be distributed.²³

In January 2018, the US Bureau of Labor Statistics, conducted a study that assessed the average income and spending patterns of families not receiving government benefits vs. families receiving government benefits. The study found that families receiving benefits had an overall pre-tax income of \$74,597 while families receiving government benefits made \$33,549.²⁴ When a title-holder dies intestate, a probate judge will apply the default rules of intestacy regardless of whether it would be a detriment or benefit for someone. For this reason, if a person of low-income suddenly receives an inheritance they were unaware of, they likely will not continue receiving government benefits.

V. **THE ROLE THAT RACE AND CLASS HAVE ON THE ABILITY TO CONDUCT INTERGENERATIONAL TRANSFERS OF WEALTH**

People of color and people of a low-socioeconomic status seem to be the individuals who most often face the consequences of dying intestate. This is the reason why scholars have asserted that when we talk about wealth transmission, we talk about wealth itself.²⁵ In fact, all the options that are available for the transmission of wealth seem to pass by those who can truly benefit from preparing for those transmissions prior to a title-holder's death.²⁶ Sociologists have observed that:

²³ *Id.*

²⁴ Ann Foster & Arcenis Rojas, *Program participation and spending patterns of families receiving government means-tested assistance*, Bureau of Labor Statistics: Monthly Labor Review (January 2018) https://www.bls.gov/cex/research_papers/pdf/program-participation-and-spending-patterns-of-families-receiving-means-tested-assistance.pdf.

²⁵ Naomi Cahn, *Dismantling the Trusts and Estates Canon*, Wis. L. Rev. 165, 166 (2019).

²⁶ Wright, *supra* note 18, at 297.

“the inheritance rules apply equally to all, regardless of privilege. But, like all defining and protecting property, rules of inheritance differentially benefit the privileged and not the vast majority who stand to inherit little or nothing . . . inheritance systems are a major mechanism for the intergenerational transmission of privilege and, as such, constitute a central component of systems of stratification.”²⁷

The common denominator for people who seek to protect and grow wealth has been capable estate planning.²⁸ In fact, a 2016 Gallop Poll found that only 31% of Americans with an annual household income of \$30,000 or less have a will, compared to 55% of those with an income of \$75,000 or greater.²⁹

a. Correlation Between Intestacy and Race

When considering title-holders who die intestate, studies have shown that black title-holders are more likely to die intestate than white title-holders.³⁰ In fact, the difference between white and black title-holders dying intestate suggests that estate planning seems to be more predominant among wealthy and moderately-wealthy whites compared to an almost complete lack of estate planning by blacks.³¹ To explain this, scholars have highlighted the different experiences white and black households have with building and maintaining wealth.³² These experiences have also been categorized as cultural norms, which lead individuals to the decisions of whether or not they should even create creating estate plans.³³

²⁷ Pamela Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 85 Or. L. Rev. 453, 465 (2010).

²⁸ Wright, *supra* note 18, at 297.

²⁹ Jeffrey M. Jones, *Majority in US Do Not Have a Will*, Gallup News, (2016).
<https://news.gallup.com/poll/191651/majority-not.aspx>

³⁰ Wright, *supra* note 18, at 302.

³¹ *Id.* at 315.

³² Thomas W. Mitchell, *Growing Inequality and Racial Economic Gaps*, 56 How. L.J., 849, 860 (2013).

³³ Strand, *supra* note 27, at 465.

These cultural norms have played a role in the overall distribution of wealth in our society. In fact, various wealth gaps seem to be correlated to whether or not individuals die intestate.³⁴ Similarly, economic inequality has been considered to be at least partially the result of intergenerational wealth transmission.³⁵ Economic inequality is defined by some social scientists as the likeliness that “children born to very affluent and very poor families will replicate their parents’ economic status when they become adults.”³⁶ For the forgoing reasons, the difference in cultural norms among homeowners and their ability to create estate plans is an issue that pertains to not only race, but socio-economic status as well.

VI. SOLUTIONS FOR ACHIEVING ECONOMIC JUSTICE

Law schools, lawyers, and legal organizations have the responsibility of utilizing every legal tool and resource that they can deploy in the struggle to promote greater economic equality.”³⁷ Below are ideas for achieving economic justice, starting with a micro, client-level solution and ending with broader-scale solutions.

a. Provide Free Estate Planning Services that Include a Revocable Living Trust

To secure their assets, title-holders have various estate planning mechanisms at their disposal such as a transfer on death deed or the creation of a joint tenancy. However, the most common and useful mechanism is the creation of a probate-avoidance revocable living trust.³⁸ This is because a trust allows homeowners to avoid the probate court system entirely. For this

³⁴ Wright, *supra* note 18, at 297.

³⁵ Cahn, *supra*, note 25, at 189.

³⁶ Mitchell, *supra*, note 32, at 851.

³⁷ *Id.* at 883.

³⁸ Wright, *supra* note 18, at 297.

reason, legal aid organizations should provide free estate planning services and in those estate plans, they should include a revocable living trust.

One potential issue that property owners face is the inability to receive free legal services. Just like receiving government benefits, many non-profit organizations take into consideration an individual's income to determine their eligibility to receive free legal services. In many cases, property can be counted as income, therefore making many individuals unable to obtain free legal services. This, in fact, becomes an issue of equal access to the legal system.

To resolve this, non-profit organizations should not count property as income and should provide free estate planning services. Furthermore, the estate plan should include (1) an advanced health care directive, (2) power of attorney, (3) pour-over will, and most importantly, and (4) a probate-avoidance revocable living trust to secure the assets of their clients. This approach promotes economic justice by helping alleviate the negative impacts of having to go through the probate court system.

b. Promote Economic Justice in Legal Academia

Legal education tends to ignore issues of race, class, and inequality, which results in future leaders lacking the training needed to address these issues as a whole.³⁹ For this reason, it is not common for a typical Contracts or Property professor to mention the implications that race, class, and inequality have on society and the legal field at large.

Law schools who promote social justice and civil rights should make an emphasis to ensure that their law students can play a meaningful role in the fight for economic justice and equality.⁴⁰ There are various approaches that law schools can take to address this including, but

³⁹ Beverly Moran and Stephanie Wildman, *Race and Wealth Disparity: The Role of Law and the Legal System*, 34 *Fordham Urb. L.J.*, 1219, 1235 (2007).

⁴⁰ Mitchell, *supra*, note 32, at 882.

not limited to, (1) requiring professors to mention the social implications of the subjects they are teaching, (2) requiring students to take courses on how the subjects they are learning have an impact on society as a whole, and (3) offering courses on ways lawyers can promote social justice through transactional legal work. These initiatives can expose students to unconventional ways to advocate for and work towards economic justice.

c. Submit Proposals to the Uniform Law Commission

The Uniform Law Commission (ULC) has drafted legislation in areas of law where state uniformity is beneficial.⁴¹ The ULC has provided essential contributions to multiple areas of law including, but not limited to, the Uniform Probate Code.⁴² In his essay, *Growing Inequality and Racial Economic Gaps*, Thomas Mitchell presents the idea of submitting proposals to develop uniform laws that may benefit low-to-moderate income and minority communities.⁴³ In fact, states civil rights and public interest law organizations do very little to develop uniform laws that relate to estate planning in comparison to those “who represent the interests of powerful interest groups.”⁴⁴

For this reason, social justice lawyers should identify the issues that impact the population they serve and then play a role in the development of uniform laws from the proposal phase to the enactment phase. There is value in connecting with legislative lawyers to inform them about how the probate code has played a role in the displacement of hundreds. Furthermore, lawyers can work together to develop mechanisms that can be implemented within

⁴¹ Michael Kerr, *Uniform Law Commission: An Update for Legislative Lawyers*, NCSL, <https://www.ncsl.org/legislators-staff/legislative-staff/research-editorial-legal-and-committee-staff/uniform-law-commissionan-update-for-legislative-l.aspx>, (2010)

⁴² *Id.*

⁴³ Mitchell, *supra*, note 32, at 886.

⁴⁴ *Id.* at 887.

the probate code to avoid the sudden loss of property that once belonged to low-to-moderate income and minority families.

VII. CONCLUSION

The attainment of property in the United States is what people consider achieving the “American Dream.” Preserving the property attained entails an interaction with a system that many do not even know exists. However, centuries-old legal mechanisms have been established to secure the estates of those who have been fortunate enough to attain property. Unfortunately, low-income minority families are unaware of these mechanisms and they fall victim to losing their estate. For the foregoing reasons, it is the responsibility of lawyers, and other members in the legal field alike, to ensure homeowners are able to keep the property they attained in their effort to achieve the American dream.