

2014

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### Recommended Citation

Gazur, Wayne M. (2014) "The White Whale: Bringing Emotion and Relevance to the Contemporary Trusts and Estates Course," *Saint Louis University Law Journal*: Vol. 58 : No. 3 , Article 13.

Available at: <https://scholarship.law.slu.edu/lj/vol58/iss3/13>

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## THE WHITE WHALE: BRINGING EMOTION AND RELEVANCE TO THE CONTEMPORARY TRUSTS AND ESTATES COURSE

WAYNE M. GAZUR\*

### INTRODUCTION

The title of this Essay is intended to evoke two conflicting interpretations at the outset. According to one plausible perspective, the contemporary Trusts and Estates course remains a highly doctrinal property course, largely devoid of emotional appeal for most students. Further, as discussed below, it is also increasingly less relevant to the planning needs of most potential clients. Consequently, a teacher's efforts to bring emotion and relevance to the course might seem to be an unsuccessful, frustrating quest much like Ahab's search for the elusive white whale, *Moby Dick*.<sup>1</sup>

I try to develop a different perspective in my teaching of the course, and I establish that tone on the first day of class with Ishmael's moving account of his will execution ceremony.<sup>2</sup> This human, client-centered view of trusts and estates is increasingly a part of my course, enriching the doctrinal material. In terms of relevance, I believe that the Trusts and Estates course can still remain so, even amidst the profound changes to the manner in which many Americans transfer their wealth upon death and the increasing irrelevance of federal wealth transfer taxation.

### I. THE EXPANSION OF DOCTRINE AND TEACHING MATERIALS

As an experienced teacher of a three-credit Trusts and Estates course, I am acutely aware of the area's increased emphasis on statutory materials and the increase in the length of casebooks. I have typically required a casebook and a statutory supplement, and I am always pressed for time. I am ever mindful, indeed troubled, that the important dialogue with my students can be easily subordinated to the relentless push of the "material."

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\* Professor of Law, University of Colorado Law School. I am grateful for the comments on an early draft of this work provided by Randi M. Grassgreen and Robert M. Phillips. I remain responsible for all shortcomings.

1. See HERMAN MELVILLE, *MOBY DICK OR, THE WHALE* (Charles Scribner's Sons 1902) (1851), available at <http://hdl.handle.net/2027/njp.32101020985469>.

2. See *infra* text accompanying notes 61–66.

While statutes are not a new development in this area, the rise of the Uniform Probate Code and other uniform laws has pushed the Trusts and Estates course in the highly statutory direction of my taxation courses. The Uniform Probate Code in particular has become increasingly complicated.<sup>3</sup> This trend promises to become even more pronounced with the widespread adoption of the Uniform Trust Code, which, for the most part, painstakingly codifies in some detail general rules that had been developed by the courts.<sup>4</sup>

Professor Leach's 1960 casebook<sup>5</sup> was notable for its focus on competent drafting and its brevity—338 pages, although in fairness the type size and page layout were less generous than contemporary casebooks, and it omitted any extended treatment of the law of trusts. In 1965 Professors Scoles and Halbach launched the first edition of their comprehensive casebook;<sup>6</sup> it filled 687 pages. With the publication of the sixth edition in 2000, the page count had increased to 1140 pages.<sup>7</sup> Professors Dukeminier and Johanson's first edition consisted of 1129 pages,<sup>8</sup> and, bucking the trend, the successor ninth edition fills 1032 pages.<sup>9</sup> Although most professors do not assign all of a casebook, it has been my experience that if students are required to purchase a book, often with prices exceeding \$200, there is an expectation that the course will cover a good portion of the contents. These page lengths speak only to the casebook—a

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3. For example, the 1969 Uniform Probate Code substitute gift provision, section 2-605, consisted of approximately 131 words. In the 1990 version, section 2-603 consisted of approximately 1122 words (including words in subsection headings). The section's Comment offered nine examples in about as many pages of explanation. Certainly, the revised version is an improvement in terms of providing answers to a broad array of possible circumstances, although this is a default provision that should rarely apply to instruments drafted by a competent attorney. But, the section is not ousted without great intention, due to the rules of section 2-603(b)(3). Moreover, section 2-603(b)(2) otherwise overrides the common law class gift doctrine that students wrestle with in first-year Property. Students consequently need to know about the potential impact of this provision. The 2008 additions of sections 2-120 and 2-121 (dealing with children of assisted reproduction) were probably unavoidable, and are indeed laudable, but they add another day to the classroom treatment of intestate succession.

4. Due to the rapid and broad adoption of the Uniform Trust Code by many states, one cannot neglect a thorough coverage of its pertinent provisions. It was released in 2000, and as of May 7, 2013, it had been enacted in some form by twenty-four states plus the District of Columbia. See *Enactment Status Map*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Trust Code> (last visited Dec. 16, 2013).

5. See W. BARTON LEACH, *CASES AND TEXT ON THE LAW OF WILLS* (2d ed. 1960).

6. See EUGENE F. SCOLES & EDWARD C. HALBACH, JR., *PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS* (1965).

7. See EUGENE F. SCOLES, EDWARD C. HALBACH, JR. & RONALD C. LINK, *PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS* (6th ed. 2000).

8. See JESSE DUKEMINIER & STANLEY M. JOHANSON, *FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS, FUTURE INTERESTS, AND ESTATE PLANNING* (1972).

9. See JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* (9th ed. 2013).

teacher may also require a statutory supplement. Students have only so much capacity for reading and synthesizing material, so the increase in the length of textual materials can crowd out time for other work that could be done in the course.

I readily admit that my concerns might be a product of the three-credit structure at my law school, where four or more credits would afford additional coverage.<sup>10</sup> And, my inability to pursue a passing investigation of the statutory material could stem from my tax lawyer predilections, as well as the fact that I practiced, and now teach, in a Uniform Probate Code state.<sup>11</sup> In spite of these confessions, I believe that most teaching materials with their emphasis on cases and statutes promote the doctrinal load, crowding out the important, client-centered core of trusts and estates practice.<sup>12</sup> By neglecting that core, we condemn our students to a course that often earns the reputation as a “bar course” with a lot of good information to know, but a course to be endured, not embraced. We may also be shortchanging the preparation of our students for practice as attorneys who exercise good judgment in estate matters where the best outcome is not entirely determined by legal rules.

## II. AN ARGUMENT FOR THE DECLINING RELEVANCE OF THE TRUSTS AND ESTATES COURSE

I often reflect on whether particular course material has much practical, long-term, economic value to my students, as I consider such value to be a standard for the relevance of the material. The “value proposition” in legal education is under increasing scrutiny and an in-depth discussion is beyond the scope of this Essay.<sup>13</sup> The continuing debate over the role of “experiential learning” and what competencies can or should be imparted to law students may change this,<sup>14</sup> but, for now, a course such as Trusts and Estates can still be

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10. As a matter of curriculum policy, my school limits the number of four-credit courses in the 2L and 3L years, in part to avoid bloat in courses (as almost everyone believes that his or her course deserves more time). This limitation also streamlines student registration as four-credit courses limit other course options.

11. See *Uniform Commercial Code Locator*, CORNELL, <http://www.law.cornell.edu/uniform/probate.html> (last visited Dec. 16, 2013).

12. Professor Leach posited two functions of a course in wills: “(a) to push the student along the road in acquiring skill in the analysis and synthesis of legal materials, using a variety of formats that approximate the realities of the practicing profession, [and] (b) to contribute toward preparing him for a probate and trust practice at the various stages at which lawyers are called upon to participate, viz. planning and drafting, advising, litigating, deciding, legislating.” LEACH, *supra* note 5, at vii.

13. See, e.g., Cynthia E. Nance, *The Value of a Law Degree*, 96 IOWA L. REV. 1629 (2011); E. Thomas Sullivan, *The Transformation of the Legal Profession and Legal Education*, 46 IND. L. REV. 145 (2013).

14. The literature discussing the impact of the so-called MacCrate Report and the Carnegie Report is substantial. Two articles incorporating those themes were published in last year’s

“comfortably” taught on a largely doctrinal plane, in large section classes, much as it has been for decades.

Even if law teachers were to shift their pedagogical leanings, imparting practical relevance in the trusts and estates area can be a difficult teaching proposition due to shifts in the subject matter itself. It is a common theme that the law of wills is not important to many Americans, as demonstrated by their choices to remain intestate.<sup>15</sup> That is not surprising, because a significant number have few or only modest assets for which attorney assistance may seem a waste or too costly.<sup>16</sup>

For those with more significant assets, the panoply of available non-tax driven will or probate substitutes such as the joint tenancy with right of survivorship, financial account survivorship features, beneficiary designations, and the revocable trust have relegated the will as a practical matter to a backstop precautionary instrument. Most of the will substitutes can be created without the advice of an attorney, whether or not that is a well-advised course of action.<sup>17</sup> Although attorneys are engaged to sort out the aftermath of client planning that goes awry, the broader estate planning market of those who will pay for the services of an attorney has surely dwindled. One would expect that online and other self-help estate planning resources will also serve to supplant legal services (i.e., displace attorneys—our students) for individuals with modest assets.<sup>18</sup> Indeed, it is likely that even the “middle market” increasingly

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Teaching Issue of this law journal. See, e.g., Tracy A. Thomas, *Teaching Remedies As Problem-Solving: Keeping It Real*, 57 ST. LOUIS U. L.J. 673 (2013); Russell L. Weaver & David F. Partlett, *Teaching Remedies As a Capstone Course*, 57 ST. LOUIS U. L.J. 609 (2013). See also A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 2048–54 (2012) (addressing the practical shortcomings of faculty in addressing changes confronting legal education).

15. See, e.g., JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, *WILLS, TRUSTS, AND ESTATES* 71 (8th ed. 2009) (referring to a Gallup survey where only fifty percent of adults claimed to have a will); Ron Lieber, *A Shocking Death, a Financial Lesson and Help for Others*, N.Y. TIMES, Jan. 12, 2013, at B1 (referring to a 2011 survey finding that fifty-seven percent of adults in the United States have no will).

16. The estimated mean net worth was \$556,300, and the median net worth was only \$120,300 for all families in 2007. However, for families seventy-five years older and over, the mean was \$638,200, and the median was \$213,500. See *Table 721 Family Net Worth—Mean and Median Net Worth in Constant (2007) Dollars by Selected Family Characteristics*, U.S. CENSUS BUREAU, <http://www.census.gov/compendia/statab/2012/tables/12s0721.pdf> (last visited Dec. 16, 2013).

17. See John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984) (discussing the competing life insurance, pension beneficiary designations, joint accounts, and revocable trust alternatives to the will).

18. Nolo offers an online will for \$34.99 and an online living trust for \$59.99; see NOLO, [www.nolo.com](http://www.nolo.com) (last visited Dec. 16, 2013). LegalZoom.com offers similar services with some attorney guidance; see LEGALZOOM, [www.legalzoom.com](http://www.legalzoom.com) (last visited Dec. 16, 2013).

will be less dependent on the personal, lawyer-provided estate planning relationship.<sup>19</sup>

Granted, the prospects for wills (and estates law, for that matter) do not appear good. But, there is the “trusts” part of the course. For wealthy individuals, the trust is a dominant tool for its privacy features, its wealth transfer tax advantages, and its role as a long-term investment management and wealth perpetuation platform. Still, the “trusts” in the Trusts and Estates course title is in large part an illusory proposition beyond fundamentals of the doctrine, as one cannot, in my view, be on the path to becoming a competent trusts attorney without significant additional coursework.

Estate planning practice of any sophistication (i.e., highly remunerative professional practice) is rife with tax-driven acronyms and jargon, usually involving some type of trust, such as the ILIT (irrevocable life insurance trust),<sup>20</sup> the IDGT (intentionally defective grantor trust),<sup>21</sup> the 2503(c) trust,<sup>22</sup> the *Crummey* trust,<sup>23</sup> the QPRT (qualified personal residence trust),<sup>24</sup> the GRAT (grantor-retained annuity trust),<sup>25</sup> the GRUT (grantor-retained unitrust),<sup>26</sup> the CLAT (charitable lead annuity trust),<sup>27</sup> CLUT (charitable lead unitrust),<sup>28</sup> CRAT (charitable remainder annuity trust),<sup>29</sup> the CRUT (charitable remainder unitrust),<sup>30</sup> the NIMCRUT (net income makeup charitable remainder trust),<sup>31</sup> and the GSTT Dynasty Trust.<sup>32</sup> The basic Trusts and Estates course does not, and cannot, prepare a student to deal with these structures.

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Wevorce.com offers divorce legal services, with flat fees of \$3500 to \$15,000; *see* WEVORCE, [www.wevorce.com/faq.html](http://www.wevorce.com/faq.html) (last visited Dec. 16, 2013).

19. “[T]he most significant recent dislocation in the practice of law . . . is at the consumer end of the market: [it is] the rise of low-cost online law firms like LegalZoom and RocketLawyer that aid clients in drafting standard partnerships, wills, leases and the like. These firms pose a mortal threat to sole practitioners . . .” Richard A. Epstein, *The Rule of Lawyers*, WALL ST. J., May 6, 2013, at A13.

20. *See* WAYNE M. GAZUR & ROBERT M. PHILLIPS, *ESTATE PLANNING: PRINCIPLES AND PROBLEMS* 294–97 (3d ed. 2012) (explaining the structure of the ILIT).

21. *See id.* at 204–09 (explaining the structure of the IDGT).

22. *See id.* at 186 (explaining the structure of the 2503(c) trust).

23. *See id.* at 189–202 (explaining the structure of the *Crummey* trust).

24. *See id.* at 210 (explaining the structure of the QPRT).

25. *See* GAZUR & PHILLIPS, *supra* note 20, at 209–10, 455–64 (explaining the structure of the GRAT).

26. *See id.* at 209–10 (explaining the structure of the GRUT).

27. *See id.* at 387 (explaining the structure of the CLAT).

28. *See id.* at 387–88 (explaining the structure of the CLUT).

29. *See id.* at 384–85 (explaining the structure of the CRAT).

30. *See* GAZUR & PHILLIPS, *supra* note 20, at 385–86 (explaining the structure of the CRUT).

31. *See id.* at 385 nn.2–4 (briefly explaining the structure of the NIMCRUT, kindred NICRUT, and FLIPCRUT).

32. *See id.* at 349–66 (explaining the structure of the GSTT dynasty trust).

The value lies yet two (or more) additional courses beyond the basic Trusts and Estates course.<sup>33</sup> A Federal Estate & Gift Taxation course (after having taken a basic Income Taxation course) and a capstone Estate Planning course are fundamental. Coursework in Partnership Taxation, Family Law, and Elder Law would be helpful.

Tax planning is not the only driver of planning by wealthier individuals. They may also be concerned about other aspects such as asset protection, perpetuating their financial legacy, and imparting their values to future generations.<sup>34</sup> Still, federal wealth transfer taxes as a call to seeking estate planning services are now of no relevance to most Americans, and of less relevance to many Americans who once had reason to be concerned.

The American Taxpayer Relief Act of 2012<sup>35</sup> (ATRA 2012) made the lifetime exemption “permanent” (as permanent as legislation can be)<sup>36</sup> at \$5,000,000 per person, plus adjustments to reflect cost-of-living increases. That latter adjustment already produced a \$5,250,000 exemption for 2013.<sup>37</sup> With proper planning (which is not as necessary with the continuation of the Deceased Spousal Unused Exclusion Amount),<sup>38</sup> a married couple can avoid federal taxes with an estate of double that amount.<sup>39</sup> The title of the opening

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33. Some knowledge of taxation is, of course, important in kindred specialties such as elder law. See, e.g., Janan Hanna, *Exploring Growing Areas of Law*, 41 STUDENT LAW., Feb. 2013, at 20, 22 (“The entrée into an elder law practice is trust and estate law . . . [T]ax law is helpful, although you needn’t be an expert.”).

34. “It is unquestioned that much of the focus of planning structures is on the tax minimization aspect. However, experienced estate planners will tell you that the first aspect, a desire to control the human elements, often is equally or even more important to the client.” GAZUR & PHILLIPS, *supra* note 20, at 178.

35. American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2012).

36. The “permanence” of ATRA 2012 defies predictions, but the history of the federal wealth transfer taxes over the past three decades is one of retrenchment. Nevertheless, President Obama’s fiscal year 2014 budget proposed a handful of provisions that would raise wealth transfer tax revenues, including a return to the 2009 wealth transfer exemptions and rates, i.e., a \$3,500,000 applicable exclusion amount, a forty-five percent tax rate, and a \$1,000,000 exclusion for gift taxes in 2018. See OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2014 BUDGET OF THE U.S. GOVERNMENT 209 (2013), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/budget.pdf>. See Kelly Greene, Estate Planning: New Hazards, WALL ST. J., Apr. 27–28, 2013, at B8 (describing the impact of the proposals). See also Beth Shapiro Kaufman, Transfer Tax Certainty Is Finally Here! What Now?, 40 EST. PLAN., June 2013, at 39, 42 (discussing possible tax law changes in the aftermath of ATRA). Fears of a return to higher rates, lower exemptions, and loophole closers will probably keep some taxpayers at the margins still in the estate planning “game.”

37. Rev. Proc. 2013–5, 2013–5 I.R.B. 448.

38. See GAZUR & PHILLIPS, *supra* note 20, at 256–63 (discussing the planning implications of the Deceased Spousal Unused Exclusion Amount).

39. State wealth transfer taxes can nevertheless remain a concern for taxpayers.

presentation at a Colorado annual estate planning retreat, “Will the Tax Tail Still Wag the Estate Planning Dog?,” reflects this state of affairs.<sup>40</sup>

One finds many statistics about the concentration of wealth in the United States. Based on data from 2004, individuals with a net worth of five million dollars or more were thirteen percent of the sampled population, and those with a net worth in excess of ten million dollars were less than five percent of the sampled population.<sup>41</sup> An article in Fortune magazine suggested that “membership” in the top one percent of the U.S. population now requires \$300,000 to \$400,000 in income, if that is the parameter, or nearly eight and one-half million dollars in household net worth, if that is the parameter.<sup>42</sup> Further, only one-half of the one percent qualify in both categories.<sup>43</sup> Consistent with those statistics, the future for estate planners relying on wealth transfer tax-inspired planning appears to be bleaker. One expert has characterized ATRA 2012 as effectively eliminating the estate tax for ninety-nine percent of the population.<sup>44</sup>

What impact will the almost complete elimination of the federal wealth transfer taxes have on the estate planning community? In 1997 I surveyed a random sample of practitioners drawn from members of the American Bar Association Real Property, Probate and Trust Law Section.<sup>45</sup> I asked a number of questions about estate planning practice, and their responses confirmed that planning for the wealth transfer taxes was a significant part of their practice. However, the federal wealth transfer tax world was much different then.

As of 1998, the estate and gift tax applicable exclusion amount was \$625,000,<sup>46</sup> while the mean client net worth reported by the responding

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40. *Estate Planning Retreat: The Changing Landscape*, TR. & EST. SEC. OF THE COLO. B. ASS'N, June 13–15, 2013, at 1. The description of the session poses this question: “Is estate and gift tax planning the buggy whip of our business or still viable and necessary?”

41. See *Table 717 Top Wealth Holders with Gross Assets of \$1.5 Million or More—Debts, Mortgages, and Net Worth: 2004*, U.S. CENSUS BUREAU, <http://www.census.gov/compendia/statab/2012/tables/12s0717.pdf> (last visited Dec. 16, 2013).

42. See Nina Easton, *Stop Beating Up the Rich*, CNN (Sept. 6, 2012, 5:00 AM), <http://finance.fortune.cnn.com/2012/09/06/stop-bashing-rich/>.

43. *Id.*

44. See Paul Sullivan, *The End of a Decade of Uncertainty Over Gift and Estate Taxes*, N.Y. TIMES, Jan. 4, 2013, <http://www.nytimes.com/2013/01/05/your-money/fiscal-deal-ends-decade-of-uncertainty-over-gift-and-estate-taxes.html?pagewanted=all&r=0> (quoting Richard A. Behrendt, director of estate planning at Baird); James R. Hamill, *New Landscape of Post-2012 (Un)Estate Planning Strategies*, 40 EST. PLAN., June 2013, at 3, 3 (“ATRA has effectively eliminated the transfer tax for 99.87% of the population.”).

45. See Wayne M. Gazur, *Muddling Along with the Federal Wealth Transfer Tax: A Survey of Practitioners and Law School Professors*, 34 REAL PROP. PROB. & TR. J. 517 (1999).

46. See STAFF OF JOINT COMM. ON TAX'N, 110TH CONG., HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM 10 (2007).



practitioners was \$2,234,192.<sup>47</sup> The mean client net worth was therefore more than triple the estate and gift tax exclusion amount. One question asked: “What percentage of the fee paid to practitioners for estate planning services by a typical estate planning client would be strictly succession and disposition related, without any federal wealth transfer tax consequences?”<sup>48</sup> The mean percentage of non-tax services was less than one-half, at 43.38 percent.<sup>49</sup> Another question asked for an estimate of the impact on estate planning practice revenues if the federal estate, gift, and generation skipping transfer taxes were abolished (without a direct replacement).<sup>50</sup> Most of the practitioners, 78.8 percent, predicted a decline in estate planning revenues, and the mean decline was 41.62 percent.<sup>51</sup>

Consider those responses in today’s planning environment. The \$2,234,192 mean client net worth amount adjusted for inflation through 2012 would be \$3,173,966.<sup>52</sup> The estate and gift tax exemption for 2013 is \$5,250,000.<sup>53</sup> Considering this pessimistic assessment of the estate planning landscape, one might conclude that estate planning attorneys face little motivation by potential clients to plan (and few assets with which to plan) at one end of the wealth spectrum, and a reduced incentive to plan by those falling in middle, below the upper group of the very wealthy at the other end of the spectrum.<sup>54</sup> Although wealthy individuals will still require estate planning services from attorneys, that promises to employ a relatively small group of attorneys.

A narrow pyramid for highly remunerative estate planning services is in part suggested by the ranks of the specialists who are members of the American College of Trust and Estate Counsel, which boasts only 2600 members.<sup>55</sup> The less exclusive American Bar Association Section of Real Property, Trust and Estate Law has 24,000 members, not all of whom are attorneys,<sup>56</sup> and some likely specialize in real property law rather than trusts

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47. Gazur, *supra* note 45, at 533.

48. *Id.* at 534.

49. *Id.* at 535.

50. *Id.* at 541.

51. *Id.* at 542.

52. See *Inflation Calculator*, WESTEGG, [www.westegg.com/inflation/](http://www.westegg.com/inflation/) (last visited Dec. 16, 2013).

53. Greene, *supra* note 36, at B8.

54. “The hardest job for most estate planners will be getting their clients to agree even to revisit their estate plans, in light of these higher exemption levels.” Howard M. Zaritsky, *Observations on Estate Planning Provisions of the 2010 Tax Act*, 38 EST. PLAN., Mar. 2011, at 48, 47.

55. See *About ACTEC*, ACTEC, <http://www.actec.org/default.asp> (last visited Dec. 16, 2013).

56. “The ABA Section of Real Property, Trust and Estate Law (RPTE) is a diverse community of nearly 24,000 U.S. and international lawyers, paralegals, real estate and financial services professionals, law students, and legal educators.” *Section of Real Property, Trusts and*

and estates. One might compare these relatively small groups of attorneys to the number of all resident and active attorneys reported by states as of December 31, 2010, i.e., 1,225,452 attorneys.<sup>57</sup> Of course, non-specialists will still produce basic estate planning instruments as part of a general law practice. However, the statistics above suggest that only a small slice of attorneys already depend on estate planning services as the mainstay of their practice.

The glass might be at least half-full, however. Estate planners that I surveyed in 1997 did not predict the elimination of their practice if the federal wealth transfer taxes were abolished; they expected a decline in revenues of 41.62 percent. Moreover, that decline in revenues would be overstated in comparison with today's estate planning climate, because the federal wealth transfer taxes have not been completely abolished. Further, clients who are multimillionaires (but not subject to federal wealth transfer taxes) still will require some estate planning services, and they typically own businesses or investments and engage in transactions that produce other legal work. That aspect was probably reflected in the practitioners' estimates of the decline in revenues.

Even twenty-five years ago, Professor Pennell decried the waning role of estate planning in the law school curriculum, predicting that the maturation of the baby boomers suggested "the need for estate planning services is about to balloon."<sup>58</sup> Professor Pennell's prediction faced the headwinds of the changes in legal practice and the decline in the sweep of the federal wealth transfer taxes. However, more recent accounts have likewise predicted that the aging of the U.S. population will increase the need for "elder law" planning, blunting the decline in tax-driven estate planning practice.<sup>59</sup> Although elder law involves public assistance issues that are outside the scope of the Trusts and Estates course, it also employs tools from the Trusts and Estates course such as

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*Estate Law*, ABA, [www.americanbar.org/groups/real\\_property\\_trust\\_estate.html](http://www.americanbar.org/groups/real_property_trust_estate.html) (last visited Dec. 17, 2013).

57. James Podgers, *State of the Union: The Nation's Lawyer Population Continues to Grow, But Barely*, ABA JOURNAL (June 30, 2011, 11:59 PM), [http://www.abajournal.com/magazine/article/state\\_of\\_the\\_union\\_the\\_nations\\_lawyer\\_population\\_continues\\_to\\_grow\\_but\\_bare?](http://www.abajournal.com/magazine/article/state_of_the_union_the_nations_lawyer_population_continues_to_grow_but_bare?).

58. Jeffrey N. Pennell, *Introduction: Whither Estate Planning*, 24 IDAHO L. REV. 339, 345 (1987-88).

59. See, e.g., Jonathan G. Blattmachr, *Looking Back and Looking Ahead: Preparing Your Practice for the Future: Do Not Get Behind the Change Curve*, 36 ACTEC J. 1, 48 (2010) ("[A]n increase in demand for Elder Law work likely may be more gradual but could more than offset, over time, the loss of business in the estate tax planning and administration area"); Hanna, *supra* note 33, at 22 ("The elder law field is relatively young, having taken shape as [a] separate practice area about 25 years ago . . . [s]o there are opportunities here for new lawyers.").

the simple will, revocable trust, and disability planning measures that future attorneys will need to know about. Is elder law the profession's new hope?<sup>60</sup>

These sobering developments should inform our teaching of the Trusts and Estates course, but I believe that the course can offer benefits to the future generalist attorney and the elder law specialist, while serving as a building block for students aiming for a career as an estate planning specialist. I now turn to the other tale of the white whale.

### III. BRINGING EMOTION AND THE HUMAN ELEMENT TO THE CONTEMPORARY TRUSTS AND ESTATES COURSE

As part of the first day's assignment, my students read the will execution passage from *Moby Dick*. A shorter snippet is not enough to create the impact that I desire:

[A]nd finally considering in what a devil's chase I was implicated, touching the White Whale; taking all things together, I say, I thought I might as well go below and make a rough draft of my will. "Queequeg," said I, "come along, you shall be my lawyer, executor, and legatee."

It may seem strange that of all men sailors should be tinkering at their last wills and testaments, but there are no people in the world more fond of that diversion. This was the fourth time in my nautical life that I had done the same thing. After the ceremony was concluded upon the present occasion, I felt all the easier; a stone was rolled away from my heart. Besides, all the days I should now live would be as good as the days that Lazarus lived after his resurrection; a supplementary clean gain of so many months or weeks as the case might be. I survived myself; my death and burial were locked up in my chest. I looked round me tranquilly and contentedly, like a quiet ghost with a clean conscience sitting inside the bars of a snug family vault.

Now then, thought I, unconsciously rolling up the sleeves of my frock, here goes for a cool, collected dive at death and destruction, and the devil fetch the hindmost.<sup>61</sup>

This well-known passage<sup>62</sup> offers a rich assortment of conventional doctrinal issues and questions. Why was Ishmael, a simple seafarer, practically required to use a somewhat formal will as his wealth transmission device?

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60. Anecdotally, I recently spoke with a senior judge. The judge has observed a pronounced upswing in the amount of litigation among family members concerning parents' care and control over their financial affairs.

61. MELVILLE, *supra* note 1, at 198.

62. See, e.g., Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning*, 35 SEATTLE U. L. REV. 427, 427-29, 446-47 (2012) (discussing the passage as illustrative of the therapeutic potential of estate planning and later discussing the will execution process); Thomas L. Shaffer, *The "Estate Planning" Counselor Values Destroyed by Death*, 55 IOWA L. REV. 376, 382 (1969) (discussing the passage in connection with a will interview study indicating that will preparation reduces fear of death).

Why might that no longer be true today? As a seafarer, which jurisdiction's laws would govern the execution of the will at sea? Why would Ishmael have written four wills at such a young age? What does this tell us about what circumstances often move clients to seek our services in drafting their instruments? If Ishmael were wealthy, how might his heirs portray the role of Queequeg in the process (particularly in view of their close relationship explored in the early pages of the book)? How might Ishmael have handled that aspect differently?

Most of those issues are premature for the first day of class, and they only serve as a preview of things to come, so my primary purpose is to set a tone for the course in terms of seeing trusts and estates, for their human non-legal aspects, through the eyes of the client.<sup>63</sup> The aim is not to become tangled up in their emotions and stories, but to understand their special (although not unique) perspectives. As attorneys, we are invited to take part in this aspect of accepting and preparing for one's inevitable death. It is a great honor and responsibility. Understandably, clients can experience Ishmael's cathartic release in surviving themselves,<sup>64</sup> such that with their affairs in order, "a stone is rolled away from [their] heart."<sup>65</sup> Due to this sudden release, it is sometimes difficult to keep clients waiting after the document execution ceremony so that the attorney can confirm that each page has been properly signed, initialed, and so forth.<sup>66</sup>

Acknowledging the role of human emotions in the various contexts of trusts and estates makes us better advisors, beyond technical document producers. The attorney's role as a counselor, who advises the client in light of the human issues that pervade the client's relationships and expectations, is part of the professional services value proposition. This gives face-to-face legal representation value that is often not provided by other competing forms of assistance.<sup>67</sup> I have also found that an awareness of the human side makes the

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63. See, e.g., Christopher L. Hayes, *Leaving a Legacy: A Client's Search for Meaning*, 4 J. PRAC. EST. PLAN., Aug.–Sept. 2002, at 25, 25–26 (describing estate planning that addresses the human aspects of defining and creating an enduring legacy).

64. See Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 U. KAN. L. REV. 139, 139–40 (2012) (arguing that preparation of estate planning documents produces a net therapeutic result).

65. MELVILLE, *supra* note 1, at 198.

66. Improper execution of instruments in ceremonies supervised by attorneys is the gist of law school casebooks. See, e.g., *In re Estate of Hall*, 51 P.3d 1134, 1135 (Mont. 2002) (execution without witnesses); *In re Will of Ranney*, 589 A.2d 1339, 1339 (N.J. 1991) (improperly executed two-step will); *In re Snide*, 418 N.E.2d 656, 656 (N.Y. 1981) (husband and wife switched wills); *In re Estate of Pavlinko*, 148 A.2d 528, 528 (Pa. 1959) (husband and wife switched wills). We need to ask why this happens and how it can be prevented.

67. While I believe that some emphasis on the emotions involved in estate planning helps to develop the students' professional skills set, I am not making a larger claim that these modest enhancements, alone, will transform the students' outlook; this is only one course, a small piece

Trusts and Estates course more interesting, and it can arise in a number of contexts.

A. *Listening to Clients*

Dealing with estate planning can be an intensely emotional time for clients. Taking charge of the meeting by prematurely retreating to the comfort of technical expertise and advice is not helpful. Nor is this time for a detailed factual cross-examination of the client. This is a time *to be present and empathetic, and especially listen to the client before focusing on the details of the mechanics*.<sup>68</sup> Human issues of which the client may be unaware may emerge during this process.

B. *Expressing Caring in Instruments*

I had never seen my father's will prior to his death. My mother predeceased him, so only my brother and I survived as the immediate family. Although a fiercely independent and proud man, I opened his will in which he referred to his two "beloved" sons. I rarely see that type of language in contemporary instruments, and it meant a lot to me. Seemingly small gestures like this can have a large impact on the bereaved. This is part of why some clients desire a so-called "ethical will" that can, in part, speak in more personal terms, outside of the standard will language.<sup>69</sup>

C. *Sowing the Seeds of Family Discord*

Clients sometimes have strong preferences among the objects of their bounty. Indeed, it is the prerogative of a parent to disinherit a child, or to give him or her a lesser share than that of siblings.<sup>70</sup> The unequal shares can be seen as fair in the eyes of the client, and they do not necessarily stem from misbehavior on the part of the child.<sup>71</sup> Handled poorly,<sup>72</sup> this can be the

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of the larger law school experience. Compare Robin Wellford Slocum, *An Inconvenient Truth: The Need to Educate Emotionally Competent Lawyers*, 45 CREIGHTON L. REV. 827 (2012).

68. See, e.g., GAZUR & PHILLIPS, *supra* note 20, at 10–23 (conducting the client interview); L. Paul Hood, Jr., *From the School of Hard Knocks: Thoughts on the Initial Estate Planning Interview*, 27 ACTEC J. 297 (2002) (discussing client and advisor impediments to the estate planning process).

69. See, e.g., Daphna Hacker, *Soulless Wills*, 35 LAW & SOC. INQUIRY 957, 961–62 (2010) (recommending the use of more personal or sentimental language in wills); Zoe M. Hicks, *Is Your (Ethical) Will in Order?*, 33 ACTEC J. 154 (2008); Steven Keeva, *A Legacy of Values*, 91 A.B.A. J., Oct. 2005, at 88.

70. This is subject to the forced share provided under Louisiana law under limited circumstances. See 1 MAUNSEL W. HICKEY ET AL., LOUISIANA PRACTICE SERIES: ESTATE PLANNING IN LOUISIANA § 4.43 (2012–13 ed. 2012).

71. Unequal financial circumstances (including other sources of inheritance) or special needs of the children can dictate unequal bequests. See, e.g., Robert Solomon, *Helping Clients Deal*

launching pad for a contest based on undue influence or lack of competence.<sup>73</sup> Aside from the property involved, unequal treatment often leaves the relationships of the survivors broken, perhaps permanently. The attorney, as counselor, might explore if the client's feelings in this regard are that strong, to warrant a possible contest, as well as to leave a legacy of discord for the family.

In a similar vein, unequal treatment of adopted children or grandchildren can leave the child and the surviving adoptive parents with a bitter remembrance of the donor.<sup>74</sup>

Finally, one would seek to fashion estate plans in a manner that otherwise minimizes the potential for family discord following the death of the donor. Some structures, such as undivided interests in family farms or other real estate and illiquid minority positions in family businesses are notorious litigation breeders.<sup>75</sup> On a more seemingly mundane level, even the "generic" division of tangible personal property can bring family frictions to the surface.<sup>76</sup>

#### D. Preserving the Dignity of Beneficiaries

With respect to surviving spouses, it remains the majority rule that a trust beneficial interest can be terminated upon remarriage.<sup>77</sup> One's surviving spouse can unhappily receive this, particularly if the age and other

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*with Some of the Emotional and Psychological Issues of Estate Planning*, 18 PROB. & PROP., Mar.–Apr. 2004, at 56, 56–57 (describing four scenarios in which unequal gifts are involved).

72. Some commentators recommend ante mortem discussions between the donors and the donees concerning the unequal treatment. *See id.* at 57–58 (recommending use of a facilitator who is usually not the estate planner).

73. To a lesser degree, the choice of fiduciaries can also create hard feelings on the part of those not selected.

74. The Uniform Probate Code, as a default matter for purposes of transferors who are not the adoptive parents, treats adoptees as children provided that the adoption took place before the adoptee reached age eighteen, the adoptive parent was the adoptee's stepparent or foster parent, or the adoptive parent functioned as a parent of the adoptee before the adoptee reached age eighteen. *See* UNIF. PROBATE CODE § 2-705(f) (amended 2010).

75. One writer has criticized estate-planning structures that bind children together through common ownership as "putting children in a rowboat." *See* Robert G. Edge, *Children In A Rowboat and Other Potential Mistakes in Estate Planning, Part I*, 17 PROB. & PROP., Jan.–Feb. 2003, at 6, 7.

76. *See, e.g.*, Robbie Shell, *If Heirs Are Fighting, Try Mediation*, WALL ST. J., Mar. 18, 2013, at R4 (in part discussing children's fights over antique cars, jewelry, limited editions of books on a family's history, a Persian rug, and a Winslow Homer painting); Stacy E. Singer, *Mistakes Fiduciaries See All the Time and How to Avoid Them*, 39 EST. PLAN., Nov. 2012, at 16, 17 (in part discussing issues concerning the structure of a tangible personal property clause).

77. *See, e.g.*, 1942 *Gerald H. Lewis Trust v. Colo. Nat'l Bank*, 652 P.2 1106, 1107 (Colo. App. 1982). This assumes that the trust is not a trust for which qualification for the federal estate tax deduction is sought, as the potential for forfeiture would vitiate the deduction. *See* TREAS. REG. § 20.2056(b)-7(h) (2004).

circumstances of the spouse make the feared outcome unlikely. A related provision *requires* the trustee to consider the other resources of the beneficiary in determining the amount of a discretionary distribution.<sup>78</sup> While this can serve to preserve the principal of the trust, what type of information is required of the beneficiary? How intrusive must the trustee be?

On the other hand, some provisions serve to preserve the beneficiary's dignity. The majority rule dictates that the donee of a testamentary power of appointment cannot enter into an enforceable contract for the exercise of the power.<sup>79</sup> Although this is a facet of dead hand control, it is also a means of preserving the dignity of the donee of the power; he or she wields considerable influence over the potential objects of the power up to the time of death. Indeed, a concern of inter vivos gifting is that the donor can be forgotten, or even abused, by the donees.

#### *E. Respecting the Settlor's Choices and Feeling Gratitude*

The decision to place property in trust, rather than to pass it outright to the beneficiaries, invokes "dead hand" control of the assets. While almost every beneficiary would prefer outright ownership, one can respect the settlor's decision in utilizing a trust and be grateful for the gift; it was the settlor's property. While the trust does afford control over the assets, it is usually for the good faith benefit and nurturing of the current beneficiaries, as well as future generations.<sup>80</sup> That development of the individual beneficiary can take place over the plane of a single generation, as children reach adulthood and maturity, or for multiple generations, each of which will go through a cycle of adulthood and maturity.

#### *F. Intimate Partners Are Often of Most Importance*

Although descendants are understandably dear to most testators, an intimate partner will often meet the testator's current needs for companionship, love, attention, and care.<sup>81</sup> That intimate partner may not be the genetic parent of the testator's offspring. The estate plan will likely favor the intimate partner to a large degree, and the descendants' interests are secondary.<sup>82</sup>

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78. See TREAS. REG. § 20.2056(b)-7(h).

79. See DUKEMINIER & SITKOFF, *supra* note 9, at 827–28.

80. See Missy Sullivan, *Lost Inheritance*, WSJ MONEY, Spring 2013, at 43 (discussing measures to counter the dominant tendency for heirs to dissipate fortunes).

81. Caregivers of any type can assume primary importance to the client; decades of familial relations can bow to the exigency of current care. Undue influence can be exerted in these circumstances. See, e.g., Spencer J. Crona, Molly A. Callender & Richard F. Spiegle, *Anatomy of an Undue Influence Case*, 42 COLO. LAW., Apr. 2013, at 55, 59.

82. See, e.g., GENEEN ROTH, LOST AND FOUND: UNEXPECTED REVELATIONS ABOUT FOOD AND MONEY 114–17 (2011) (describing a father who, contrary to representations to the children, left much of the estate for the benefit of his wife); Gregory v. Bowsby, 88 N.W. 822, 823 (Iowa

G. *This Ultimately Involves Money and that Is an Emotional Topic*

Much of estate planning involves choosing who will receive money and other property and in what fashion. That process can be emotional for clients, because it deals with death, family, and money. Money has an emotional pull for most people; it represents survival, security, and power. The recipients also bring their views about money to the process, which is mixed with the symbolism, such as love or rejection, that the gift represents to them.

Moving beyond a presentation of the legal doctrine takes additional pedagogical effort and focus. Ideally, Trusts and Estates would be taught as a problems and drafting practicum, with the problems touching on these broader issues. I typically have required an individual drafting project or student team projects. I find it very worthwhile, but if one thoroughly reviews and comments on the student work product, it is additional grading for a course that is often taught in large sections.<sup>83</sup> I also try to discuss hypothetical client problems in class—ones that apply the doctrine but also raise other softer issues requiring the students to exercise judgment.<sup>84</sup> This also is worthwhile, but it is slow moving if one deals with the problems with any thoroughness. The tension between this intensive approach and the large enrollment approach of many Trusts and Estates courses cannot be comfortably resolved. The solution at my school is to largely rely on a capstone estate planning course, although relatively few students take the capstone course because of its tax-driven nature and prerequisites.

#### IV. BRINGING RELEVANCE TO THE TRUSTS AND ESTATES COURSE

Although the practice landscape for trusts and estates has evolved, there is continued relevance for the law school course, but stemming from different perspectives.

The wealthy client base for which estate planning is driven by wealth transfer tax concerns will continue to require the services of attorneys. Educating attorneys to serve that increasingly elite client base remains a role for the Trusts and Estates course. For these future attorneys, the Trusts and

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1902) (allegations that children deeded property to their father in trust, with the remainder to them; the decedent instead conveyed an undivided one-third interest in the property to his second wife).

83. Other law teachers are grappling with the issue of introducing more experiential work to non-litigation courses. See, e.g., Heather M. Field, *Experiential Learning in a Lecture Class: Exposing Students to the Skill of Giving Useful Tax Advice*, 9 PITT. TAX REV. 43, 46–48 (2012) (including the literature listed by Professor Field in footnote 8).

84. I recently adopted a new casebook to promote this problem-based approach to the course. See SUSAN N. GARY, JEROME BORISON, NAOMI R. CAHN & PAULA A. MONOPOLI, *CONTEMPORARY APPROACHES TO TRUSTS AND ESTATES* (2011).



Estates course serves as a necessary building block among many in a larger professional knowledge base.<sup>85</sup>

Some students will enter general practice or work in elder law, and they will have the occasion to prepare non-tax driven estate plans.<sup>86</sup> The Trusts and Estates course has continuing relevance for them, although they are clearly limited in terms of the complexity of the tax issues. For example, even relatively simple income tax consequences of lifetime gifting can be a trap for the unwary.<sup>87</sup>

For the rest of the students in the course, the course may remain just a general background course. I accept that. However, I hope that they will retain some core principles as part of their general legal education about one of the fundamental human experiences that touches all of us, the transmission of wealth in anticipation of one's death.<sup>88</sup>

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85. As discussed earlier in Part II of this essay, these students will require more specialty courses, particularly in the taxation area. *See supra* text accompanying notes 20–33.

86. A survey of graduates of the classes of 1955, 1965, and 1970 from three law schools, found that 31.2% worked in the trusts and estates area, with 14.9% considering the area to be primary. Of those working in the area, 10.2% found law school training to be not useful, 47% found it somewhat useful, and 24.7% found it very useful. 18.1% worked in the area with no law school training. Leonard L. Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264, 264, 271 (1978). The time period for conducting the survey is not clear from the article, but considering the time necessary for its processing, as well as the writing and publication of the article, one would assume that it reflects pre-1977 practice. Years prior to the effective date of the Tax Reform Act of 1976 saw wealth transfer taxes that touched a much greater percentage of the population, because the exemption for estates was only \$60,000. *See* STAFF OF JOINT COMM. ON TAX'N, *supra* note 46, at 6 n.22.

87. Wealth transfer tax principles can play an important role in smaller estates in terms of the income tax consequences of planning. For example, absolute inter vivos gifts of appreciated property can present income tax surprises for the donee due to the transferred basis rules under I.R.C. § 1015 (2006). The planner's facility with the retained strings rules can instead produce an at death basis adjustment under I.R.C. § 1014. *See, e.g.*, Hamill, *supra* note 44, at 3 (in part discussing strategies to maximize the I.R.C. § 1014 adjustment).

88. "The American legal education's greatest strength has been its value of turning out well-educated generalists, much like the theme expressed in Dean Tony Kronman's wonderful book, *The Lost Lawyer*. On reflection, however, the supply side of this market—the firms and entities that employ our law graduates—are telling us that our graduates must come out more focused, more finely educated, and practice-ready in more specific areas. I lament this direction or trend because while it may lead to greater depth of technical knowledge, I am not sure it builds the requisite judgment and wisdom that come from a more generalist-centered legal education experience." Sullivan, *supra* note 13, at 154 (footnotes omitted).

A. *Everyone Should Have a Will, But Many Wills Have Little Practical Impact*

Every adult should prepare a will, and keep it current, as a default instrument for overlooked assets. However, for many people the rise of will substitutes supplants the will's application to their most significant assets.<sup>89</sup>

B. *Nonprobate Transfers Are the "New" Will, But the Documents Need to be Updated and Coordinated*

Nonprobate transfers are valuable planning tools, but like a will, they require monitoring to account for changes, such as the birth or death of beneficiaries. More fundamentally, they generally transfer assets on a piecemeal basis that can produce an uncoordinated plan of disposition. That the "do it yourself" planner often uses them only compounds this.

C. *Write It If You Intend It (Provided You Know What To Write)!*

The course is generally about the application of statutes to instruments, with great emphasis on the language employed by the authors of the instruments. Much of the Uniform Probate Code, for example, is a set of default provisions that can be anticipated, tailored, and overridden by an informed planner.<sup>90</sup> Moreover, some of the default provisions do not go far enough.<sup>91</sup> The same is true of much of the Uniform Trust Code.<sup>92</sup> However, one must understand what one is to alter or avoid. This is particularly true of several of my favorites, the doctrines of lapse (and substitute gifts), ademption, and precatory requests. In drafting instruments, the attorney should look past the boilerplate language and place him or herself in the shoes of the fiduciary,<sup>93</sup> devisees, or a reviewing court. The attorney should consider how this would play out in practice.<sup>94</sup>

Beyond trusts and estates, much of transactional law practice turns on the same principle of clear drafting.

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89. *See supra* note 15 and accompanying text.

90. There are exceptions to this statement, such as the will execution requirements, UNIF. PROBATE CODE § 2-502 (amended 2010), the Rule Against Perpetuities, UNIF. PROBATE CODE §§ 2-901 to 2-905, and the spousal elective share, UNIF. PROBATE CODE §§ 2-201 to 2-214.

91. For example, § 2-804 severs only revocable transfers upon the divorce of spouses. It does not impact the designation of a spouse as the beneficiary of an irrevocable trust; consequently, a flexible definition of "spouse" is required in the instrument. *See Id.* at § 2-804.

92. *See* UNIF. TRUST CODE § 105 (amended 2010) (specifying default and mandatory rules).

93. *See supra* note 73.

94. The trusts and estates casebook favorite, *Clark v. Campbell*, 133 A. 166 (N.H. 1926) dealing with an invalid gift "among my friends" is an example of this type of flawed drafting. Similarly, I had the occasion to deal with an instrument instructing that gifts received by the testator during her lifetime were to be returned to the various donors. Determining which property items were gifts, the donors of such items, etc., was a daunting task for the fiduciary.

*D. Two Basic Trusts Are Relatively Simple But Very Helpful*

Attorneys can provide a valuable service in the creation of two basic, non-tax driven trusts. The first is the contingent trust for minors, a flexible tool for managing the parents' estate for the care and nurturing of the children if both parents die, while avoiding more cumbersome and costly conservatorships for minors. This is a fundamental tool for almost every parent with any significant wealth, for its wealth transmission aspects as well as providing an entrée into other necessary planning, such as the discussion about guardians and the preparation of property and health matters powers of attorney.

The revocable trust or living trust is the other valuable trust. While it is not always preferable to utilizing a will, it is clear that it can provide a flexible platform for the management of the settlor's assets if the settlor is unable to do so. This structure offers additional benefits in states where excessive probate costs are a concern.

*E. Stepparents, Stepchildren, Remarriage of the Survivor, and Spendthrifts Often Require Special Measures*

Stepparents and stepchildren in an estate plan require careful planning. As a fundamental matter, if stepchildren are to be included in gifts to children, that must be spelled out. Further, one must assume that a stepparent will prefer his or her descendants (or other kin) or own consumption desires, to the possible detriment of the testator's descendants.<sup>95</sup> Further, even if there are no stepchildren currently, the plan must consider the consequences of the surviving spouse remarrying, thereby dissipating assets (for the benefit of the new union), to the detriment of the testator's descendants.<sup>96</sup>

The use of a life estate trust is a common starting point for a solution to some of these problems.<sup>97</sup> However, the choice of fiduciary, the structure of

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95. *See, e.g.*, Estate of Anderson, 65 Cal. Rptr. 2d 307, 309 (Cal. Ct. App. 1997) (documenting widow's exercise of a power of appointment largely in favor of her daughter, as opposed to her step-relatives).

96. Aside from avoiding possible dissipation of assets for the benefit of unintended beneficiaries, the trust for the benefit of a surviving spouse promises other well-known benefits such as asset protection, professional management, and some wealth transfer tax benefits, even in the wake of the Deceased Spousal Unused Exclusion Amount, or the DSUEA. *See supra* note 38 (citing a discussion of the DSUEA planning). Particularly in long-term marriages where stepchildren are not a factor, the attorney and the client must determine whether the avoided risks are significant, as the use of a trust for the surviving spouse can generate bad feelings. *See supra* notes 74–75 and accompanying text.

97. This could be structured along the lines of a qualified terminable interest property (QTIP) trust where the surviving spouse has a mandatory income interest, but nothing else. *See* I.R.C. § 2056(b)(7) (2006).

any discretionary distribution standards,<sup>98</sup> and the amount of property passed free of trust are all considerations. Of course, the spousal elective share may unravel these plans if a marital agreement is not utilized.

The trust is the backbone of tax-driven estate planning, but it can be important for lesser estates in which beneficiaries raise concerns such as special needs stemming from disability, spendthrift behavior, substance abuse and other destructive behavior, or working in a profession that is subject to creditor exposure.

*F. Corporate Trustees Can be Underutilized*

The long-term success of a trust as a wealth management and transfer structure is in large part a product of a capable, honest, and impartial trustee. Trustees drawn from the ranks of family or friends may not possess such qualities. Directed trusts for the investment and safekeeping functions, for example, can blend the expertise and trustworthiness of a corporate trustee, with the personal input from a family trustee.

*G. Lifetime and Nonmonetary Issues Such as Disability Are Almost As Important*

Estate planning is broader than the transmission of property at death. Even if a client believes that he or she has effectively disposed of property through the use of will substitutes, gaps may still exist in the plan concerning the client's lifetime needs. The crucial distinction is that death is inevitable, while some of the lifetime difficulties, such as disability, may not be.

A revocable trust, for example, can also serve as a vehicle for the lifetime management of property, particularly if the settlor becomes unable to do so. Likewise, a durable power of attorney for property and an advance health-care directive can more effectively carry out the principal's intent, while avoiding the complications of gap filling arrangements such as guardianship or conservatorship.

*H. Gifts to Drafting Attorneys Are Very Dangerous*

The Rules of Professional Conduct forbid a lawyer from soliciting a substantial gift from a client or preparing an instrument for a client who gives a substantial gift to the lawyer or a person related to the lawyer.<sup>99</sup> An attorney

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98. Even with an income-only trust for the benefit of the surviving spouse, issues can arise as to the investment of the corpus in terms of whether income or capital growth is preferred. *See, e.g.,* Howard v. Howard, 156 P.3d 89, 90–91 (Or. Ct. App. 2007) (language in the trust instrument that preferred the surviving spouse to the remaindermen modified the duty of impartiality); *In re* Heller, 849 N.E.2d 262, 263 (N.Y. 2006) (litigation between the surviving spouse stepmother and the stepchildren trustees concerning her election of a unitrust amount).

99. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8 (2013).

who engages in such activity risks loss of his or her reputation, and possibly livelihood. Moreover, from an even more self-interested standpoint, such a gift may be contested on grounds of undue influence.

*I. This Area, Like Most of Law, Constantly Evolves and the Specialty Areas Can be Traps as well as Opportunities*

The Trusts and Estates course provides a valuable background and can develop some lifelong skills or instincts. However, the generalist may need to engage the specialist, particularly as the law evolves. The dramatic changes in assisted reproductive technology<sup>100</sup> have created a number of new planning challenges. Likewise, the transmission of digital assets is an emerging concern, and the practical challenges are many.<sup>101</sup> Finally, same-sex marriages and civil unions in the context of conflicting state and federal laws present another developing area of practice.

Although this is not unique advice, the generalist needs to avoid dabbling in specialty areas that are part of “estate planning” but present pitfalls for inexperienced practitioners. On the other hand, these areas can be a profitable area of practice for the specialist. Such areas include, but are not limited to, asset protection, marital agreements, business continuation planning, tax-driven structures, and public benefit (e.g., SSI and Medicaid) planning.

#### CONCLUSION

I wrote this Essay because I have become increasingly concerned about whether there is lasting value in the material presented in the Trusts and Estates course. I am under no illusion that my approach is a significant improvement in how the course should be taught, in terms of developing students with both doctrinal skills and wisdom about human relationships and behaviors that one encounters in estate planning. At best, this is an incremental tilting in a different direction.

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100. See, e.g., Anne Hood Gibson & Marnin J. Michaels, *Determining Heirship in the World of Modern Reproduction*, 40 EST. PLAN., Jan. 2013, at 29.

101. See, e.g., John Conner, Comment, *Digital Life After Death: The Issue of Planning for a Person's Digital Assets After Death*, 3 EST. PLAN. & CMTY. PROP. L.J. 301 (2011); Karin C. Prangle et al., *Web of Estate Planning Considerations for Digital Assets*, 40 EST. PLAN., May 2013, at 3; Tyler G. Tarney, Comment, *A Call for Legislation to Permit the Transfer of Digital Assets at Death*, 40 CAP. U. L. REV. 773 (2012).