1996

**Trusting Our Partners: An Essay on Resetting the Estate Planning Defaults for an Adult World**

Henry Ordower
TRUSTING OUR PARTNERS: AN ESSAY ON
RESETTING THE
ESTATE PLANNING DEFAULTS FOR
AN ADULT WORLD

Henry M. Ordower

Editors' Synopsis: The author expresses concern that estate planning should benefit the client and not cause unnecessary harm to others, especially a surviving spouse. He urges estate planning lawyers to be attentive to the impact that a plan may have on survivors and to encourage their clients to use estate planning structures that empower, rather than disempower, surviving spouses. The author reviews fundamental estate planning tactics, the benefits derived from estate planning structures, and the ethical obligations of estate planning lawyers.

I. INTRODUCTION
II. TAX PLANNING FUNDAMENTALS
   A. Modest Estates
   B. Moderate Estates
   C. Large Estates
   D. Taxes and Trusts
   E. Value-Oriented Planning
III. CONTROL AFTER DEATH
    A. Generally
    B. The Doubtful Premise of Ownership
    C. Addressing and Resetting the Control Defaults

* Professor of Law, St. Louis University; Of Counsel, Suelthaus & Walsh, P.C.; A.B., Washington University; M.A., J.D., University of Chicago. I am grateful to Associate Professor Nancy Staudt, State University of New York at Buffalo, for organizing the Workshop in Critical Tax Theory (Fall 1995) that prompted me to realize that this Article, which I had considered writing for many years, was long overdue. I am ever grateful to my spouse, Ilene Ordower, and my children, Jeff, Billy, and Daniel, for years of discussion of the themes this Article encompasses. I also thank Caroline Thomason, a law student at St. Louis University, for her research assistance. Copyright © 1996 Henry Ordower.
I. INTRODUCTION

The more a client relies upon a lawyer’s advice, the greater is the lawyer’s obligation to understand and limit the potentially detrimental ramifications of that advice. Thus, the lawyer should not advise a course of action that provides the client little or no benefit and affects others adversely. The lawyer should seek to dissuade the client from embarking upon a course of action that might harm others, especially if the client has little to gain from the selected course of action.

In the abstract, most lawyers would concur in the foregoing observations. Also, most lawyers would deny that they act contrary to those observations. Nevertheless, estate planning lawyers routinely encourage clients to select estate planning structures from which the client derives little or no benefit and that are inimical to the interests of those with whom the client often has the closest relationships, such as spouses and children.¹

¹ The author includes himself as a member of the estate planning industry who advises clients engaged in many of the practices this Article addresses.


³ According to the results of a recent survey of qualified terminable interest property trusts, wealth professionals found estate planning lawyers unsuitable for exercising control over the ultimate disposition of assets for estate plan clients.

⁴ Cf. ACTEC Commentaries, supra note 2, recommending that the estate planner facilitate the

SUMMER 1996

At the same time, estate planning is an industry or its members, not postulates that they are acting other than in the interests of their clients, this Article concludes that the industry needs to revise its goal to encourage their primary client—general autonomy-denying default settings that decision-making abilities of the client’s struc-
STATE PLANNING AS AN INDUSTRY OF THE

I. INTRODUCTION

As upon a lawyer’s advice, the greater is the
stand and limit the potentially detrimental
Thus, the lawyer should not advise a
pvides the client little or no benefit and
The lawyer should seek to dissuade the
on a course of action that might harm
client has little to gain from the selected

While this Article neither ascribes ill intent to the estate planning
industry or its members, nor postulates that estate planning lawyers
believe that they are acting other than in the best interests of their
clients, this Article concludes that the industry needs to reevaluate
the default settings it employs for estate planning. In particular,
estate planning lawyers need to revise their current tendency to
encourage their primary client—generally the husband—to accept
autonomy-denying default settings that discount the independent
decision-making abilities of the client’s spouse and children. These

2 Consider the number and scope of claims of undue influence, breach of duty,
and violations of ethical rules in this area of law. See William M. McGovern, Jr.,
Undue Influence and Professional Responsibility, 28 REAL PROP. PROB. & TR. J. 643
(1994); Debra T. Landis, Annotation, Conduct of Attorney in Capacity of Executor or
Administrator of Decedent’s Estate as Ground for Disciplinary Action, 92 A.L.R.3d 655
(1995); Frank D. Wagner, Annotation, Attorneys at Law: Disciplinary Proceedings
Based Upon Attorney’s Naming of Himself or Associate as Executor or Attorney for
Executor in Will Drafted by Him, 57 A.L.R.3d 703 (1995); Annotation, Drawing Will
of Deed Under Which He Figures as Grantee, Legatee, or devisee as Grantee of
Disciplinary Action Against Attorney, 98 A.L.R.2d 1234 (1964). See also American
College of Trust and Estate Counsel, ACTEC Commentaries on the Model Rules of
Professional Conduct 19-26 (2d ed. 1995) [hereinafter ACTEC Commentaries].

3 According to the results of a recent survey, the average practitioner utilizes
qualified terminable interest property trusts, which preclude the surviving spouse
from exercising control over the ultimate disposition of the property, for 43.5% of
clients. Chris J. Prestopino, Strategies Recommended by Experienced Estate Planners,
TR. & EST., Jan. 1994, at 50-51. It seems unlikely that such a large percentage of
clients request such a device without prompting from their lawyers.

4 Cf. ACTEC Commentaries, supra note 2, at 68 (acknowledging the role of the
estate planner to encourage disclosure and communication between spouses when
the estate planner represents both). This Article takes that position further by
recommending that the estate planner facilitate communication and respect between
default settings, especially holding gifts in trust, rather than effecting them outright, and the selection of trustees other than the spouse for gifts in trust degrade the spouse by influencing the client to disempower the spouse following the client's death. This Article proposes that estate planning lawyers alter their fundamental planning approach to eschew structures that disempower the spouse, both in basic planning defaults and other settings, unless these structures arise from arm's length negotiations between the marital partners.

In attempting to catalog the best interests of and benefits to the client, this Article first reviews some fundamental tax-based estate planning tactics that prompt estate planning lawyers to recommend various disempowering structures to their clients. This Article then observes that no substantial tax foundation for those structures exists. The Article then reviews other commonly identified benefits that support the structures and concludes that planners choose such structures more from a belief that "dead hand" control is beneficial than from the sound planning for the transition of wealth. Finally, the Article briefly reviews the ethical responsibilities of the estate planning lawyer and suggests that the industry has an obligation to transform estate planning into an inclusive process in which interested parties possess sufficient information to participate meaningfully.  


Most literature on the ethical problems of estate planning focuses on conflicts of interest issues confronting the attorney in estate planning, including multiple representation and the need to modify the role of the lawyer. See, e.g., Jeffrey N. Pennell, Professional Responsibility to Accommodate Estate Planning and Family Considerations, 78 Va. L. Rev. 1800 (1991).

7 The tax under I.R.C. § 2501 is imposed on the estate. See e.g., United States v. Anderson, 65 F.3d 1398 (10th Cir. 1995) (holding that the tax is a gift tax). In addition, under I.R.C. § 2503, the total amount of any decedent's estate, not the gift taxes payable on those gifts. I.R.C. § 2031.

8 Under I.R.C. § 2001, the estate tax is imposed on the gross estate. Under I.R.C. § 2051, the gross estate includes all property of the decedent at the date of death, undiminished by any deduction for the indebtedness of the decedent.

9 Id. § 2035(c).

10 Assuming, for example, a 55% tax rate for a $100 gift costs $55, i.e., $100 plus $55 in gift taxes accumulate to $122.22 to pass the same $100 at death estate tax at 55% leaving $100 for the gift. Assuming an income-tax return of 10%, an 8.28 year survival is required for accumulation, while nearly 16.5 years would be
II. TAX PLANNING FUNDAMENTALS

Tax-based estate planning seeks to match the passage of the greatest amount of wealth with the smallest amount of taxes. Aside from some basic tools, it remains an inexact planning process because much depends upon the uncertainties of survivorship.

For example, lifetime taxable gifts are taxed on a net basis\(^7\) while testamentary gifts are taxed in gross;\(^8\) thus, lifetime gifts attract a lower effective rate of tax. Nevertheless, it is not a mathematical certainty that a lifetime gift will be better than a testamentary gift. If the donor dies within three years of the gift, the gift tax paid becomes includable in the donor's estate, and the tax advantage of the lifetime gift is lost.\(^9\) Moreover, the longer the donor survives, the greater the likelihood that investment of the gift tax paid would have accumulated an amount greater than the additional estate tax payable. In these cases the lifetime gift loses its edge.\(^10\)

---

\(^7\) The tax under I.R.C. § 2501 is imposed on the transfer of property by gift, including, under I.R.C. § 2503, the total amount of gifts during the calendar year, but not the gift taxes payable on those gifts. I.R.C. §§ 2501, 2503 (1994).

\(^8\) Under I.R.C. § 2001, the estate tax is imposed on the taxable estate, which, under I.R.C. § 2051, is the gross estate diminished by certain deductions. Id. §§ 2001, 2051. Estate taxes payable are not one of these deductions, and the gross estate includes all property that the decedent owns or in which the decedent has certain interests at the date of death, undiminished by estate taxes payable. Id. § 2031.

\(^9\) Id. § 2035(c).

\(^10\) Assuming, for example, a 55% tax rate for both gift and estate tax purposes, a $100 gift costs $55, i.e., $100 plus $55 in gift tax. That $55 gift tax would have to accumulate to $122.22 to pass the same $100 at death, i.e., $222.22 draws a $122.22 estate tax at 55% leaving $100 for the gift. At an annually compounding after-income-tax return of 10%, an 8.28 year survival would be necessary to permit the accumulation, while nearly 16.5 years would be necessary at 5%.
Nonetheless, the uncertainties of survivorship have little to do with the form that the transfer of wealth assumes. As the following paragraphs demonstrate, the tax effects of basic planning models for differing estate sizes remain independent of the construct.

A. Modest Estates

Absent a need to concern oneself about death taxes, most married individuals with children solely of that marriage would leave everything to the surviving spouse and assume that the survivor would provide for the children if wealth remained after the survivor’s death.11 Even more likely, neither spouse would give much thought

---

11 While statistical study of this phenomenon is lacking, the perception has existed for some time among estate planning lawyers that spouses very often view their property as co-owned, despite title ownership to the contrary. Consider, for example, the American Law Institute’s study in support of the unlimited marital deduction:

This [deduction] changes the present picture significantly in its allowance of a completely tax-free interspousal transfer rule. It is designed to simplify the handling of property dispositions between husband and wife, to lessen the economic adjustment that may now be required, when the earning power of a spouse ceases on death, by making it possible to avoid any tax payment at such time, to make the impact of the transfer tax felt in the same degree regardless of the state in which the transferor resides, and to carry out the philosophy of the average husband and wife who regard the property they own as “our” property.


Similarly, the author found in advising estate planning clients that, in most harmonious marriages, most spouses would leave everything to the survivor. The information is elicited in the course of the initial interview through a question, such as: "If taxes were not an issue, what would you do with your property at death?" Discussions with other estate planning lawyers confirm this conclusion for clients who have moderate estates. For male clients having larger estates, more concern is expressed about the wife’s ability to handle the wealth, and some males distrust their

---

12 The frequent use of survivorship tenancies, focus on taxation of property held jointly by state governing such property, first by defining certain of the estate planning models for differing estate sizes remain independent of the construct.

B. Moderate Estates

As the marital unit becomes wealthier, the simplicity of planning for the partner, not alter the underlying premise of survival

---

13 $600,000 is the unified credit deduction amount an individual may pass by combined interest of federal estate and gift taxes. I.R.C. § 2010 (1999) provide a credit of $192,800 against gift and estate that would be imposed, but for the credit, on the amount based upon the tax rates in I.R.C. § 2002A, § 2502, for lifetime gifts, refers to the rate table. Accordingly, for marital units owning combined as of the death of a survivor owning all the unit’s assets.
certainties of survivorship have little to do
insure of wealth assumes. As the following
the tax effects of basic planning models for
independent of the construct.

concern oneself about death taxes, most
children solely of that marriage would leave
big spouse and assume that the survivor
remained if wealth remained after the survivor’s
never spouse would give much thought

If this phenomenon is lacking, the perception has
state planning lawyers that spouses very often view
the title ownership to the contrary. Consider, for
instance’s study in support of the unlimited marital
changes the present picture significantly in its
tax-free interspousal transfer rule. It is
handling of property dispositions between
the economic adjustment that may now be
ower of a spouse ceases on death, by making
payment at such time, to make the impact of
the degree regardless of the state in which the
out the philosophy of the average husband
very they own as "our" property.

REAL ESTATE AND GIFT TAXATION: RECOMMEN-
DIATE AND REPORTERS’ STUDIES 145-46
er ALI Recommendations]. The ALI Recom-
backdrop materials on estate and gift tax reform
ation of estate and gift taxes in 1976 through the
No. 94-455 (codified as amended in scattered
mitted marital deduction through the Economic
No. 97-34 (codified at I.R.C. § 2056).

advising estate planning clients that, in most
s would leave everything to the survivor. The
of the initial interview through a question, such
that would you do with your property at death?”
iers confirm this conclusion for clients who
ens having larger estates, more concern is ex-
able the wealth, and some males distrust their

SUMMER 1996

Tusting Our Partners

319

to estate planning at all, and the spouses would hold most, if not all,
property in survivorship tenancies to facilitate transfer to the survivor
and to avoid third party interference with the succession, such as
through probate proceedings.12

Such a decision, or lack of a decision, remains acceptable and
desirable for marital units owning, in the aggregate, not more than
$600,000 in property.13 Although one spouse may lead the family
financial decision-making, this estate plan does not deny the
autonomy of either spouse. Instead, the plan gives the survivor full
control over the family wealth.

B. Moderate Estates

As the marital unit becomes wealthier, death taxes intrude upon
the simplicity of planning for the partners’ deaths, but the taxes do
not alter the underlying premise of survivor-takes-all. Sound tax

spouse’s willingness to follow the husband’s wishes. See infra part II.C.

12 The frequent use of survivorship tenancies by spouses motivated Congress to
focus on taxation of property held jointly by spouses and to modify the rules
governing such property, first by defining certain qualified joint interests and, later,
by enacting the unlimited marital deduction. See H.R. REP. No. 201, 97th Cong., 1st Sess.,
at 158-64 (1981); S. REP. No. 144, 97th Cong., 1st Sess., at 126-27 (1981). The
concept of qualified joint interests under I.R.C. § 2040(b), which eliminated the
general consideration tracing rules of I.R.C. § 2040 for spouses, was added by the
the estate tax joint tenancy rules, especially with spousal joint tenancies, were principal
concerns of the ALI Recommendations. See ALI Recommendations, supra note 11,
at 21-16, 106-114.

13 $600,000 is the unified credit deduction equivalent amount, which is the
amount an individual may pass by combined inter vivos and testamentary gifts free
of federal estate and gift taxes. I.R.C. § 2010 (1994). I.R.C. § 2010(a) and 2505(a)
provide a credit of $122,800 against gift and estate taxes, which is the amount of tax
that would be imposed, but for the credit, on lifetime and testamentary gifts of
§ 2502, for lifetime gifts, refers to the rate tables in I.R.C. § 2001. Id. § 2502.
Accordingly, for marital units owning combined assets less than or equal to $600,000,
the death of a survivor owning all the unit’s assets will not draw an estate tax. Id.
§ 2010.
planning suggests that marital units having wealth between $600,000 and $1.2 million should be able to pass that wealth free of federal death taxes. Unless the individuals can predict the order of their deaths with certainty, the tax planning necessary to avoid federal death taxes requires that neither member of the marital unit own more than $600,000 of the unit’s property. The plan also requires that the property included in the first-to-die’s estate should not become included in the survivor’s estate; therefore, the unit should avoid survivorship tenancies. Accordingly, the spouse owning any excess over $600,000 should transfer that excess immediately to the spouse owning less than $600,000.

In making that recommendation, estate planning lawyers also frequently suggest that the spouse owning the excess may make the gift through a qualified terminable interest property trust\(^\text{15}\) that limits the recipient’s control over disposition of the gift. Such a suggestion seriously deprecates the marital relationship. The transfer of property to one’s spouse does not alter the basic marital relationship. If one spouse generally defers to the other in matters involving financial decisions, separate ownership of more of the marital property ought not change the hierarchy; that spouse will continue to look to the other for financial guidance. If continuation of the marriage is doubtful, the transfer is unlikely to affect the overall division of marital property in a divorce,\(^\text{16}\) and limitation of the recipient’s autonomy only enhances interspousal enmity as the relationship deteriorates.

\(^{14}\) Survey data indicate that estate planning lawyers overwhelmingly recommend against the use of survivorship tenancies. The lawyers covered by the survey represent clients with sizable estates, not modest estates to which joint tenancies most often recommend themselves. Prestopino, supra note 3, at 5.

\(^{15}\) I.R.C. § 2523(e) (1994).

\(^{16}\) Equitable distribution provisions in state dissolution statutes permit the court to include, in its evaluation separately owned as well as community property. UNIF. MARITAL DIVISION ACT § 307 (1973). See generally, Lawrence W. Waggoner, Marital Property Rights in Transition, 59 Mo. L. Rev. 21, 44-46 (1994) (discussing current trends in marital property rights).

Fundamental tax planning further insists that the first spouse dies, that spouse’s property will be included in the survivor’s estate so as not to become included in the unit’s property. In many instances, however, the spouses will prefer to prevent property from exiting the unit will never need the property if it exists. In part, the desire to retain property from the fear that the survivor will lose dependent upon the unit’s offspring because the property has passed to them.

Thus, estate planning lawyers design “no inclusion” in the survivor’s estate while keeping the property available for use by the survivor. The traditional equivalent "trust, which permits or requires property distributed to the surviving spouse, and permits in the survivor’s benefit, as limited by an ascendant's testamentary wishes. Thus, the trust becomes the preferred disposition of "surviving spouse."

Nevertheless, these individuals deny naming a third party, often a child of the estate pursuant to advice the estate planning lawyer fails to because the estate planning lawyer fails to consider that because the estate planning lawyer fails to consider the party trustee. As discussed below,\(^\text{18}\) the trust represents one instance in which the industry should revise its thinking to reclassify the survivor as that trust’s sole trustee.

\(^{17}\) The interests and powers suggested do not appear in the appointment and, thus, would not cause the trust to be part of the survivor’s estate. See I.R.C. § 2041 (1994); infra.

\(^{18}\) See infra part IV.
MARRITAL units having wealth between $600,000
are able to pass that wealth free of federal
individuals can predict the order of their
tax planning necessary to avoid federal
neither member of the marital unit own
the unit’s property. The plan also requires
in the first-to-die’s estate should not
survivor’s estate; therefore, the unit should
be. Accordingly, the spouse owning any
transfer that excess immediately to the
$600,000.

In amendment, estate planning lawyers also
spouse owning the excess may make the
terminable interest property trust that
over disposition of the gift. Such a
terminates the marital relationship. The transfer
does not alter the basic marital relation-
ship it defers to the other in matters involving
the ownership of more of the marital
be hierarchy; that spouse will continue to
psychological guidance. If continuation of the
transfer is unlikely to affect the overall
in a divorce, and limitation of the
enhances interspousal enmity as the

Thus, estate planning lawyers devise methods to prevent
inclusion in the survivor’s estate while keeping the property available
for use by the survivor. The traditional “by-pass” or “unified credit
equivalent” trust, which permits or requires the trust income to be
distributed to the survivor and permits invasion of the corpus for the
survivor’s benefit, as limited by an ascertainable standard, accom-
plishes this objective. The trust becomes a tax motivated substi-
tute for the preferred disposition of “survivor takes all,” which is
available to smaller estates.

Nevertheless, these individuals deny autonomy to the survivor by
naming a third party, often a child of the marital unit, trustee of the
trust pursuant to advice the estate planning lawyer renders or
because the estate planning lawyer fails to recommend against a third
party trustee. As discussed below, there is rarely a valid reason
for the spouse not to be the trustee. Thus, the unified credit equiva-

tent trust represents one instance in which the estate planning
industry should revise its thinking to recommend appointment of the
survivor as that trust’s sole trustee.

17 The interests and powers suggested do not constitute a general power of
appointment and, thus, would not cause the trust corpus to be included in the
survivor’s estate. See I.R.C. § 2041 (1994); infra part III.A.
18 See infra part IV.
C. Large Estates

As the wealth of the marital unit exceeds $1.2 million, planning can no longer prevent imposition of a federal estate tax, but it can diminish the overall impact of estate taxes and, sometimes, income taxes. Because it is impossible to predict the order of death with certainty, the ideal environment for estate planning is one in which the spouses separately own identical amounts of property. Equal amounts of property offer the greatest range of planning opportunities.

Because the federal gift and estate tax rates are graduated, assets passed from the first spouse to die to the survivor may become subject to a higher rate of tax in the survivor's estate. Equal estates offer, without regard to the order of death, the flexibility to defer estate taxes by passing all property, other than the first $600,000, to the survivor or to pay tax on part or all of the first-to-die's estate. In general, the first estate should not pay on more than $3 million, in order to secure two full sets of marginal rates. If, however, the survivor's estate would be greater than $10 million, thereby falling into the realm of the phaseout of the unified credit and graduated rates, it may be desirable to pay tax on $10 million or more at the time of the first death. At the same time and without regard to the order of death, the marital unit captures the income tax basis adjustment to fair market value at death on at least half the unit's property.

---

19 Unless the marital unit makes sufficiently large charitable gifts to reduce the estate size to less than $1.2 million.


21 The maximum rate of 55% is imposed on that portion of the taxable estate in excess of $3 million.

22 I.R.C. § 2001(c)(2) imposes an additional tax of 5% on that portion of the estate that exceeds $10 million but $21,040,000. The maximum additional tax is $552,000, which is $192,800 (unified credit amount) plus $359,200 (the difference between $3 million taxed at the 55% maximum rate [$1,650,000] and the $1,290,800 of tax on $3 million imposed by the tables of graduated rates).

23 I.R.C. § 1014 (1994). This computation assumes that each member of the unit has an equal amount of the unit's appreciated properties.

---

SUMMER 1996

There is no certain answer as to whether it is desirable on the next $2.4 million after the equivalent of the first-to-die's estate, as to the survival period of the surviving spouse's existence is available to help in the analysis. The million on which tax is deferred to be taxed, the length of survival necessary to render the return on the deferred taxes, is equal to

Expression 1

\[
T_n = \frac{\log \left( \frac{1 - \frac{T}{T_c}}{1 + n} \right)}{\log (1 + n)}
\]

when "n" is the minimum survival period in years, advantageous, "T" is the higher rate of tax at death, and "T_c" is the rate of tax which would have been imposed on the first-to-die's death.

Or, similarly, if we assume a given survival period, the return on the deferred portion of the estate is taxed at the lower rate of tax "T_c" can be

---

24 The following formulas are adapted from "Henry Ordower, A Theorem for Compensation By Taking Your Rabbi Abroad," 47 TAX L. 301 (1993). The derivation of the formulas may be found in the source.
The marital unit exceeds $1.2 million, planning preparation of a federal estate tax, but it can act of estate taxes and, sometimes, income possible to predict the order of death with certainty for estate planning is one in which the identical amounts of property. Equal for the greatest range of planning opportu-

Gift and estate tax rates are graduated, assets cause to die to the survivor may become of tax in the survivor's estate. Equal estate to the order of death, the flexibility to pass all property, other than the first for to pay tax on part or all of the first-to-die first estate should not pay on more than secure two full sets of marginal rates. If, estate would be greater than $10 million, pout of the phaseout of the unified credit may be desirable to pay tax on $10 million first death. At the same time and without much, the marital unit captures the income tax market value at death on at least half the

makes sufficiently large charitable gifts to reduce the

The 6% is imposed on that portion of the taxable estate excess as additional tax of 5% on that portion of the $21,040,000. The maximum additional tax is $359,200 (the difference $21,040,000 and the $21,399,800 in the tables of graduated rates).

The computation assumes that each member of the unit's appreciated properties.

There is no certain answer as to whether deferral of estate taxes is desirable on the next $2.4 million after the unified credit deduction equivalent of the first-to-die's estate, as the answer depends fully on the survival period of the surviving spouse. However, formulaic guidance is available to help in the analysis. For any portion of the $2.4 million on which tax is deferred to be taxed later at a higher rate, the length of survival necessary to render deferral advantageous, given a return on the deferred taxes, is equal to the rate "r": 24

Expression 1

\[
\log \left( \frac{1 - \frac{T_r - T_s}{T_s(1 - r)}}{\log (1 + r)} \right)
\]

when "n" is the minimum survival period for deferral to become advantageous, "T_s" is the higher rate of tax at the second-to-die's death, and "T_r" is the rate of tax which would have been imposed at the first-to-die's death.

Or, similarly, if we assume a given survival period "n," the rate of return on the deferred portion of the estate that would have been taxed at the lower rate of tax "T_s" can be expressed as follows:

24 The following formulas are adapted from Expressions 10 and 11 respectively in Henry Ordower, A Theorem for Compensation Deferral: Doubling Your Blessings By Taking Your Rabbi Abroad, 47 TAX LAW. 301, 309 (1994). An explanation of the derivation of the formulas may be found in the cited article.
Expression 2

\[ r > \frac{1}{\sqrt{1 - \frac{T_r' - T_r}{T_r(1 - T_r)}}} - 1 \]

So, for an amount that would have been taxed at 37 percent in the first-to-die’s estate, but is instead taxed at the maximum 55 percent rate, a nearly 26 year survival period is required for deferral to become advantageous at a 6 percent investment rate of return. But if the investment rate were 7.7 percent, only 20 years would be required. With each advance of the marginal brackets, the spread between the lower rate imposed on the first-to-die and the higher rate imposed upon the survivor’s estate becomes smaller and demands ever shorter survival periods or lower rates of investment return to reader deferral the better choice. Additionally, except in the case of very large estates in which adding to the survivor’s estate forces the phaseout of the survivor’s unified credit and graduated rate structure,\(^25\) deferral from the first-to-die’s estate of all value in excess of $3 million is always the better decision for any survival period.\(^26\)

But, however clever the deferral analysis may be, the tax plan remains independent of the manner of disposition. The portion of the first-to-die’s estate that will be taxed in the survivor’s estate may be passed outright to the survivor without altering the overall tax effect of the disposition.\(^27\) Thus, the use of autonomy to the surviving spouse must serve more than providing tax advantages.

D. Taxes and Trusts

Even in the absence of a surviving spouse, limited tax benefits and threats to government. Historically, a trust constituted a set of marginal brackets. While the throw from trusts that accumulated their incommu

\(^27\) This statement is only approximately accurate, having more than $1.6 million of assets may find it even for tax purposes, to provide for a qualified terminable interest worth more than $400,000. This would capture part of the tax exemption through a reverse election, with the election for the trust having been allocated to the unified code at § 2652(a)(3) (1994).

In addition, because the election under I.R.C. § 2041, terminable interest property, is made on the estate the five months following the decedent’s death to the return filing deadline is extended. I.R.C. § 6081, interest property trust gives the executor the full time to determine the estate’s and qualified disclaim made within nine months of death. Id. §§ 2050, 2051, the months to watch for the survivor’s death hardly s the survivor autonomy for the remainder of his or her life.

Moreover, if the six months are of great importance, a interest trust may approximate the effect of an ordinary spouse the trustee and permitting that spouse’s portion of the trust without limitation after five general inclusion, the surviving spouse may not have terminable interest property determination. Id.


\(^26\) The maximum rate under I.R.C. § 2001(c)(1) is reached at $3 million.

effect of the disposition. Thus, the use of structures that deny autonomy to the surviving spouse must serve some purpose other than providing tax advantages.

D. Taxes and Trusts

Even in the absence of a surviving spouse, trusts offer very limited tax benefits and threaten to generate substantial tax detriments. Historically, a trust constituted a separate taxpayer with a full set of marginal brackets. While the throwback rules for distributions from trusts that accumulated their income diminished the economic advantage of the trust's accumulation of income at tax rates lower than what might be available to its beneficiaries, the available deferral was of considerable benefit. The additional tax on the

---

27 This statement is only approximately accurate. For example, marital units having more than $1.6 million of assets may find it worthwhile in some cases, solely for tax purposes, to provide for a qualified terminable interest trust disposition of not more than $400,000. This would capture part of the first-to-die's generation-skipping tax exemption through a reverse election, with the remaining $600,000 of the exemption having been allocated to the unified credit equivalent trust. See I.R.C. § 2522(a)(3) (1994).

In addition, because the election under I.R.C. § 2056(b)(7), relating to qualified terminable interest property, is made on the estate tax return, the executor has fifteen months following the decedent's death to make the election, so long as the return filing deadline is extended. I.R.C. § 6081(a) (1994). A qualified terminable interest property trust gives the executor the full election period to determine how much to include in each spouse's estate, as opposed to a survivorship contingency which is limited to six months and qualified disclaimers, which are only effective if made within nine months of death. Id. §§ 2056(b)(3), 2518. The additional six months to watch for the survivor's death hardly seems a fair exchange for denying the survivor autonomy for the remainder of his or her life.

Moreover, if the six months are of great importance, the qualified terminable interest trust may approximate the effect of an outright gift by making the surviving spouse the trustee and permitting that spouse to withdraw the principal of that portion of the trust without limitation after fifteen months. However, to prevent general inclusion, the surviving spouse may not have the power to make the qualified terminable interest property determination. Id. § 2041. Either the determination must follow a formula strictly or a third party must have the power to allocate between the portion of the trust to which the election will or will not be made.

accumulation distribution drew no interest.\textsuperscript{29} Furthermore, distributions of amounts accumulated before the recipient reached age twenty-one were free of the additional tax.\textsuperscript{30}

Since 1991, however, marginal income tax brackets for trusts and estates have been compressed.\textsuperscript{31} Compression limits the extra taxpayer benefit to a maximum of $7,500 of taxable income, thus, virtually eliminating that additional taxpayer advantage.

A second historical tax benefit from trusts and trust-like structures was the ability of the settlor to skip a generation in the line of the estate and gift tax. A gift of income for life, or a life estate to a member or members of one generation with the remainder passing to members of the next or any subsequent generation, would not draw estate tax when the older generation beneficiaries died. The generation-skipping tax, enacted in 1986, altered this result.\textsuperscript{32}

With the exception of a $1 million per donor lifetime exemption,\textsuperscript{33} all property passing to a younger generation without a gift or estate tax being levied at the preceding generation incurs a generation skipping tax.\textsuperscript{34} Because the generation-skipping tax is a single-rate tax equal to the maximum gift and estate tax rate\textsuperscript{35} in some cases the generation-skipping tax will be at a higher rate, and only very rarely at a lower rate,\textsuperscript{36} than the estate tax rate that the

\begin{itemize}
\item \textsuperscript{29} Id. § 667 (providing for the computation of tax on the accumulation distribution). If the trust were a foreign trust, an interest charge would be imposed. Id. § 668.
\item \textsuperscript{30} Id. § 665(b).
\item \textsuperscript{31} Id. § 1(e).
\item \textsuperscript{32} Id. §§ 2601-2604, 2654.
\item \textsuperscript{33} Id. § 2631.
\item \textsuperscript{34} Id. §§ 2601, 2611.
\item \textsuperscript{35} Id. § 2641.
\item \textsuperscript{36} Because the generation-skipping tax is imposed at the maximum federal estate tax rate, currently 55% without regard to the current 5% surtax to phase out the graduated rates and unified credit, it effectively may be 5% less than the tax would have been if the property subject to the tax were included in the estate of an individual whose taxable estate was or would have been in the $10-20 million range.
\end{itemize}

property would have incurred had it been a member of the previous generation.

If a transfer will be subject to a generation equal estate tax, the trust, as opposed to the generation skipping gift ("direct skip"),\textsuperscript{37} defers the tax on the beneficiary who is a member of the preceding generation by deferral is not always advantageous. The value of the trust or termination of the trust results in the transfer of the property distributed, including appreciation at the time of creation of the trust.\textsuperscript{38} In the case of a subsequent generation, it burdens the value on the date of transfer by reducing the increase in the value after the transfer.

Trusts are not devoid of tax advantages, however. The discretion to distribute trust income among beneficiaries enables the trustee may distribute the income in the form of a gift that would incur the lowest federal income tax rate.\textsuperscript{39} Split-interest trusts enable settlors to capitalize on charitable-gift deductions while retaining an interest in the trust and the subject of the charitable gift.\textsuperscript{40} Nevertheless, tax reasons for preferring gifts in trust are eliminated by changes in the tax laws. To preserve the autonomy of their beneficiaries without tax consequences, the trust must serve purposes other than tax saving or other purpose at all.

E. Value-Oriented Planning

Tax planning focuses considerably on the structure of the trust to reduce the value of assets for estate and gift tax purposes and diminishing the composite value of the

\begin{itemize}
\item \textsuperscript{37} Id. § 2612(c).
\item \textsuperscript{38} Id. § 2612(a), (b).
\item \textsuperscript{39} Id. § 170(f)(2).
\end{itemize}
property would have incurred had it been includable in the estate of a member of the previous generation.

If a transfer will be subject to a generation-skipping tax or an equal estate tax, the trust, as opposed to an outright generation-skipping gift ("direct skip"), defers the tax until the death of the beneficiary who is a member of the preceding generation. This deferral is not always advantageous. The taxable distribution from the trust or termination of the trust results in a tax on the full value of the property distributed, including appreciation in value from the time of creation of the trust. In the case of a direct skip, the tax burdens the value on the date of transfer, but does not burden any increase in the value after the transfer.

Trusts are not devoid of tax advantages. When a trustee has discretion to distribute trust income among a class of beneficiaries, the trustee may distribute the income to those beneficiaries who would incur the lowest federal income tax rates. Also, charitable split-interest trusts enable settlors to capture charitable contribution deductions while retaining an interest in the property that is the subject of the charitable gift. Nevertheless, the principal, historical tax reasons for preferring gifts in trust to outright gifts have been eliminated by changes in the tax laws. Therefore, trusts that restrict the autonomy of their beneficiaries with respect to trust property must serve purposes other than tax savings, if they are to serve any purpose at all.

E. Value-Oriented Planning

Tax planning focuses considerably on creating structures that reduce the value of assets for estate and gift tax purposes without diminishing the composite value of the property or the original

\[ Id. \$ 2001(c)(1) \]
\[ Id. \$ 2612(c) \]
\[ Id. \$ 2612(a), (b) \]
\[ Id. \$ 170(f)(2) \]
III. CONTROL AFTER DEATH

A. Generally

Estate planning concerns itself primarily with the transfer of wealth and the reduction of taxes. As observed above, when there is a surviving spouse, tax planning seldom underlies the use of trusts for more than $600,000 of the client’s assets, never for more than half the combined wealth of the marital unit, and rarely for more than $3 million. Even in the absence of a surviving spouse, the combination of the generation-skipping tax and the compressed income tax rates for accumulating trusts generally is neutral and may favor transmission of wealth outright rather than in trust. Yet, the frequency with which wealth is transmitted in trusts that go beyond their role in avoiding probate would seem to belie the tax-based observations.


41 This discussion is largely anecdotal and based upon conversations the author has had with his estate planning clients and estate planners. The author believes that the principal reasons clients mention for wishing to maintain control after death will be familiar to experienced estate planners.

42 In 1992 at least $655 billion was held by bank personal trusts. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1995 THE NATIONAL DATA BOOK 514 (115th ed. 1995) [hereinafter STATISTICAL ABSTRACT 1995]. Attorneys overwhelmingly recommend one or more trusts for their estate planning clients, and many of the trusts continue long after the settlor’s death. See Prestopino, supra note 3 (discussing survey data on the use of trusts).

SUMMER 1996

Competing with the objective of the living grantor may be the wealth holder’s wish for controlling his or her assets during his or her lifetime. Often, without concern for minimizing the wealth to then pass through the probate process, the living grantor wishes to preserve or expand the wealth for use during his or her lifetime and during another’s lifetime.

Although after-death control is a less common estate planning objective, alongside tax planning objectives, many clients who find “dead hand” control either desirable, must nevertheless accept some level of control. Early in Anglo-American law, perpetuities set the outside boundary of estate and inheritance taxes confiscates the income of all property rights such as the historical earnings of estates and husbands from defeating their surviving spouse’s interest. In addition, modern probate codes provide for rights in real property in the estates of their decedents.

Regardless of differing views on after-death control, in fact relinquishes control at death. For instance, the specific devisee no longer intercedes in the disposition of the trust assets.

43 One common formulation of the rule is: “The Rule Against Perpetuities is violated unless it must vest, if at all, not later than 21 years after the life in being at the time of creation, or some life or lives in being at time of creation of the life interest, or any life interest in the estate created by the instrument.” UNIF. PROB. CODE § 5-1101 (1990).

44 States follow variants of the Uniform Probate Code. Uninhabited lands, for example, provides a share of the estate to a spouse omitted from the will executed before the marriage. UNIF. PROB. CODE § 5-1102. However, and the decedent may not disinherit the surviving spouse if the decedent’s will and any gifts received under the decedent’s will and any gifts received under the decedent’s will. The decedent’s will have been previously executed and have not been revoked.
such as limited partnerships and limited liability setting reduce tax value through value
rests and lack of marketability. Such an estate is not a gift property
as with other structures discussed above, such as LLCs, but a
creation on autonomy following the donor’s estate planning goals.

CONTROL AFTER DEATH

This refers primarily with the transfer of
assets. As observed above, when there is
removal of a surviving spouse, the combination
and the compressed income tax rates
rally is neutral and may favor transmis-
sion than in trust. Yet, the frequency with
in trusts that go beyond their role in
to belie the tax-based observations.

Joseph B. Darby, III, Family Limited Partnerships: Be
A New Bottled, 49 TAX LAW. 127 (1995); By
Family Limited Partnerships Can Create

A copious and upon conversations the author
tests and estate planners. The author believes
mission for wishing to maintain control after death
planners.
was held by bank personal trusts. U.S. BUREAU
TRACT OF THE UNITED STATES: 1995 THE
ed. 1995) [hereinafter STATISTICAL ABSTRACT
commend one or more trusts for their estate
ests continue long after the settlor’s death. See
survey data on the use of trusts).

SUMMER 1996

Trust Our Partners 329

Competing with the objective of the smooth transition of wealth
may be the wealth holder’s wish for continuing control, notwithstanding
his or her death. Often, without counseling the client adequately
concerning the drawbacks to such restrictions, estate planning lawyers
facilitate and motivate the client to impose onerous restraints on the
movement of wealth—sometimes for long after both the client and
the estate planning lawyer cease to exist.

Although after-death control is arguably a primary estate planning objective, alongside tax planning and transmission of wealth, those who find "dead hand" control permissible, perhaps even desirable, must nevertheless accept some limitations on continuing control. Early in Anglo-American legal history, the Rule against
Perpetuities set the outside boundary to such control. Similarly, estate and inheritance taxes confiscate portions of wealth, thereby removing those portions from continued control. Various inchoate property rights such as the historical estate of dower have prevented husbands from defending their surviving spouses' property rights. In addition, modern probate codes provide surviving spouses with property rights in the estates of their decedent spouses.

Regardless of differing views on after-death control, the decedent in fact relinquishes control at death. Following death, he or she can no longer intercede in the disposition of the wealth. Continuing

43 One common formulation of the rule is that "no interest in property is good
unless it must vest, even if at all, not later than 21 years, plus period of gestation, after
some life or lives in being at time of creation of interest." BLACK'S LAW DICTIONARY

44 States follow variants of the Uniform Probate Code formulations, which give
surviving spouses interests in decedent spouses' estates. The Uniform Probate Code
provides a share of the estate to a spouse omitted from the will because the will was
executed before the marriage. UNIF. PROB. CODE § 2-301 (1993). Likewise, the
decedent may not disinherit the surviving spouse under the Uniform Probate Code,
which permits the surviving spouse to elect a statutory share by rejecting the
decedent spouse's will and any gifts received under that will. Id. § 2-201. For an
extensive discussion of spousal property rights, see Wagger, supra note 16.

45 While not wishing to appear sacrilegious, metaphysical considerations of
afterlife which permit post-death oversight hardly require trusts to facilitate exercise
of that control.
control consists of either strictly limiting options for the use and disposition of the wealth or yielding control to someone other than the decedent. Even the most fervent adherent of "dead hand" control would likely counsel against rigid after-death restrictions that preclude the flexibility to respond to changing economic, social, and personal conditions and would be in favor of some discretion lodged in a third party. Thus, the favored option is the selection of a deputy to exercise post-death control.

The default that historically has caused estate planners to begin with long-term, continuing control must be reset to a "minimal and essential" control default. Accordingly, before considering the selection of a deputy, the estate planning lawyer should first determine whether to dissuade the client from exerting after-death control if the control offers no benefit to the client and is detrimental to others.\textsuperscript{46} Unfortunately, the issue of benefits and detriments with respect to control after death is murkier than with respect to tax advantages, of which there are none. Moreover, the answer to whether control is beneficial or detrimental may differ materially depending upon whether the after-death control to be exerted concerns a spouse or a child.

Possible benefits of after-death control for the prospective decedent, in descending order of selflessness, include the comfort of knowing the following: (1) the decedent’s family will be cared for; (2) the family will be guarded against its own spendthrift tendencies; (3) the wealth will be protected and preserved in the blood line; (4) the wealth will serve as a monument causing the decedent to be remembered in future generations; (5) no one will enjoy the wealth more than the decedent did while alive; and (6) through his deputy, the decedent can continue to control and punish. The first two and perhaps three of these possible benefits have considerable appeal; however, on closer inspection, each possible benefit lacks a solid premise when a surviving spouse is involved and, often, even with respect to children.

\textsuperscript{46} See supra part I (discussing the estate lawyer’s obligations).

---

\textsuperscript{47} In early cultures, it was customary to sometimes live servants (and wives—an unfortunate India today despite legal prohibitions), with the hopes they would provide for the decedent in the next life. Walter H. Porath, in ARCHAEOLOGY: MYTH AND REALITY, notes that these societies generally abandoned this practice, in part because it was inefficient. The practice deprived the society of the orphans and cultivated the grave robbing industry. On the other hand, archaeologists opportunities to study cultures for which written records exist.

With limited exceptions for specific items with which the decedent, most decedents today do not adhere to. In most states courts occasionally abide by executor’s interments in an automobile. N.Y. TIMES, Apr. 17, 1984 (property with them, wealthy individuals build large and dynamic estate plans, private foundations, and other organizations that happily place the individual's name on something (perhaps not quite so durable as a pyramid, but...)}

B. The Doubtful Premise of Ownership

The underlying premise for and probably the most compelling argument in favor of after-death control is also the simplest. The property belongs to the donor who may do with it as he or she wants. While this argument is quite appealing, it rests on a tenuous premise of unconditional ownership.

As noted earlier, the donor's ownership terminates with death. The supposition that the production of income and wealth gives one unrestricted ownership in that wealth is flawed. Ownership during life remains subject to various legal rules that limit the individual's autonomy with respect to wealth and its disposition. For example, taxes starkly circumscribe the individual's freedom to deal with a portion of wealth. Similarly, state enforced obligations for support of children and others limit autonomy. Spousal rights in property upon divorce, if not earlier, likewise restrict the free disposition of wealth.

47 In early cultures, it was customary to inter considerable property, and sometimes live servants (and wives—an unfortunate custom that may continue in India today despite legal prohibitions), with the corpses of wealthy decedents to provide for the decedent in the next life. Walter B. Emory, The Tombs of the First Pharaohs, in ARCHAEOLOGY: MYTH AND REALITY 87-92 (1982). Most later cultures generally abandoned this practice, in part because it was economically inefficient. The practice deprived the society of the current use of the wealth after death and cultivated the grave robbing industry. On the positive side, burial finds provide archaeologists opportunities to study cultures for which no, or only a sparse, written record exists.

With limited exceptions for specific items with particular sentimental value to the decedent, most decedents today do not attempt to take personal property with them, although courts occasionally abide by exceptional wishes of decedents, such as interment in an automobile. N.Y. TIMES, Apr. 13, 1977, § 3, at 2. Instead of taking property with them, wealthy individuals build monuments to themselves through dynastic estate plans, private foundations, and often with the cooperation of institutions that happily place the individual's name on a building or wing of a building (perhaps not quite so durable as a pyramid, but you take what you can get).

But the question is not simply one of legal restraint. Many of the legal limitations on the disposition of wealth arise from principled foundations. Just as a developed and stable society facilitates the generation of wealth, and in return asks its participants to contribute to its maintenance through taxes, spouses and other family members contribute to the individual’s wealth production. Although these contributions may be difficult to measure in conventional terms, they are nevertheless meaningful, and in return the family members may ask to participate in the wealth. At a minimum, family members contribute to the production of wealth by relieving the wealth producer of other obligations, thereby removing hindrances to the production, and by providing motivation for the production of wealth.

State laws with respect to spousal property rights acknowledge the indirect contributions of financially and economically less active spouses to the creation of family wealth. Equitable distribution and community property rules identify the spouse as an equal contributor in the production of wealth accumulated during marriage when it comes time to terminate those marriages. Moreover, modern probate laws preclude the decedent’s spouse, although not from limiting the estate.

Although legal restraints on disposition are acquired outside the marriage, including before marriage and wealth received that are far less stringent than for wealth from marriage, advisors frequently counsel individuals with prospective spouses before marriage by removing it from the estate for best and by compelling the couple to agree to a valid prenuptial agreement.

Some people believe that antenuptial agreements are a fair distribution.

52 See, e.g., UNIF. PROB. CODE § 2-201 (Vernon 1992) (providing an elective share for a prenuptial agreement) (critique of the elective share, see John H. Langbein, Redesigning the Spouse’s Forced Share, 22 Real Prop. Prop. & Int. Law 391 (1992)).

53 Thus, for example, Missouri’s formula share by the value of all property and interests from the decedent, including income interests, neither the trustee nor the remainder beneficiary (Vernon 1992). New York, however, recently excluded the value of income interests from the estate’s share when the estate’s interest in the November 1, 1992, the surviving spouse is the sole N.Y. Est. POWERS & TRUSTS LAW § 5-1.1-A.

54 Community property laws do not apply premarital wealth and property received by gift or inheritance bears the burden of proving it. Pre-marital distribution in community property jurisdictions has no relationship between equitable distribution.

55 But see Zelig, supra note 50, at 1223 and divorce, coupled with the failure of time and dependent spouses render extensive use of the...
PROPERTY, PROBATE AND TRUST JOURNAL

not simply one of legal restraint. Many of the disposition of wealth arise from principled principles developed and stable society facilitates the in return asks its participants to contribute with taxes, spouses and other family members to family's wealth production. Although these efforts to measure in conventional terms, they fail, and in return the family members may indeed wealth. At a minimum, family members allocate spouse property shares in order to relieve the wealth distribution, thereby removing hindrances to the joint motivation for the production of marital property.

Spatial to spousal property rights acknowledge of financially and economically less active family wealth. Equitable distribution and identify the spouse as an equal contributor with accumulated during marriage when it is those marriages. Moreover, modern
distribution of family law 131 (1990) (examining two decades of change in direction of family reforms); Joseph W. McKnight, Survivor at Divorce, 23 Fam. L. Q. 193 (1989) (determination upon dissolution of a marriage by divorce); 44-46 (explaining the equitable distributions and joining the unfair distribution of marital property). Spousal contributions are important in the determination of the value of property and estate interests.

SUMMER 1996

Trusting Our Partners 333

probate laws preclude the decedent from disinheriting his or her spouse, although not from limiting the surviving spouse's autonomy.

Although legal restraints on disposition of wealth created or acquired outside the marriage, including both wealth generated before marriage and wealth received through gift and inheritance, are far less stringent than for wealth created within the marriage, advisors frequently counsel individuals to negotiate property rights with prospective spouses before the marriage takes place.

Some people believe that antenuptial negotiations undermine the marriage by removing it from the emotional plane where it functions best and by compelling the couple to address the materialistic details of life. This view seems rather unrealistic in a society in which

special needs, in making a fair distribution.


53 Thus, for example, Missouri’s formulation is typical. It reduces the elective share by the value of all property and interests in property received by the survivor from the decedent, including income interests in trusts of which the survivor is neither the trustee nor the remainder beneficiary. Mo. Rev. Stat. § 474.163 (Vernon 1992). New York, however, recently modified its elective share to remove the value of income interests from the determination of property passing to the survivor when the survivor elects against the will. Thus, for decedents dying after September 1, 1992, the surviving spouse is entitled to an elective share outright. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A (West Supp. 1996).

54 Community property laws do not apply to separately held property, such as premarital wealth and property received by gift, although the party asserting separate ownership bears the burden of proving it. McKnight, supra note 48. Equitable distribution in common law property jurisdictions is somewhat more flexible because of the relationship between equitable distribution and concepts of fairness.

55 But see Zelig, supra note 50, at 1223 (arguing that the realities of marriage and divorce coupled with the failure of the courts to provide adequately for dependent spouses render extensive use of the antenuptial agreement compelling).
roughly half of all marriages end with a divorce and many commence with a considerable period of premarital cohabitation. Even if neither divorce nor frequent cohabitation were common, negotiation of antenuptial agreements is likely to benefit both parties. Control and disposition of wealth are among the most troublesome aspects of marriage. Negotiations might reveal the potential partners' divergent or common views of wealth and provide insight into the pending relationship, which might aid the relationship to endure. Moreover, negotiations compel each party to confront his or her own thoughts concerning the control and disposition of wealth and allow him or her to understand and modify those views as needed. In addition, antenuptial agreements tend to diminish animosity between spouses concerning wealth, both during the marriage and its dissolution.

56 STATISTICAL ABSTRACT 1995, supra note 42, at 105 (disclosing that in 1993 there were 2,334,000 marriages and 1,187,000 divorces—thus, more than half as many divorces as marriages).
58 See Elizabeth Thomson & Ugo Colella, supra note 57, at 262 (identifying money as one of the principal sources of disagreement between spouses). In the course of divorce, division of wealth becomes a troubling issue. See DIVORCE REFORM AT THE CROSSROADS, supra note 48. See also WEITZMAN, supra note 50, at 323-56 (demonstrating that women become financially disadvantaged through divorce).
59 Cf. Ralph Underwager & Hollis Wakefield, Psychological Considerations in Negotiating Premarital Contracts, in PREMARITAL AND MARITAL CONTRACTS: A LAWYER'S GUIDE TO DRAFTING AND NEGOTIATING ENFORCEABLE MARITAL AND COHABITATION AGREEMENTS 217 (Edward L. Winer & Lewis Becker eds., 1993) (analyzing the benefits of negotiation of premarital agreements); Zelig, supra note 50, at 1229 (demonstrating the advantages of premarital contracts).
60 To some degree, the minimal and essential Waterman states that divorce depends upon an interspousal duty of disclosure. 51; infra in part V (discussing the attorney's ethical obligations) emanating from joint representation, prior representation that affects the spouse's property.
As a default setting, rather than focusing on the client's rights as the owner, an estate planning lawyer should emphasize limitations on the client's ownership and the reasons for these limitations. This emphasis may transform estate planning into a process of identifying and commencing with the least onerous method for addressing the client's underlying concerns, whatever they may be. In other words, estate planners should adopt the minimal and essential control standard, rather than suggesting disempowering devices.60

C. Addressing and Resetting the Control Defaults

As the estate planning lawyer listens to and seeks to understand the client better, rather than immediately offering the client the estate planning lawyer's full set of planning tools and weapons, the estate planning lawyer's role will assume a greater counseling function. Estate planning will become a dynamic process in which the estate planning lawyer actively seeks to educate the client to choose the minimum level of disempowerment of the client's eventual survivors and to redirect the client to options that empower survivors. In some cases, the estate planning lawyer will fail to persuade the client to embrace these objectives, and then must decide whether he or she is comfortable with the client's objectives. Sometimes the decision must be negative, despite the estate planning lawyer's loss of revenue.

The following paragraphs identify some commonly identifiable client objectives, suggest one or more alternative understandings of those objectives, and recommend an initial, and hopefully final, revisionist approach for the estate planning lawyer to achieve those goals.

50, at 1229 (demonstrating the advantages of premarital agreements).

60 To some degree, the minimal and essential control standard recognizes and depends upon an interspousal duty of disclosure. See Collett, supra note 6, at 740-51; infra in part V (discussing the attorney's ethical obligations to the other spouse emanating from joint representation, prior representation of the spouse, or even nonrepresentation that affects the spouse's property rights).
1. Punishment

Among the client’s possible goals may be a straightforward wish to punish his or her spouse by disempowering the spouse and subjecting the spouse to continuing financial control by third parties. When punishment is the objective, the estate planning lawyer should evaluate carefully whether to permit exploitation of his or her skills to that end. Facilitation of punishment is anathema to the lawyer’s traditional role and contrary to broad public policies that reject private retribution and punishment, at least in the absence of court approval and oversight, except in certain parent-child relationships.

The estate planning lawyer needs to recognize that a wish to penalize most likely reflects an underlying defect in the marital relationship, which may require assistance the estate planning lawyer cannot provide—marital or divorce counseling, for example. Moreover, assumption of the representation frequently embroils the estate planning lawyer in an ethical dilemma. Clearly, the lawyer cannot represent both spouses and, once having undertaken representation of one spouse, should withdraw from representation of the other.

2. Negative-Based Control

Similar to the desire to punish is the wish to prevent others from using the wealth the client has created or accumulated, in ways of which the client does not approve. Conceptually, the range of concerns is broad in this category. Some individuals do not want others to enjoy the wealth more than they do. Others have more specific concerns, such as a group of luxury expenditures.

In most cases, regardless of whether future expenditure are broad or narrow, one should seek to dissuade the client from spending, to their potentially adverse impacts on the restrictions undoubtedly test the skill of even a greater test of skill is persuading the client to their position with regard to restrictions. The client requires the practitioner to assist the client’s client, and the requirements for wanting the restrictions.

If the wish emanates from the client’s without consuming, the estate planning lawyer should understand that this is a lifestyle decision simply enjoys work and creation of wealth, sometimes a few questions focus on work as a source of pleasure. The importance of the work, will cause the client to his own choices and permit the client to different choices family members might.

When the issue is specific expenditure, preferable to restrictions. Such language reflects the client’s preferences. When combined with the client and family member becomes acceptable to the client as a substitute. The estate planning lawyer may hold communication and should expand his or facilitate conversation between the client. In addition, the estate planning lawyer can make the restrictions effective, trust should flexibility in the context is the reason, for survivors are intended, at the very least, to make non-complicated than they would be otherwise.
others to enjoy the wealth more than the individuals did while alive. Others have more specific concerns, such as not believing in a narrow group of luxury expenditures.

In most cases, regardless of whether the desired restrictions on future expenditure are broad or narrow, the estate planning lawyer should seek to dissuade the client from imposing the restrictions due to their potentially adverse impacts on survivors. Carefully designed restrictions undoubtedly test the skillfulness of the drafter, but an even greater test of skill is persuading the client to reevaluate his or her position with regard to restrictions. Redirecting the client requires the practitioner to assist the client in gaining insight into the reasons for wanting the restrictions.

If the wish emanates from the client's decision to produce wealth without consuming, the estate planning lawyer should help the client understand that this is a lifestyle decision. In many cases the client simply enjoys work and creation of wealth more than any activity that uses wealth. Sometimes a few questions encouraging the client to focus on work as a source of pleasure, without belittling the importance of the work, will cause the client to gain insight into his or her own choices and permit the client to become comfortable with different choices family members might make.

When the issue is specific expenditures, precatory language is preferable to restrictions. Such language informs survivors of the client's preferences. When combined with open communication between the client and family members, the language alone often becomes acceptable to the client as a substitute for direct restrictions. The estate planning lawyer may hold the key to the necessary communication and should expand his or her counseling skills to facilitate conversation between the client and family members. In addition, the estate planning lawyer can explain to the client that to make the restrictions effective, trust structures that severely limit flexibility and autonomy for survivors are necessary. These structures tend, at the very least, to make normal financial activities more complicated than they would be otherwise.
3. Paternalism

Lack of experience in financial matters neither evidences inability to make sound financial decisions and choose advisors wisely nor justifies appointment by the wealth-producing spouse of someone to look after the other’s interests. Usually, the surviving spouse should have the power to choose, replace, and dispense with advisors. Moreover, the estate planning lawyer must wonder why the spouse lacks financial experience.

Household management, traditionally delegated to the non-wealth-generating spouse, is a daunting endeavor. Inexperience in broader based financial management likely arises more from underlying historical control and disrespect for judgment than from genuine inability to manage. When this disrespect for the spouse’s judgment is inadvertent or essentially benevolent, the estate planning lawyer should encourage dialogue between the spouses, so that each gains a better understanding of the other’s responsibilities and capabilities.

Although a dialogue may prove extremely difficult to initiate because it frequently must overcome historical role playing supporting the conclusion that the non-wealth-generating spouse cannot manage, the dialogue nevertheless may prove worthwhile. Probably in an overwhelming majority of cases, such a dialogue will suffice to persuade the client that the client’s spouse understands the gravity of the control of wealth and possesses the capacity to act intelligently and select reliable advisors whenever needed. The new commu-

ination even may encourage the client to actively in the management of wealth to the spouse for the future. Empowerment management can be beneficial especially if the wealth producer is incapacitated.

Similarly, although emanating from a general fear, a client may desire control financial predators by placing the wealth accordingly, the predators’ reach. This evidence does not support the conclusion money. In fact, the converse is quite possible.

Even when a paternalistic approach may be required, to the control of advisors clients must be freed, is a radical step to be undertaken of alternatives and the rejection, for worthless autonomy-denying options. The requires one to deny a spouse basic freedom be humiliating and denigrating.

---

63 In 1960 5.8% of women and 9.7% of men had completed four years of college, while the percentages in 1994 were 19.6% for women and 25.1% for men. STATISTICAL ABSTRACT 1995, supra note 42, at 157. Thus, while only 60% as many women as men were college educated in 1960, that percentage had advanced to nearly 80% by 1994. Moreover, the similarity in educational attainment by marital partner has increased materially over the past 50 years. Robert D. Mare, Five Decades of Educational Assortive Mating, 56 AM. SOC. REV. 15, 30 (1991) ("Barriers to marriage between persons with unequal amounts of formal schooling increased between the 1930s and the present."). Interestingly, but perhaps not surprisingly, the gender gap in education has increased even more starkly among unmarried, cohabiting couples. Robert Schoen & Robin M. Weinick, Partner Choices in Marriages and Cohabitations, 55 J. MARRIAGE & FAM. 408 (1993).

64 The evidence is anecdotal, but educators to provide the best protection to any surviving spouse, that women bond more thoroughly with their children, and are less likely than men to disinherit children. See W. H. KLEIN, INTIMATE NETWORKS (discussing the continuing dominance of the mother in divorce, despite equal standards). Consensus men, wish to conserve economic resources for their children are less likely to be taken in by companionship control. Cf. Ralph C. Brashear, Disinheritance and Res. L. REV. 84 (1994) (discussing disinheri-
In understanding the ways in which financial matters neither evidences inability to make decisions and choose advisors wisely nor the wealth-producing spouse of someone to trusts. Usually, the surviving spouse should use, replace, and dispense with advisors. Ruling lawyer must wonder why the spouse
dreaded, traditionally delegated to the non-
is a daunting endeavor. Inexperience in management likely arises more from trol and disrespect for judgment than from age. When this disrespect for the spouse’s essentially benevolent, the estate planning dialogue between the spouses, so that each living of the other’s responsibilities and
may prove extremely difficult to initiate or overcome historical role playing support-
the non-wealth-generating spouse cannot worse may prove worthwhile. Probably.
ity of cases, such a dialogue will suffice to the client’s spouse understands the gravity of possesses the capacity to act intelligently whenever needed. The new communi-

and 9.7% of men had completed four years of 1994 were 19.6% for women and 25.1% for men. supra note 42, at 157. Thus, while only 60% as many educated in 1960, that percentage had advanced to the similarity in educational attainment by marital over the past 50 years. Robert D. Mare, Five Mating, 56 AM. SOC. REV. 15, 30 (1991) ("Barriers in unequal amounts of formal schooling increased tient."). Interestingly, but perhaps not surprisingly, even more starkly among unmarried, cohabiting in M. Weinick, Partner Choices in Marriages and

Similarly, although emanating from a specific fear rather than general fear, a client may desire control to protect the spouse from financial predators by placing the wealth out of the spouse’s and, accordingly, the predators’ reach. This fear generally is unfounded as evidence does not support the conclusion that widows with money are more likely to be deceived by predators than widowers with money. In fact, the converse is quite possibly true.64

Even when a paternalistic approach seems advisable given the spouse’s historically demonstrated lack of sound financial judgment and ready susceptibility to undue influence by third parties, the estate planning lawyer should commence from the presumption that each individual is competent to govern his or her own affairs. To recommend or to comply with the client’s wishes to subject the spouse to the control of advisors whom the spouse has not selected freely, is a radical step to be undertaken only after careful evaluation of alternatives and the rejection, for well-considered reasons, of all less autonomy-denying options. The estate planning lawyer should recognize that to deny a spouse basic freedom to control wealth can be humiliating and denigrating.


64 The evidence is anecdotal, but education and sensitivity to risks would seem to provide the best protection to any surviving spouse. Anecdotal evidence suggests that women bond more thoroughly with children than do men and would seem less likely than men to disinherits children. See Weitzman, supra note 50, at 215 (discussing the continuing dominance of the mother as the custodial parent following divorce, despite sex neutral standards). Consequently, women, perhaps more than men, wish to conserve economic resources for the benefit of their children and, thus, are less likely to be taken in by companionship offers in exchange for wealth or its control. Cf. Ralph C. Brashear, Disinheritance and the Modern Family, 45 CASE W. RES. L. REV. 84 (1994) (discussing disinheirtance generally).
The revised estate planning default asks the client, in order to steer the client away from disempowerment of the surviving spouse, whether the client would be willing to submit to the control of others, even if the client were aware of his or her own susceptibility to the influence of certain others. If not, as most often will be the case, the client should not expect the spouse to more willingly submit. Moreover, both the estate planning lawyer and the client should recognize that no reason supports the belief that the advisors the client selects will be more honest or reliable than advisors the spouse might select.

Often, however, financial predators and spousal protection do not really motivate the client; rather, the client simply wishes to continue controlling the spouse to prevent the spouse from enjoying the money with a new partner following the client’s death. This reason suffers from the same infirmities as control rationales discussed previously. It raises the issues of wealth ownership, lifestyle, and the quality of the marital relationship. Furthermore, it suggests a need for the spouse to be represented by separate counsel.

An additional argument that women wish neither the autonomy nor the responsibility that accompanies control of wealth—i.e., that they do not want to be bothered—is misdirected. To the extent that the argument can be validated, the failure of the estate planning lawyer and the client to communicate the ramifications of third party control explains why women are misled into accepting third party control as a viable option. While some women might initially say they prefer not to be bothered, when made to understand the realities of third party control over their expenditures and activities, those women likely would choose autonomy.

4. Dynastic Ownership—First Marriages

In a first marriage, unity of interest demands that the survivor transmit the family wealth to the children of the marriage, without the need for any restrictive planning structure. Departures from dispositions to children of the marriage are probably more likely in the case of a surviving father than a mother. Dispositions designed to keep the wealth within the marital unit have more substance in that the surviving spouse’s children, rather than the survivor’s collateral relatives, rather than the survivor’s collateral relatives, rather than the survivor’s collateral relatives, rather than the survivor’s collateral relatives, rather than the survivor’s collateral relatives, rather than the survivor’s collateral relatives, rather than the survivor’s collateral relatives, rather than the survivor’s collateral relatives, rather than the survivor’s collateral relatives, rather than the survivor’s collateral relatives, rather than the survivor’s collateral relatives, rather than the survivor’s collateral relatives.

In such cases, the matter is best resolved by agreement between the spouses.

Given the expectation that the surviving spouse’s children will seek to control the estates of their deceased parent’s children, they might come to understand their parent’s decision to pass their estate to them and may seek to emulate that disrespect for the parent, thereby adversely affecting the survivors.

Even worse than solely denying the children control to adult children, involuntarily to the financial control of the family wealth by the parent, may look voluntarily to adult children for respect to financial matters, imposing another matter that may deny the survivor and the children the benefits of their parents’ wealth.

5. Dynastic Ownership—Subsequent Marriages

Marriages in which one or both parties previously married do not necessarily invoke different responses from those of a first marriage addressed by previous sections of this article. The wishes of and respect for one’s spouse. Acceptance of reasonable knowledge and understanding.

65 See discussion supra note 64.
Planning default asks the client, in order to prevent disempowerment of the surviving spouse, if they would be willing to submit to the control of others, aware of his or her own susceptibility to the control planning lawyer and the client should support the belief that the advisors are honest or reliable than advisors the spouse

The case of a surviving father than a surviving mother, so restrictions designed to keep the wealth within the family line are generally unnecessary. When the marital unit has no children, the issue may have more substance in that the survivor may pass the wealth to the survivor’s collateral relatives, rather than to the decedent’s collaterals. In such cases, the matter is best resolved through discussion and agreement between the spouses.

Given the expectation that the survivor will pass the wealth to the children of the marriage, use of a structure enforcing that disposition might seem inoffensive. But such structures can never be neutral because they deny autonomy and disempower the survivor. Transfer of control to someone other than the survivor undermines the authority of the survivor within the family. Children, even minor children, might come to understand the structure as a demonstration of their deceased parent’s disrespect for and distrust of the survivor, and may seek to emulate that disrespect in their own treatment of the parent, thereby adversely affecting the parent-child relationship.

Even worse than solely denying the spouse’s control may be the transfer of control to adult children. Subjecting a surviving spouse involuntarily to the financial control of children reverses the normal authority relationship of parents and children. While the survivor may look voluntarily for adult children for assistance and advice with respect to financial matters, imposing that order upon him or her is another matter that may deny the survivor dignity.

5. Dynastic Ownership—Subsequent Marriages

Marriages in which one or both spouses have children from a previous marriage do not necessarily raise different questions or invoke different responses from those outlined above. The primary issue addressed by previous sections of this Article is the autonomy of and respect for one’s spouse. Accordingly, if both spouses have reasonable knowledge and understanding of the facts, they usually

65 See discussion supra note 64.
are willing to negotiate property rights different from those provided under state law. Among very wealthy individuals, negotiations and modifications of property rights are commonplace in antenuptial agreements. Failure to enter into an antenuptial agreement causes the general state law property rules of divorce and probate to apply to subsequent, as well as first, marriages. The existence of children from a prior marriage diminishes the share that the surviving subsequent spouse will receive.66

While estate planning lawyers assist their clients in limiting the spouses' property rights following the clients' deaths, often without disclosing those limitations either entirely or effectively to the spouse, the spouse's voluntary waiver of property rights requires far more disclosure under state law. Enforceability of antenuptial agreements depends upon disclosure of assets and separate representation of the parties to assure that the prenuptial negotiation took place in a non-coercive environment. Theoretically, neither party is allowed to overreach the other by exploiting secrecy and the superior bargaining position that wealth brings.67

No other protections are afforded during estate planning, except for the elective share. But in almost all jurisdictions, the marital

66 For example, in Missouri a surviving spouse receives one-half the decedent's estate by taking against the will, but only one-third if the decedent has surviving lineal descendants. See MO. ANN. STAT. § 474.160 (Verno 1992).
67 Enforceability is discussed often in the literature. See, e.g., PREMARITAL AND MARITAL CONTRACTS, supra note 59; J. Thomas Oldham, Premarital Contracts Are Now Enforceable, Unless ..., 21 Hous. L. REV. 757 (1984); Zelig, supra note 50. The Uniform Premarital Agreement Act, 9B U.L.A. 367 (1987), has been enacted by at least eighteen states. While it regulates the conditions for enforcement of premarital agreements, it does not expressly require full disclosure, and waiver of disclosure is a possibility under the Act. On the other hand, under the Act, unconscionability of the agreement constitutes grounds to avoid the agreement, especially in the absence of full disclosure. For a critique of the Act and its unconscionability standard, see Barbara Aan Atwood, Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act, 19 J. LEGIS. 227 (1993).

Needless to say, disclosure and separate representation do not assure a fair bargain. Representation may be unequal in quality. One party may enter the negotiation wearing rose colored glasses and consequently not demand an interest in the wealthy party's property that is sufficient to fulfill future needs.

SUMMER 1996

elective share is easily defeated or limited by the planning structures. Purchase of life insurance affecting both the purchase price and the proceeds to the surviving spouse,68 and interests receiving a terminable interest property trust count against the share of the decedent's property.69

When an individual of means chooses to marry, the terms of separation by death might be questioned. Perhaps, the prospective spouse might refuse to marry unless the settlement in advance of marriage and a future mate was willing to give.

In any event, the same public policy considerations and separate representation for the clients suggest that estate planning lawyers should enter into premarital agreements to avert future litigation and to prevent the disempowering estate planning. The efficient use of antenuptial arrangements as property. Accordingly, even in subsequent marriage agreements, lawyers should eschew such structures and openly with spouses and intended spouses.

D. Intermediate Conclusion

Undoubtedly, other reasons will support the use of antenuptial agreements. Whether they seem just as compelling as the reasons described in the preceding paragraphs. While this Article does not

68 See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 2-205 (1993) (including life insurance in the augmented marital share).
69 See supra note 53.
PROPERTY, PROBATE AND TRUST JOURNAL

Property rights different from those provided very wealthy individuals, negotiations and rights are commonplace in antenuptial enter into an antenuptial agreement causes property rules of divorce and probate to apply first, marriages. The existence of children diminishes the share that the surviving receive.66

If lawyers assist their clients in limiting the following the clients' deaths, often without either entirely or effectively to the spouse, payment of property rights requires far more Enforceability of antenuptial agreements' assets and separate representation of the antenuptial negotiation took place in a non-sようには、どちらの会社も得するり逆さで、いそれる。secrity and the superior bargaining

66 See supra note 53.

Democratic estate planning, except that in almost all jurisdictions, the marital

65 See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A(b) (West Supp. 1996) (failing to reach life insurance in augmenting the estate with testamentary substitutes for purposes of the forced share); Mo. Rev. Stat. § 474.163 (Vernon 1992) (failing to augment the estate with testamentary substitutes). But see UNIF. PROB. CODE § 2-205 (1993) (including life insurance in the augmented estate for purposes of the spousal share).

SUMMER 1996

Tusting Our Partners 343

elective share is easily defeated or limited by common estate planning structures. Purchase of life insurance products removes both the purchase price and the proceeds from the reach of the surviving spouse, and interests received through a qualified terminable interest property trust count against the survivor's elective share of the decedent's property.69

When an individual of means chooses not to negotiate, before marrying, the terms of separation by death or divorce, the individual's motives might be questioned. Perhaps, the individual feared that the prospective spouse might refuse to marry if requested to negotiate settlement in advance of marriage and allowed to see how little the future mate was willing to give.

In any event, the same public policy interests that require disclosure and separate representation for antenuptial arrangements suggest that estate planning lawyers should encourage antenuptial agreements to avert future litigation and animosity. Readily availability of disempowering estate planning structures undercuts the efficient use of antenuptial arrangements to settle the division of property. Accordingly, even in subsequent marriages estate planning lawyers should eschew such structures and advise clients to negotiate openly with spouses and intended spouses.

D. Intermediate Conclusion

Undoubtedly, other reasons will suggest themselves for disempowering the spouse following the client's death. Those reasons will seem just as compelling as the reasons addressed in the preceding paragraphs. While this Article does not aver that restrictive disposi-
tions are never appropriate, justifications for denial to a surviving spouse of autonomy over property rest on an extremely weak, but traditionally condoned, foundation. Estate planning lawyers too long have failed to question the soundness of that foundation in plying their trade. The estate planning lawyer has honed the skills necessary to fulfill the client's expressed and unexpressed dispositional objectives, resulting in frequent financial disempowerment of the client's surviving spouse. In carrying out the client's apparent wishes, the estate planning industry has supported legislation to facilitate that disempowerment.\textsuperscript{70}

Simultaneously, the estate planning lawyer has failed to acknowledge the importance of guiding the client in making decisions with respect to survivors. The industry is diligent in preparing consistently high quality documents that effectively exploit all possible tax planning opportunities, but at times has failed to understand the impact of estate planning choices on survivors, especially as society changes. Among those changes is the increased education of women at all levels and in all fields. The decision to manage household and family, rather than engaging directly in wealth production, does not render the non-wealth-producing spouse any less intelligent, educated, or capable to manage financial affairs. These societal changes should lead estate planning lawyers to assign, and encourage their primary clients to assign, a more complete role in family financial matters to their spouses, regardless of wealth production.\textsuperscript{71}

\textsuperscript{70} See Gerzog, \textit{supra} note 5. The ALI Recommendations, which became part of the background for the Economic Recovery Tax Act, recommended what later became the qualified terminable interest property trust, in conjunction with the unlimited marital deduction: "This type of trust can be used where the donor spouse wants to protect his children from being left out as a result, for example, of the second marriage of his spouse." ALI Recommendation, \textit{supra} note 11, at 33 (emphasis added).

\textsuperscript{71} See \textit{Model Rules of Professional Conduct} 2.1 (1993) (requiring a lawyer to exercise independent judgment limited "not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation") [hereinafter \textit{Model Rules}].

IV. SELECTING THE TRUSTEE

Previous parts of this Article questioned the extensive use of trusts and similarly restricted use in estate planning, especially when the client is unmarried but has adult children. A simple equivalent trust, remains appropriate on occasion. Sometimes a trust may be unnecessary or uneconomic anyway. In all those cases, the settlor must carry out the trust's objectives.

Clients who have not previously understood the process commonly assume that there is some sort of trustees and will look to their estate planning recommendation. Rarely will the client ask concerning the selection of a trustee, the reasons for asking them to understand that neither tax nor estate planning lawyers remain uncertain as to the designation of specific classes of trustees. With caution, tend to recommend institutional or non-institutional trustee as deputy to execute trust. The selection of such trustees is a function of the trust industry has begun to reset, but the industry

Ideally, the client's deputy should be one who believes will act as the decedent would have done—someone who is closely attuned to the client's wishes, who is familiar with the company and the nuances of the deceased's personal and business affairs. Indeed, the trustee should be the surviving spouse. Estate planning lawyers do not always, or probably rarely, select this kind of individual. The future may suggest otherwise.
state, justifications for denial to a surviving property rest on an extremely weak, but
foundational. Estate planning lawyers too long
the soundness of that foundation in plying
the planning lawyer has honed the skills
their expressed and unexpressed disposi-
ing in frequent financial disempowerment of
use. In carrying out the client’s apparent
industry has supported legislation to facil-
state planning lawyer has failed to acknow-
other that effectively exploit all possible tax
ours to understand the
choices on survivors, especially as society
increased education of women
The decision to manage household and
wealth production, does not
providing spouse any less intelligent,
affairs. These societal
planning lawyers to assign, and encour-
and encourage
role in family finan-
regardless of wealth production.71

The ALI Recommendations, which became part
the Recovery Tax Act, recommended what later
interest property trust, in conjunction with the
type of trust can be used where the donor spouse
being left out as a result, for example, of the
ALI Recommendation, supra note 11, at 33

IV. SELECTING THE DEPUTY

Previous parts of this Article question the desirability of the
extensive use of trusts and similarly restrictive dispositive structures
in estate planning, especially when the client is married or when the
client is unmarried but has adult children. Nevertheless, the use of
a trust as a dispositive device, such as through a unified credit
equivalent trust, remains appropriate on certain occasions. At other
times a trust may be unnecessary or undesirable, but will be used
anyway. In all those cases, the settlor must designate a deputy to
carry out the trust’s objectives.

Clients who have not previously undergone the estate planning
process commonly assume that there is some standard for selection
of trustees and will look to their estate planning lawyer for a
recommendation. Rarely will the clients ask probing questions
concerning the selection of a trustee, the answers to which might lead
them to understand that neither tax nor legal constraints materially
affect the selection of the trustee. Unfortunately, many estate
planning lawyers remain uncertain as to the tax and legal impact of the
designation of specific classes of trustee, and to err on the side of
care, tend to recommend institutional trustees. To choose an
institutional trustee as a deputy to execute the client’s wishes seems
peculiar. The selection of such trustees is a default setting that the
industry has begun to reset, but the industry needs to go further.72

Ideally, the client’s deputy should be someone whom the client
believes will act as the decedent would have acted if still living—someone who is closely attuned to the decedent’s wishes. A
trust company hardly seems the logical choice. Rather, the selection
of an individual who knows and understands the decedent’s thinking
and the nuances of the decedent’s personality suggests itself. Who
better than the decedent’s spouse? Certainly, the default setting for
the trustee should be the surviving spouse. Yet estate planning
lawyers do not always, or probably rarely, recommend the surviving

72 See Jerry A. Kasner, A Trust Law Professor’s Perspective, TR. & EST., May 1995 at 58 (highlighting some of the problems that arise from the increasing use of non-institutional trustees).
(female) spouse as the sole trustee for trusts continuing after or originating with the decedent's death.

If, rather than resulting from the unquestioning acceptance of the estate planning lawyer's recommendation, the failure to select the spouse as trustee (not to mention the failure to make outright gifts to the spouse) is truly the client's decision, the estate planning lawyer should suspect the existence of flaws in the marital relationship that may need to be addressed in another manner, such as marriage counseling. For the estate planning lawyer, these flaws enhance the likelihood that the estate planning lawyer will have a conflict of interest in planning for the couple.

Following the surviving spouse's death, adult children who have become the beneficiaries of the trust should also become its trustees, absent a mental defect that militates against the designation. While it may be appropriate to limit their power to withdraw assets from the trust for some limited period of time, it is inappropriate to subject them to the financial control of someone other than a parent. Because they ultimately will become the outright owners of the trust property, the adult children should control the property's disposition, although possibly not its outright expenditure, earlier rather than later to enable them to ease into the responsibility associated with the wealth.

This discussion does not imply that the estate planning industry has not moved away from the unnecessary expense and sometimes undesirable conservatism of institutional trustees. Increasingly, individual, nonprofessional trustees are appointed in numerous estate planning structures. From a surviving spouse's perspective, however, the selection of a noncorporate trustee may be more unfortunate than the selection of a corporate trustee. As humiliating as financial control by an impersonal trust department may be, control by a child, an in-law, or a personal friend of a deceased

73 Id. Kasner expresses some concern about the proliferation of nonprofessional trustees and the risks involved in administering trusts. When these concerns are warranted, the estate planning industry should educate the trustees rather than seek to redirect appointments to professional fiduciaries.

A. Unified Credit Trusts

Earlier, this Article identified features under which a trust receives a marital unit member who dies first from wasting its unified credit or its unused brackets. The decision to use such a trust substitutes for the outright gift of the spouse, as commonly occurs in modest outright gift, the trust should be structured to benefit the spouse an interest that approximately because the underlying assumption for the trust will not need to consume all the trust assets. If the trust should be includable in the first trust consumed that decedent's unified credit, the survivor's estate. In this manner, the unit to pass two full unified credit death the next generation free of estate tax. If the survivor of the use of the assets as not trusts, there is no tax reason to name the surviving spouse.

Only to the extent that the surviving power of appointment will the trust be donee spouse. Nongeneral powers are, nearly as much control of and access to the powers. A general power of appointment holder may appoint trust property to

74 See supra part II (discussing basic tax-
75 Currently, the unified credit deduction
76 I.R.C. § 2041 (1994). Certain interests are
among other individuals, whether or not in trust of I.R.C. §§ 2701-2704 in the same manner as interest. Id. §§ 2701-2704.
spouse is frequently worse.

A. Unified Credit Trusts

Earlier, this Article identified fundamental tax planning structures under which a trust receives a portion of the estate of the marital unit member who dies first. The trust prevents the estate from wasting its unified credit or its unified credit and marginal rate brackets. The decision to use such a trust is tax driven, and the trust substitutes for the outright gift of the entire estate to the surviving spouse, as commonly occurs in modest estates. As a substitute for an outright gift, the trust should be structured to give the surviving spouse an interest that approximates the outright disposition. Because the underlying assumption for the trust is that the survivor will not need to consume all the trust assets during the survivor's life, the trust should be includable in the first decedent's estate so that it consumes that decedent's unified credit, but should not be includable in the survivor's estate. In this manner, the trust enables the marital unit to pass two full unified credit deduction equivalent amounts to the next generation free of estate taxes, while not depriving the survivor of the use of the assets as needed during life. For such trusts, there is no tax reason to name a trustee other than the surviving spouse.

Only to the extent that the surviving spouse possesses a general power of appointment will the trust be includable in the estate of the donee spouse. Nongeneral powers of appointment can provide nearly as much control of and access to the trust property as general powers. A general power of appointment exists only when the power holder may appoint trust property to the power holder, the power

---

74 See supra part II (discussing basic tax-based estate planning).
75 Currently, the unified credit deduction equivalent is $600,000. I.R.C. §§ 2001(c), 2010 (1994). See discussion supra part II.B.
76 I.R.C. § 2041 (1994). Certain interests and rights given to the donee spouse, among other individuals, whether or not in trust, activate the special valuation rules of I.R.C. §§ 2701-2704 in the same manner as if the donor spouse had retained the interest. Id. §§ 2701-2704.
holder’s estate, or to creditors of the power holder or the power holder’s estate.\textsuperscript{77} Avoiding the grant of those specific powers minimally diminishes the flexibility available to the spouse as power holder.

If the spouse has the power to appoint to anyone other than those specified above to whom a right to appoint would render the power a general power, neither inclusion in the spouse’s estate nor a taxable gift occurs when the property is distributed pursuant to the exercise of the power. The world of appointees may include children, grandchildren, parents, grandparents, siblings of the grantor and the spouse, and unrelated individuals or entities.\textsuperscript{78} This result does not change, even when the power holder may exercise the power in a nonfiduciary capacity.

Also, without the power becoming a general one, the power holder may have the power to invade the trust’s income and corpus for the power holder’s benefit, provided the invasion is subject to an ascertainable standard relating to the health, education, support, or maintenance of the power holder.\textsuperscript{79} Although the retention of an income interest by a grantor of a trust causes the trust assets to become included in the grantor’s estate,\textsuperscript{80} no similar result inheres from the surviving spouse’s receiving one hundred percent of the trust income for life, so long as the survivor is not the grantor.\textsuperscript{81}

As trustee, the power holder has broad investment powers to realign investments to increase or decrease the flow of income from the trust. Finally, the power holder may have an annually lapsing

\textsuperscript{77} Id. § 2041(b)(1).
\textsuperscript{78} Appointment by the power holder of the corpus to another, while the power holder has the right to income, may constitute a gift of the present value of the power holder’s income interest from that portion of the corpus. Treas. Reg. § 25.2514-1(b)(2) (as amended in 1981). But see Selk v. United States, 142 F. Supp. 939 (Ct. Cl. 1956) (holding that there is no gift).
\textsuperscript{79} I.R.C. § 2041(b)(1)(A) (1994).
\textsuperscript{80} Id. § 2036(a).
\textsuperscript{81} Of course, the income from the trust is includable to the extent that the survivor has accumulated, rather than consumed, it.
right to withdraw the greater of $5,000 or 5% of the trust corpus each year without more than the year-of-death’s unexpired, permissible withdrawal amount becoming includable in the power holder’s estate.\textsuperscript{82}

Broader powers in a third party trustee that would not result in inclusion in the spouse’s estate are unlikely to add to the spouse’s available wealth. Because a third party trustee would want the trust document to provide guidance with respect to the exercise of the power for the spouse’s benefit, the standard for determining whether inclusion is warranted will usually resemble the ascertainable standard that would prevent inclusion in the survivor’s estate if held by the survivor directly.\textsuperscript{83}

B. Trusts for Children and Others

When sufficient assets are available for the spouse’s use during his or her life, or as a result of a divorce or antenuptial agreement, the wealth producer and spouse may decide to fund a trust for children of the marriage or of a prior marriage. This trust may be funded either while both spouses are alive or following the wealth producer’s death. The spouse whose children will be the trust beneficiaries seems the logical choice as the trustee or successor trustee to the grantor. Often, the subsequent spouse is also a suitable trustee for children of a prior marriage, but animosities between the children or the prior spouse and the current spouse may render that choice undesirable. Sometimes estate planning lawyers suggest that tax impediments go against the selection of the spouse as trustee. When tested, however, tax arguments for the selection of other trustees rarely provide valid reasons for failing to designate the spouse.

On the gift and estate side of taxation, powers and interests

\textsuperscript{82} I.R.C. § 2041(b)(2) (1994).

\textsuperscript{83} Id. § 2041(b)(1)(A).
given to a spouse are not imputed to the donor. If the donor does not retain a power or a prohibited interest in the trust, the lifetime gift to the trust is complete, and the role of the donor's spouse as trustee will not make the gift includable in the donor's estate. As to the spouse's acting as the power holder, so long as the trust does not hold insurance on the life of the spouse, trust powers and interests held by the donee spouse, other than a general power of appointment, will not cause trust assets to become included in the donee spouse's estate. 

On the income tax side, however, reasons may support appointing a trustee other than the spouse, but those reasons are weak when balanced against the loss of autonomy. After the grantor's death, trust income that is not distributable to the surviving spouse is not taxable to the spouse, unless the spouse applies the income to discharge his or her obligations of support. While the grantor is alive, however, powers held by the grantor's spouse are imputed to the grantor and may result in inclusion of the trust's gross income in the gross income of the grantor, although the same power held by a third party would not be imputed to the grantor. If a third party holds the trust remainder, the income to the grantor in the following circumstances: (1) the grantor holds a discretionary power to spray the income among a class of beneficiaries; or (2) the income, independent, may allocate income among beneficiaries according to a reasonably definite, ascertainable method, the avoidance of taxes requiring the grantor's spouse be a member of the income beneficiaries. If these same powers were held by the grantor's spouse, they would not be considered taxable to the grantor because they are not held by a third party.

Given current compressed income tax brackets, there is little advantage to accumulating in a relatively small amount of taxable income the maximum income tax rate bracket. The payment of a lesser amount of the income to the grantor may not be a viable planning perspective. The payment of the income to the trust beneficiaries by the grantor would have to pay on the income. Yet, if the additional amount, and the income tax on the opposite of the grantor's estate—a customary goal of tax planning is less than the tax fall rate, this use of

---

84 For certain arrangements, such as reciprocal trusts, the courts will disregard the separate trusts and determine a term of life interest to be a retained interest for purposes of inclusion in the gross estate of the settlor under I.R.C. § 2036(a). United States v. Estate of Grace, 395 U.S. 316 (1969).

85 For example, any of the interests or powers described in I.R.C. §§ 2036-2038 (1994).

86 Under I.R.C. § 2042, if an individual is trustee of a trust holding insurance on his or her life, the individual's powers as trustee are likely to constitute incidents of ownership in the life insurance policy which would cause the policy proceeds to become includable in the individual's estate. I.R.C. § 2042 (1994).

87 Id. § 2041. See supra part IV.A.

88 I.R.C. § 678(c) (1994).

89 I.R.C. § 672(e) imputes powers held by the spouse to the grantor in order to treat the grantor as the owner of the trust for income tax purposes. Id. § 672(e). However, I.R.C. § 674, which relates to powers to control beneficial enjoyment, does not distinguish between the grantor and a non-adverse third party holding certain powers that cause the grantor to be treated as the owner of the trust. See id. § 674. Therefore, the greatest impact of Section 672(e) is probably the treatment, under Section 673, of the grantor as the owner of the trust when the spouse has a remainder in the trust. Id. § 673.

90 Under I.R.C. § 673, a spousal remainder is not taxed to the grantor because powers held by the spouse under I.R.C. § 672(e).

91 I.R.C. § 674(c) (1994).

92 Id. § 674(d).

93 See id. § 677(a)(1).

94 Id. § 672(e). Under I.R.C. § 674(d), a grantor and spouse were not living together because I.R.C. § 672(e), applies by its own terms to a person only if the spouse is living with the grantor.

95 See I.R.C. § 1(e) (1994).
imputed to the donor. If the donor does not hold any interest in the trust, the lifetime interest, and the role of the donor's spouse as gift includible in the donor's estate. As to the power holder, so long as the trust does not pass to the spouse, trust powers and interests, other than a general power of appointment, are included in the donee.

The income, however, is not included in the donee, and the donee has no power to control the income. The trust income is taxable to the grantor even if the donee has no power to control it. The income is taxable to the grantor even if the donee has no power to control it.

Given current compressed income tax rates for trusts, however, there is little advantage to accumulating income in a trust because a relatively small amount of taxable income may push the trust into a higher income tax rate bracket. Moreover, taxation of the income to the grantor may not be desirable from an estate planning perspective. The payment of tax by the grantor increases the gift to the trust beneficiaries by the amount of income tax they would have to pay on the income. Yet, no gift tax is payable on that additional amount, and the income tax payment diminishes the size of the grantor's estate—a customary goal of estate planning. So long as the spread between the donor's and the donee's income tax rates is less than the gift tax rate, this use of a grantor trust yields an

hails the trust remainder, the income will not be taxable to the grantor in the following circumstances: (1) if an independent trustee holds a discretionary power to spray income, principal, or both among a class of beneficiaries, or (2) if the trustee, whether or not independent, may allocate income among a class of beneficiaries according to a reasonably definite, ascertainable standard. In both situations, the avoidance of taxes requires that neither the grantor nor the grantor's spouse be a member of the class of permissible income beneficiaries. If these same powers or interests were held by the grantor's spouse, they would cause the income to become taxable to the grantor because they would be imputed to the grantor.

Given current compressed income tax rates for trusts, however, there is little advantage to accumulating income in a trust because a relatively small amount of taxable income may push the trust into a maximum income tax rate bracket. Moreover, taxation of the income to the grantor may not be desirable from an estate planning perspective. The payment of tax by the grantor increases the gift to the trust beneficiaries by the amount of income tax they would have to pay on the income. Yet, no gift tax is payable on that additional amount, and the income tax payment diminishes the size of the grantor's estate—a customary goal of estate planning. So long as the spread between the donor's and the donee's income tax rates is less than the gift tax rate, this use of a grantor trust yields an

such as reciprocal trusts, the courts will disregard a term or life interest to be a retained interest for the estate of the settlor under I.R.C. § 2036(a).

A power of appointment is the power to appoint property to beneficiaries. The power of appointment is a gift power to the donee, and the donee has no power to control the income. The income is taxable to the grantor even if the donee has no power to control it.

Given current compressed income tax rates for trusts, however, there is little advantage to accumulating income in a trust because a relatively small amount of taxable income may push the trust into a maximum income tax rate bracket. Moreover, taxation of the income to the grantor may not be desirable from an estate planning perspective. The payment of tax by the grantor increases the gift to the trust beneficiaries by the amount of income tax they would have to pay on the income. Yet, no gift tax is payable on that additional amount, and the income tax payment diminishes the size of the grantor's estate—a customary goal of estate planning. So long as the spread between the donor's and the donee's income tax rates is less than the gift tax rate, this use of a grantor trust yields an

remainder in the trust. Id. § 673.

Under I.R.C. § 673, a spousal remainder causes the income of the trust to be taxed to the grantor because powers held by the spouse are imputed to the grantor under I.R.C. § 672(e).

Id. § 674(d).

See id. § 677(a)(1).

Under I.R.C. § 674(d), a different result might inhere if the grantor and spouse were not living together because this section, which predates I.R.C. § 672(e), applies by its own terms to a power held by the grantor's spouse only if the spouse is living with the grantor.

See I.R.C. § 1(e) (1994).
overall tax advantage.\footnote{The Internal Revenue Service does not agree with this result for so-called "defective grantor trusts" designed to make the payment of income tax a nontaxable gift to the trust beneficiaries. See Priv. Ltr. Rul. 94-44-033, 1994 PRL LEXIS 1357 (Aug. 5, 1994). But see Commissioner v. Hogle, 165 F.2d 352 (10th Cir. 1947).}

In view of the lack of a meaningful tax basis for the failure to select the spouse as trustee, that failure suggests that the grantor either falsely believes that a tax reason exists, lacks respect for the spouse’s judgment, or lacks confidence that the spouse will follow the donor’s wishes in disposing of the donor’s property. As discussed in part III of this Article, the flaw does not necessarily lie with the spouse, and may well lie with the donor. Absent compelling reasons to the contrary, the estate planning lawyer should seek to persuade the client to designate the spouse as trustee, rather than follow the traditional estate planning defaults that disempower the spouse.

V. ETHICAL CONSIDERATIONS

Estate planning lawyers long have been troubled by the potential and real conflicts of interest emanating from their activities.\footnote{See Pennell, supra note 62 (providing recent and extensive discussion of conflicts in estate planning). The estate planning bar continues to struggle with the interplay of multiple representation. See, e.g., ACTEC Commentaries, supra note 2; Collett, supra note 6; Special Study Committee on Professional Responsibility, ABA Section of Real Property, Probate and Trust Law, Comments and Recommendations on the Lawyer’s Duties in Representing Husband and Wife, 28 REAL PROP. PROP. & TR. J. 765 (1994) [hereinafter Lawyer’s Duties]. The bar has also often discussed issues of undue influence and fiduciary obligations. See, e.g., McGovern, supra note 2; Special Study Committee on Professional Responsibility, ABA Section of Real Property, Probate and Trust Law, Preparation of Wills and Trusts That Name Drafting Lawyer as Fiduciary, 28 REAL PROP. PROP. & TR. J. 803 (1994).}

Representation of both husband and wife in estate planning is commonplace because most primary clients do not want to provide their spouses with, or encourage their spouses to secure, separate representation. In most cases, despite the potential for conflicts, no

\footnote{See, e.g., MODEL RULES, supra note 71, 1.9 (dealing with conflicts of interest and waiver of conflict and dealing with when the attorney acts as an intermediary between spouses, the attorney is probably engaged in joint representation while also acting as an intermediary. Collett, supra note 6, at 703; 782.}

significant issues arise as both spouses question the details of the plan. Nevertheless, the lawyer may do well to seek the help of a qualified expert in an independent capacity.

While the estate planning lawyer may attempt to resolve conflicts of interest by insisting that the spouse have independent representation, this solution has proved impractical. Because estate planning is generally viewed as nonadversarial, most clients prefer a fairly informal system enabling clients to act together. Disclosure of the potential conflicts, and attempts to have both spouses, if possible, sign a waiver, is stylized and generalized to an extent that makes it nearly impossible to become suspicious of one another or to proceed with the plan. More detailed disclosures of possible conflicts are likely to be rejected because there may be no effective way of designing a plan that will allow the spouse to waive interest in the other’s property while the lawyer has independent representation, the hours, and the fees.

Even if each spouse has separate representation, the full extent of the conflicts still may not be solved. Waiver of conflicts will not necessarily be necessary. Often, the estate planning lawyer negotiates with clients, or represents the marital unit with respect to past business, and previous representation, in an adversarial estate planning lawyer from representing the other spouse.

Moreover, by their very nature, conflicts often do not arise until the estate planning lawyer makes representations about the dispositions of the interest.

\footnote{See MODEL RULES, supra note 71, 1.9 (dealing with conflicts of interest and waiver of conflict and dealing with when the attorney acts as an intermediary between spouses, the attorney is probably engaged in joint representation while also acting as an intermediary. Collett, supra note 6, at 703; 782.}

As the estate planning lawyer continues to struggle with these issues, the hope for a clear, effective, and generalized solution is not very high.
significant issues arise as both spouses ultimately die without questioning the details of the plan. Nevertheless, the malpractice risk looms.

While the estate planning lawyer may escape the malpractice risk by insisting that the spouse have independent representation, that solution has proved impractical. Because the estate planning setting is generally viewed as nonadversarial, most practitioners rely on a fairly informal system enabling clients to waive potential conflicts. Disclosure of the potential conflicts, a condition to an informed waiver, is stylized and generalized to avoid causing the spouses to become suspicious of one another or the estate planning lawyer. More detailed disclosures of possible conflicts may be inadequate because there may be no effective way of fully disclosing the possible conflicts to allow the spouse to waive intelligently. Unless the spouse has independent representation, the ethical dilemma inheres.

Even if each spouse has separate representation, the problem of conflicts still may not be solved. Waiver of conflicts of interest may nevertheless be necessary. Often, the estate planning lawyer or other members of the estate planning lawyer's firm have represented the marital unit with respect to past business or family matters. This previous representation, in an adversarial setting, might disqualify the estate planning lawyer from representing either party without a waiver from the other. Moreover, by representing one party with respect to the disposition of property in which the other may have an interest, the estate planning lawyer may effectively be representing both spouses, especially if the disposition by one spouse diminishes or

---

98 See, e.g., Model Rules, supra note 71, 1.7, 2.2 (addressing conflicts of interest and waiver of conflict and dealing with representation of multiple clients when the attorney acts as an intermediary between the clients). In representing spouses, the attorney is probably engaged in joint representation rather than acting as an intermediary. Collett, supra note 6, at 703; Lawyer's Duties, supra note 97, at 782.

99 See Model Rules supra note 71, 1.9 (dealing with representation of a client whose interests are materially adverse to those of a former client).
destroys the other’s rights in that property.\textsuperscript{100} As part III of this article demonstrates, ownership is not unfettered; thus, both spouses’ property rights are at stake. Customarily, however, most lawyers do not view the ethical rules governing conflicts of interest as addressing the limited rights that arise in the event of a divorce because those interests do not limit a spouse’s ability to deal with his or her property during the marriage.

Perhaps of greater significance is the issue of whether the spouse really gains anything through separate representation. If one spouse holds title to property, the other spouse would have to dissolve the marriage to protect his or her rights. Disclosure of the fact that divorce is the only possible method to secure rights in the property is hardly useful. Additionally, if one spouse understands that the other spouse is planning for the possibility of a divorce, the harmony of the continuing marital relationship likely will be disrupted. On the other hand, failure to disclose remains equally unacceptable.

The universal resetting of estate planning defaults emerges as the only sensible solution to the ethical problem. The industry should alter its fundamental approach to planning by ensuring that parties negotiate the terms of the estate plan to generate a plan suitable to all. Both spouses should participate actively in the planning process, ideally from its outset. The estate planning lawyer should eschew any device that disempowers a member of the marital unit unless both members of the unit, having a full understanding of the device’s ramifications and constraints, have agreed that the use of the device best suits their common objectives. Absent a tax motivation,\textsuperscript{101} such devices rarely prove suitable in a first marriage and, in any event, should be a subject of premarital marriage.

VI. CONCLUSION—ESTATE PLANNING INDUSTRY OF THE FUTURE

The estate planning industry depends on perceptions of the capacity for survival. Naturally enough, that dependence upon various biases in favor of women have been predominantly male. The perceptions of the industry and division of the transmission of wealth. Despite the accompanying shift toward equality for women, estate planning lawyers and their clients created a symbiosis that tends to exclude men from the estate plan. That symbiosis has motivated the disempowering structures and positive termination property trusts for the interests to the calculation of the state’s probate code, and the exclusion of men from the enhanced probate estate against their will.

The foundations upon which these structures are seriously flawed. Control of property through corporate trusts, probably are less likely than men to disempower a member of new lovers or spouses. Furthermore, only thoughtful, educated people. Given the investment capital through mutual funds, trusts, and other financial structures, gender is rarely necessary or desirable, even for the person to manage their investments. When our own to be desired, the person for whom the

---

\textsuperscript{100} Indeed, the representation of a married individual may be inherently joint with the individual’s spouse. \textit{Lawyer’s Duties}, supra note 97, at 778. The marital unit may constitute one of the triangular relationships in which the lawyer owes a duty to the spouse whom the lawyer has not undertaken to represent. \textit{See} Geoffrey C. Hazard, Jr., \textit{Triangular Lawyer Relationships: An Exploratory Analysis}, 1 Geo. J. Legal Ethics 15 (1987) (examining the nature of the lawyer’s responsibilities when the lawyer’s client has a special relationship with another party that modifies the lawyer’s normal professional responsibilities).

\textsuperscript{101} \textit{See supra} part II (demonstrating the absence of a tax benefit from autonomy-denying estate planning structures).

\textsuperscript{102} \textit{See supra} part III.C.4, 5.
in that property. As part III of this marriage is not unfettered; thus, both spouses' rights. Customarily, however, most lawyers doing divorce to address conflicts of interest as addressing the outcome of a divorce because those spouse's ability to deal with his or her own.

The issue of whether the spouse is entitled to separate property. If one spouse has all separate property, the other spouse would have to dissolve the marriage. Disclosure of the fact that the property is secure in the property is if one spouse understands that the other possibility of a divorce, the harmony of the marriage likely will be disrupted. On the other hand, it remains equally unacceptable.

Of estate planning defaults emerges as the ethical problem. The industry should be to planning by ensuring that parties have an estate plan to generate a plan suitable to participate actively in the planning process, estate planning lawyer should eschew any member of the marital unit unless both have a full understanding of the device's and have agreed that the use of the device is tax advantageous. Absent a tax motivation, suitable in a first marriage and, in any

event, should be a subject of premarital negotiation in subsequent marriages.

VI. CONCLUSION—ESTATE PLANNING AS AN INDUSTRY OF THE WEALTHY

The estate planning industry depends upon the wealthy for its survival. Naturally enough, that dependence has led to the development of various biases in favor of wealthy clients who, historically, have been predominantly male. Those biases may now cloud the perceptions of the industry and divert it from reexamining its role in the transmission of wealth. Despite fundamental cultural changes accompanying the shift toward equal educational opportunities for women, estate planning lawyers and their male clients have perpetuated a symbiosis that tends to exclude women from controlling family wealth. That symbiosis has motivated legislative approval of various disempowering structures and positions, such as the qualified terminable interest property trust, the application of trust income interests to the calculation of the spousal elective share under the probate code, and the exclusion of most life insurance benefits from the enhanced probate estate against which the elective share is figured.

The foundations upon which these structures are based may be seriously flawed. Control of property terminates with death. Women are no more likely to succumb to financial predators than men and probably are less likely than men to disinherit their children in favor of new lovers or spouses. Furthermore, the investment of wealth through corporate trust companies seldom meets the needs of thoughtful, educated people. Given the vast opportunities to pool investment capital through mutual funds, real estate investment trusts, and other financial structures, generalized third party control is rarely necessary or desirable, even for individuals who do not wish to manage their investments. When outside wealth management may be desired, the person for whom the wealth will be managed—the

102 See supra part III.C.4, 5.
surviving spouse—ought to make that decision. No meaningful benefit to any party emanates from post-death restrictive devices.

The industry needs to reevaluate its underpinnings. Notions that the principal wealth producer in the family has the privilege to control the disposition and investment of wealth long after death are outmoded. These notions reflect disrespect for the non-wealth-producing spouse’s contributions to a marriage and to a family, as well as disrespect for the family itself. The default settings for estate planning should move to empower surviving spouses. Outright gifts, spouses as trustees, equal participation in ownership, and control of property during the marriage should be the initial, firmly advocated tools of the estate planning lawyer. The estate planning community should facilitate disempowering options principally in negotiated settings, such as in the course of or pursuant to antenuptial agreements at the time of a second marriage.

Rather than resisting change, the industry should seize the opportunity provided by estate planning lawyers’ nearly unique role among professional advisers. Unlike many other advisory contexts, in which clients look to the adviser solely to execute a decision the clients have made already, estate planning lawyers’ clients genuinely look for guidance and frequently follow the advice provided. The industry should seek to transform estate planning into a dynamic and inclusive process and should depart from outdated norms of wealth control. Those norms suit best the needs of institutions that depend upon post-death control of wealth for their livelihood rather than the needs of an adult society in which both sexes, without regard to their role in the family, participate meaningfully in the management and transmission of wealth for the benefit of the family.

SPECIAL DELIVERY: DOES IT RING AT ALL—THE CURRENT DELIVERY REQUIREMENT

Chad A. McGowan

Editors’ Synopsis: This Article discusses the role of the delivery requirement for valid gifts, examines the requirement’s history, founding, concluding that actual delivery is no longer to be complete. The author argues that evidence of a donative intent, rather than a gift. As a result, the author suggests, a concept of delivery to validate what is left.

I. INTRODUCTION
II. HISTORY AND JUSTIFICATIONS OF THE REQUIREMENT
III. CURRENT STATE OF THE DELIVERY REQUIREMENT
IV. DELIVERY’S CURRENT PURPOSES
V. IS DELIVERY’S DEMISE A GOOD IDEA?
VI. CONCLUSION

A frequently litigated issue in the disposition of the estate. Often, a family member or decedent will resist any attempt of the executor to marshal the estate assets by claiming value that the executor seeks to recover was a gift from the decedent or an heir.

'Principal, The McGowan Firm, Atlanta, Georgia. B.S., Clemson University; J.D., Emory University, Emory South Carolina Bar. The author wishes to thank the faculty of Emory Law School who provided valuable insight and guidance.