I. My Thesis

My thesis is that estate planning as I learned it nearly 40 years ago has not changed in meaningful ways. Sure, the formulas that we use (like dividing a taxable estate into marital and nonmarital portions) that are driven by tax-informed results are different, because the tax results have changed. And there are some techniques and strategies that are common today that changes in the tax laws have spawned (like GRATs and QPRTs). I'm actually pretty bored with much of that, and I have grown very tired of planning that someone trumped up (and sometimes patented) primarily for marketing purposes (to say nothing of race-to-the-bottom state law changes that represent state-legislated trolling for local trust business). What I mean about the lack of change is that the basic estate planning "boxes"[1] that planners tend to put clients into, and the structure of the basic dispositive provisions that are in use, have not changed much since they were developed for the clients estate planners served before I became a lawyer, decades ago.

Back then, most of those clients were men in my father's generation, the World War II (referred to herein as the G.I.) generation. Our planning options today essentially reflect what those G.I. men wanted. I stress what the men wanted because, back then, the planning was driven by the bread winner, not by the bread server, and largely the plans we crafted did not give the surviving spouse — almost always the widow — any control to make meaningful changes.[2] Demographically, virtually all the men in the G.I. generation are gone now, so estate planning today, especially for married couples, is for the next several generations. My observation is that it hasn't really adapted for those subsequent generations.

The G.I. generation had children who we know as the Baby Boomers (usually considered to be those born between 1946 and 1964). The generation between these two has defied definition. Some call it the "Silent" generation, because they didn't make much of a fuss about anything. A war era analog makes them the Korean War generation. My favored term is the Elvis generation (named for its most famous icon; you may prefer the Sandra Day O'Connor generation). Call it what you want, its members were born between about 1927 (too young to be involved in World War II) and 1945 (pre-Baby Boomer). They are the other group that is most likely to seek estate

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1. I thank Dennis Belcher for this terminology. What I mean by it is that estate planners identify client problems, evaluate the planning options (boxes) that might best address the situation, select the boxes that they expect to produce the best results, and then tailor those solutions to fit the client's needs.

2. This statement is not true, to the extent a marital deduction trust gave the surviving spouse a general power of appointment — before §2056(b)(7) qualified terminable interest property (QTIP) trusts were legislatively created in 1981 — but almost all of those powers were testamentary and seldom were they exercised, or meant to be. After 1981 estate plans pretty much stopped giving even that much control to the surviving spouse, because everyone grew enamored with the special benefits available only with QTIP trusts (for example, partial and reverse QTIP elections), which did not require the general power of appointment. The G.I. generation of men liked QTIPs, and in the main their surviving widows did not object.

To a lesser extent the denial of control also was not true to the extent the surviving spouse was given a nongeneral testamentary power of appointment, although most of those powers only permit the spouse to change the shares of remainder beneficiaries but not divert the wealth to outsiders.

planning today (although they don't have the same wealth as the G.I. generation's beneficiaries — the Boomers).[3]

Now, regarding my thesis: I'm confident that Baby Boomer clients are very different from their G.I. generation parents, for whom most of our current estate planning boxes were developed and refined. Boomer attitudes about wealth; about the role and abilities of women; about marriage, divorce, remarriage, and family; about education; and about work, careers, retirement, and about inheritance are all (remarkably) different from that of their parents in the G.I. generation. And I suspect that Boomers may not resonate with planning options that estate planners developed for the G.I. generation. This remains to be seen, because Boomers are only starting to become serious about estate planning as they finally inherit wealth. Most Boomers have not *yet* become orphans, in the sense that over two-thirds still have not lost their mothers.[4] And their need for estate planning is just beginning to become clear, as they reach an age at which they qualify for Social Security retirement and their alumni newsletters report classmates who have died of *natural* causes. My observation is that estate planners have not yet reconsidered the planning boxes that were developed for a prior generation of clients.

I'm less sure about whether the Silent generation of married clients differs from the G.I. generation. True to their name, they are less vocal than the Boomers, and they are a much smaller cohort than the Boomers (having been born during the lean years of the Great Depression and World War II). Little has been written about them, and the demographic studies are pretty sparse. We know that they are not nearly as well educated as the Boomers.[5] Women in the Silent

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3. A survey of estate planners conducted in 2007 reports that their client base was 43% individuals in their 60s (i.e., born before 1947), 34% individuals in their 50s, and 13% individuals in their 70s. See 2007 Industry Trends Survey at www.wealthcounsel.com.

4. Data represented in this article is harvested from a variety of sources, including U.S. Census Bureau, Statistical Abstract of the United States: 2001, No. 40. "Persons 65 Years Old and Over — Characteristics by Sex: 1980-2000"; U.S. Census Bureau, "Marriage, Divorce, and Remarriage in the 1990's"; U.S. Census Bureau, "Estimated Median Age at First Marriage, by Sex: 1890 to Present"; Houghton, "ACTEC and the Practice at 2000: Where Have We Been and Where Are We Going," 26 *ACTEC Notes* 110 (2000); National Center for Health Statistics, "Births: Final Data for 2005" and "Births, Marriages, Divorces, and Deaths: Provisional Data for 2005"; Putney and Bengtson, "Family Relations in Changing Times: A Longitudinal Study of Five Cohorts of Women," 25:3 *Int'l J. of Sociology and Soc. Policy* 92 (2005); Timmerman, "Retirement Income Decisions: The Silent Generation Speaks," *Benefits Quarterly* 30 (4th Quarter 2005); "Bequests to Boomers: Myth vs. Reality," madisonmagazine.com/article.php ?section_id=918&xstate=view_story&story_id=230292; MetLife Retirement Income Decisions Study: "The Silent Generation Speaks," metlife.com/WPSAssets/12303612051173729461V1FMetLifeRetirementStudySilentGenerationSpeaks.pdf; Strauss and Howe, "The Fourth Turning: An American Prophecy" (1997), fourthturning.com/html /silent_generation.html; "Senior Citizens Confident Assets Will Carry them in Retirement to Age 85," seniorjournal.com/NEWS/Retirement/5-06-21AssetsTo-85.htm; National Endowment for Financial Education, nefe.org/pages/whitepaperlifeplanning.html; "Number of People in a Family," hypertextbook.com/facts/2006/StaceyJohnson.shtml; "Children Ever Born," ublib.buffalo.edu/libraries/e-resources/ebooks/records/ecy7172.html.

Specific citation of authority for various demographic "facts" is not attempted and, in some cases, it is not directly available, the data being an extrapolation or interpretation of various sources. In that regard the representations herein are not scientific and should be regarded as only generally descriptive.

5. Less than half have a high school diploma, versus 87% of the Boomers; 53% of Boomers have some college; 31% have a degree. For Silents it was 38% and 21%. For the G.I. generation it was 7% and 10%.

generation were not as work-experienced,[6] and they may not be as financially facile. Some studies suggest that they resemble the G.I. generation much more than they reflect Boomer attitudes, and perhaps their notions about wealth, family, control, and inheritance are similar to the G.I. model. This might make the existing planning boxes appropriate for this cadre. To the extent this is true, estate planners may need two sets of boxes, for these two different generations of clients being served today.

My observation is simply the need for change. My sense is that most estate planners have not paid much attention to this demographic development.[7] I'd like to explore that notion in a number of ways in this Chapter. I say "It's Not Your Father's Buick, Anymore"[8] because the estate planning vehicle that my father thought was appropriate or desirable is not what I expect today's generation of clients to embrace.

Another reality that informs this topic is that estate planners bring certain biases to their work. We all have presumptions, predilections, and prejudices that influence our representations,

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6. In only 50% of Silent marriages were both spouses employed; Boomers exceed 70%.

7. We have seen demographic data on issues relating to elderlaw or the graying of America, but not on the next generation planning aspects of this topic. LIMRA and other retirement studies are not as useful as would be information about preferences or prejudices in terms of inheritance, the role of women, concerns about predators, fears about exhausting resources, altruism, desires regarding dynasty planning or incentive trusts, financial and investment acumen, business succession, and clients' sense of family and other changes (like providing for in-law children, the new biology, nonmaritals, step children, and adoption).

8. Although I don't intend this discussion to result in any kind of marketing frenzy, we know that the "It's Not Your Father's Buick" phrase actually came from an advertising campaign about change in automobiles. The 2008 economic turmoil and the fear of an industry collapse in Detroit may prove that the campaign was either too-little-too-late, or too false of a promise. There is much to be said about the client satisfaction element of this discussion. Cline, "The Fault, Dear Brutus, Is Not in Our Stars, But in Ourselves. Some Thoughts on the Estate Planning Profession," 33 *ACTEC J.* 34 (2007), reflects an introspection by estate planners regarding their role in the planning endeavor. But it is not primarily what I have in mind here — which is a reflection on the client base instead of what planners do for them. Cline stating that "we need to reinvent ourselves . . . to cope with [a] new environment" and that "lawyers in private practice are all salespeople" is a reality that only indirectly considers the core of my thesis.

Cline *does* address a portion of the question here when he speaks about one principle that clients care about these days. "How much money does it take to ruin a child" is a question that informs incentive trust planning. Yet Cline recognizes that "few trust agreements for minors address such possibilities" as "go-to-school or get-a-job" kinds of provisions. According to Question 13 in the summary of the JPMorgan study in Appendix H, incentive trust provisions are used quite infrequently (94% of the respondents in that survey report seeing this planning less than 25% of the time). And when Cline (in my view correctly) states that "saving transfer taxes is not the most important issue to clients, even when they say that it is," he is reflecting a reality that does not appear to have changed with the generations. Regarding incentive trusts in general, see McCue, "Planning and Drafting to Influence Behavior," 34 *Univ. Miami Inst. Est. Plan.* Chapter 6 (2000), and specifically ¶609.3, stating that discretionary trusts are "generally preferable to incentive trusts. Where the family is not highly dysfunctional, it is often desirable to sacrifice the objective focus of the incentive trust for the greater flexibility of the discretionary trust . . . [which] is also a better vehicle to deal with changing values over a long period of time." Because drafting incentive trusts is difficult — for all sorts of reasons — I agree that trustee discretion generates better results, *if* the "right" trustee is involved. By my lights trustee selection and succession is one critical constant in estate planning that will not likely change over time, and it may be the single biggest reason why dynasty trusts are unlikely to endure. Who will be trustee decades or centuries from now?

the recommendations that we make, and the documents that we draft. As proof, consider whether you believe that the "right" form of representation among descendants is the traditional common law per stirpes, or is it per capita or per capita at each generation? I'll bet that every estate planner has a personal sense about this, and it would surprise me if the typical planner's basic documents include a different form of representation than the one the drafter personally believes is best. Surely a good planner would change that preferred approach in a given situation, but I wonder how many planners really delve into this topic and try to educate their clients about the differences in approach, or why one approach may be better for a client's situation than another.[9]

My point is only that we make implicit recommendations to clients by the drafting choices that we make and by the planning boxes that we present as basic solutions. So an important element in this discussion is knowing our presumptions, predilections, and prejudices, and the extent to which these are a function of our generation, upbringing (in general, and in the law practice), and sensitivity to client situations.[10] And while my intent is to challenge you to consider the thesis, I encourage you to be circumspect about various specifics. Because I too am a merchant of various presumptions, predilections, and prejudices.

In this regard, please consider when you last undertook to identify and then to challenge your assumptions about what is appropriate or best for your clients, not in terms of the latest tax motivated changes, but rather based on the family or individual side of the endeavor. I see my role here as asking you to consider whether certain estate planning "wisdom" still is good advice today, for new generations of clients. I confess that I don't have many answers to recommend, and you correctly will remind me that my inclinations are not formed with the benefit of extensive client interaction — I *am* the pin-headed academic, speaking from my cloistered ivory tower.

So, I seek your help, to ground this in reality. I hope that collectively we will advance the estate planning endeavor in ways that are appropriate for the next client and not just for the last. I also hope that we will begin a discussion of various firmly held traditional concepts (whether they be presumptuous, predilective, prejudicial, or well-informed decisions) that may benefit

9. Please note that this is not meant to be a criticism; it is simply a reality that there are too many issues for a typical client to digest, given the time and cost that would be involved in raising and explaining each, and then teasing out the client's preferences. Clients in all legal endeavors rely on advisors to make judgments or choices, based on a variety of criteria that include the particular client and situation, as well as experience about clients in similar situations. The hard aspect in each of these endeavors is whether the planner made the right choice in distinguishing between issues that are important enough to raise specifically and those that admit to the planner's informed judgment. It may be fair to suggest that all lawyers suffer from becoming wedded to particular approaches and may not re-evaluate their judgment as often as changing circumstances may require.

10. I also do not mean to vilify the inevitable reflection of planner attitudes in the planning suggestions that are made. First, because it is unavoidable and, second, because clients simply cannot be expected to learn enough about and then make reasoned decisions regarding every issue that must be confronted in a typical estate planning engagement. A New England estate planner and long-time friend states that "part of my job has always been to do their thinking — or at least some of it — for my clients." My point is to be aware that we're doing it. As the same friend admitted: "I have not been thinking **about** who I have been thinking **for**." More accurately, as a group, I think we have tended not to think about how each generation of clients differs from the last.

from careful (re)examination. But I note that there are few planning profession committees, task forces, or list serves that have such an endeavor as part of their focus or charge.[11]

There is no way to delve into all the different planning choices that estate planners make in implicit and not so secret ways for their clients when directing them into the estate planning approaches that we use. But here follows a discussion of a few, along with a list of some of the questions that I have been asking myself. But first, a few demographic nuggets may be of interest.

II. A Few Demographic Factoids

- The average ages for first marriage and for first birth have been rising.[12] Were it not for two other factors, these might predict that surviving children will be a bit younger when their surviving parent dies. Contraindications are the number of nonmarital births — before the parents marry — and longer life expectancies.[13] All of which raises the really important question, which is the likely age of surviving children when they become orphans and inherit? My observation is that the typical surviving parent dies later in life than ever before, due to extended life expectancy. Thus, children are more likely to be a good bit older when they inherit than the ages (like 25, 30, and 35) for delayed

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11. At its Fall 2008 meeting ACTEC empowered a Task Force on 21st Century Estate Planning that has undertaken this conversation. Aside from that nascent endeavor, the closest bar association group that I have found that may have such a focus is the ABA Real Property, Trust and Estate Section Committee on Emotional and Psychological Issues of Estate and Financial Planning, the mission of which (as noted on their web site) is

> to assist the estate planning bar in understanding and responding to the interpersonal and emotional issues that are often encountered in the estate planning process. The committee's areas of focus include: 1) dealing with the stressful issues of estate planning; 2) helping clients develop plans that stress family values as well as tax savings; 3) understanding the client's relationship with money; and 4) special problems encountered in estate planning, including sudden wealth, issues with children and the issues involved in dealing with the terminally ill client. The committee is currently working on the issues involved in working with clients who are going through the grief process and its impact on the client and attorney.

abanet.org/dch/committee.cfm?com=RP592500. Although this is the closest committee I found on this topic, aside from its item 2 it is not focused the same as this Chapter.

12. In 2005 the average age at first birth for United States women was 25.2, which was almost four years older than in 1970. National Vital Statistics Reports (2007). The average age for Silent men to marry was between 22.8 and 23.2 (early to late in the cohort) and for women was 20.4 to 20.8. For Boomers it rose from 23.2 to 26.3 and 20.9 to 24.1. It continues to rise in Generation X (children of Silents). (Note that the average age for the G.I. generation was not informative, because the war interfered with normal marriage and child bearing.) "Mean Age of Mother, 1970-2000," Nat'l Vital Stat. Rep. (2002), which straddles several generations, shows an increase from 24.6 in 1970 to 27.2 in 2000.

13. Racial trends also have an impact that is difficult to estimate. For example, fewer than 75% of African-American women will marry, compared to over 90% of white women, which may mean that certain demographic trends are more notable in selected segments of the population. Because there has been a decline in the number of first marriages in response to a nonmarital pregnancy — the social stigma and therefore the drive to marry in that context is much diminished — it may be that marriage in a mainstream context is less changed than some raw data might suggest.

distribution that we routinely witness in trust provisions.[14] Unless a subsequent marriage is involved and the children from a prior relationship are not made to wait for the surviving spouse to die (which is not very common), do these ages for distribution seem sensible? In fact, where did they come from, were they *ever* appropriate, and when did you last consider them?[15]

- 83% of Boomers have children. For Silents that was 89%. Boomers have 2.1 children on average. Silents had 3.6 (the G.I. generation had 3.8 on average), which means that the "old-fashioned" support network (children as caregivers) for Silent generation clients is larger. But so is the group of their children (Generation X) potentially fighting for the wealth.[16] Also note that, with fewer children these days, a Boomer surviving spouse will need more wealth to live on than did a G.I. generation surviving parent. But fewer claimants will vie for it. Overall, will our notions about sharing the credit shelter trust change much, on this score?

- The number of married couples with children declined by about 40% between 1970 and 2000. The year 2000 census shows that fewer than 25% of all households are married couples with children. Meanwhile, children in mother-only households rose from 8% to 27% between 1960 and 1999, as did the number of women (with or without children) who never married.[17] This is consistent with a rise in the number of nonmarital births — now approximately 40% of all births (with little variation in the different relative rates among the races).[18] Note that the racial and economic aspects of various demographic trends have not been addressed by the estate planning community, nor has there been any notable change in the lack of racial representation in the ranks of estate planners. Where

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14. As an indication that this "regular" planning has been common and unchanged for quite some time, see Melfe, "Estate Planning from the Trust Officer's Viewpoint," 4 *Univ. Miami Inst. Est. Plan.* ¶70.1607 (1970).

15. If the rationale was to avoid the negative aspects of inheriting "too-much-too-soon," then the ages may remain a viable anticipation of a parent's premature death, but the three-stage form of distribution is designed in part to allow a beneficiary who receives substantial wealth to "find their way" and should be an important planning tool even for more mature inheritors. In which case the ages commonly employed are too low in planning for "normal" life expectancies and age at time of inheritance.

16. The growing concern over misuse of durable powers of attorney and litigation designed to recover unequal lifetime transfers, often to the powerholder personally, reveals that children fight for wealth these days even before their surviving parent is dead. In general it seems undeniable that clients and their lawyers are much less reluctant to litigate than they once were. And changes in family structure and traditions may generate more litigation yet. A veritable tsunami may occur as Baby Boomers inherit, and fight over their inheritances. This trend will further burgeon and accelerate as we add new dynamics like same sex arrangements, adult adoption, and the new biology. We know already that elective share litigation is increasing because of multiple marriages and the inevitable disputes between blood heirs and successive spouses. A survey of ACTEC Fellows in 2006 reports that 30% say that they already do substantial litigation. To put that in perspective, only 51% reported that they do tax planning!

17. Most of that increase was among African-American and Latina women.

18. Between 1980 and 2005 it rose from 18.4% of all live births to 36.9%. National Vital Statistics Reports (2007). This study reports that Latina women had three times the rate and African American women, had over double the rate of non-Latina white and Asian women.

are wealthy racial minorities in America getting quality estate planning services, and is *that* going to change?

- The number of children in grandparent-headed households also has increased, by 30% since 1990. What changes in dispositive patterns will this generate? Maybe none, because these households don't tend to be at the wealthy end of the spectrum? This is a new dynamic that may influence how clients think about the proper role of women; about parenting (for example, a potential backlash about child rearing); a sense of entitlement and perhaps a concomitant feeling of guilt, and the need to provide an inheritance; and so on. Will generation-skipping transfer tax planning and adoption of grandchildren increase?

- The number of divorces rose significantly in the 1970s and then leveled out (and now actually may be declining, although that may be a reflection of the decline in marriage itself),[19] as did the incidence of remarriage.[20] So, overall, families look different for both the Silent and Boomer generations, in comparison to the G.I. generation. Much more interesting is the pattern of divorce and remarriage as between the generations. For example, Boomers divorced their first spouse much earlier in their marriages than did their parents, for whom divorce didn't become "acceptable" really until the 1970s, when they had been married for decades. Many of their children were grown and out of the nest by then, and the divorce was likely much more polarizing. The men who remarried probably selected much younger women than did Boomers who divorced early in a bad marriage and remarried someone closer to their age. Even more important, when a G.I. man remarried a younger woman and they had a family together, those children by the subsequent marriage were likely much younger than children of his first marriage, while Boomers who remarried may have come to the marriage with children of each prior relation and they all were much younger, living together in a blended family, to which their parents may have added more of them. The point is that the conflict among the children and their step-parents likely was different from what we think of in terms of the G.I. phenomenon. Simply put, children of blended families are likely different from children of separate families and marriages later in their parents' lives.[21] But we talk about the dynamic of children by a prior relationship as if this was a one-size-fits-all dynamic.

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19. As reported by divorcereform.org/rates.html, the proportion of new marriages that are predicted to end in divorce has dropped to roughly 43%.

20. 70% of Boomers are married. Over half of them (38%) have been divorced. Again as reported by divorcereform.org/rates.html, 75% of all divorced people remarry, half of them within three years.

21. Also consider that Generation X children grew up with divorce — they think it is normal — and their parents were the Silent generation. Generation Y children are offspring of second marriages in the Silent generation — maybe between a Silent father and a Boomer mother — or they are children of two Boomers. Their generation likely reflects differences among their parents, which may alter planning with the children and conflict in mind. One report suggests that the number of children living with a divorced parent dropped by year 2004, although that also may reflect a drop in birth rates in general.

- It is no great surprise that more Boomer women report having depression than any generation before — both due to more work place and family obligations, and probably due to more accurate reporting. Studies suggest that the two most significant trends in the late 20th century were an increase in women in the labor force[22] — over two-thirds of women with children under age six are in the work force today — and the decline of marriage. That would account for a lot of depression! Quaere what impact it may have on the dispositive provisions these women will want in their estate plans.

- The social scientists also report lower self-esteem among women today. How should we understand that, and what planning might it predict? My own sense is that women have been treated less equitably: often they spend less time in leisure pursuits and, notwithstanding that they work more than men, they are paid less. I still cling to the notion that we are going to see an explosion in the number of surviving widows who reject a deceased husband's estate plan in favor of a state law elective share, even if the monetary value may be less, because that forced heir share is received outright and the spouse will want control and freedom. Curiously, I also doubt that dissatisfaction with a decedent's estate plan will be gender specific: I suspect that as more men become surviving spouses we will see a similar rejection of estate plans. Because the two most dangerous drugs are testosterone and adrenaline, and guys who get agitated and upset about the way they were treated by their deceased wife are not going to be passive. This is not a concern in states that do not provide an elective share (the community property jurisdictions, and Georgia) but elsewhere planning for (or to defeat) the elective share impresses me as having merit that estate planners still do not discuss. Estate planners in these situations might consider how to protect the plan against defeat by the forced share election.[23] Do you *still* think such planning is taboo — as not politically correct?

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22. One report states that 50% of all American women were employed in the late 1970s, as compared with just 38% in 1960. The rise in working women may at one time be both a function of and a contributing cause of the increase in divorce during the same periods. Whichever it is — chicken or egg — the number of children of divorce has risen by 300% since the 1950s and one observation made by an expert estate planner (who is not an expert sociologist, however) is that experience suggests that children of working mothers are "more ill-equipped for life" and "there is more 'unhealthy' behavior among adults who, when children, were not cared for by their mothers during 'normal working hours.'" Statistically, these children are twice as likely to be divorced themselves, and to have mental health problems, reports an April 2008 article in Newsweek, which also states that divorce rates have declined from a high of 5.3 individuals per 1000 to just 3.6 per 1000 (in 2006), but partly because marriage also has fallen from a high of 10.6 per 1000 in 1970 to 7.3 per 1000 in 2006. Further, "well educated and better paid [individuals] are staying married, while the poor are still getting divorced (people with college degrees are half as likely to be divorced or separated as their less-educated peers). And the younger you marry, the more likely you are to get divorced." Newsweek, April 21, 2008, at 49. None of this should come as a surprise, but quaere how many estate planners' intake questionnaire solicits the kind of information that would speak to these statistics and how they might predict client or beneficiary behavior in the future.

23. In that regard, consult Pennell, "Minimizing the Surviving Spouse's Elective Share," 32 *Univ. Miami Inst. Est. Plan.* Chapter 9 (1998). There is plenty that can be done to effectively disfranchise a surviving spouse's elective share, and I don't think any part of it is unethical (perhaps even if you purport to represent both spouses).

- As the population ages, another interesting dynamic is that more generations are alive at any given time (albeit with fewer members in each generation).[24] Known as "co-survivorship between generations," this means that more individuals will be looking to share an inheritance at any given time. It may seem counter-intuitive but I question whether this means that plans should *limit* the number of beneficiaries who line up to enjoy wealth during the surviving spouse's overlife, as the best (or only?) way to eliminate intergenerational conflict. Making everyone wait (or receive benefits only through the surviving spouse) may work better than having a trustee parcel discretionary distributions out while the surviving spouse is still alive.

- Also more critical may be planning for the least costly way of transferring benefits during the surviving spouse's overlife. I think especially of the §2503(e) ed/med and §2503(b) annual exclusions as good ways for clients with "modest" wealth to avoid the generation-skipping transfer tax during the overlife of a surviving spouse. See §§2611(b) and 2642(c). In much more wealthy situations I wonder if sheltering more than "just" the credit shelter amount is advisable. All of this may recommend planning that gives the surviving spouse the ability to transfer monies that qualified for the marital deduction by making tax free gifts during the spouse's overlife. We tend instead to draft to accelerate distribution of the nonmarital funds. As discussed beginning at page 16, this impresses me as backwards in a tax sensitive situation.

- Along these lines, the Pew Research Center[25] reports that 50% of all Boomers have dependent children — not all minors — and that ◆ 67% of Boomers who have children are supporting at least one child, ◆ 20% of Boomers with children are supporting a parent, [26] and ◆ 13% are doing both at the same time. Also note: some are supporting a step-parent who plays an important role in their life. That really is different. Moreover, almost 70% of Boomers with adult children are financially supporting at least one adult child. For 33% the Boomer parent is the primary source of that adult child's support. That tells us a lot about the children — beneficiaries — of Boomers (as well as about their debt service for tuition, mortgages, and credit cards), and perhaps also about notions of the proper use of a bypass trust during a surviving spouse's overlife. It especially makes us wonder about planning to benefit dependent ancestors,[27] because the "sandwich"

24. It is more likely that a 20 year old alive today has a living grandmother than that a 20 year old 100 years ago had a living mother!

25. The Pew Research Center, "From the Age of Aquarius to the Age of Responsibility" (2005).

26. Pew reports that over 70% of Boomers have a living parent, which is up 10% since the same question was asked by Pew in 1989.

27. For example, by creating a trust that provides a lifetime benefit to a surviving dependent parent, with the remainder to the decedent's surviving spouse. If it is vested that remainder will qualify for the marital deduction (it is not a nondeductible terminable interest because the spouse receives the remainder, which is not a terminable interest at all). Also viable may be insurance on the life of the client, funded by the client but owned by and payable to the dependent parent. Each concept is a major change from planning a generation ago.

period is being extended by (1) parents living longer and (2) multiple sets of children, children born later in life, and children taking longer to mature and leave the nest.

- Boomers are reported to not fear debt the way their predecessors did — it is a fact of life for them — although perhaps the 2008 financial meltdown triggered by irresponsible levels and forms of debt will change all that.

- A higher percentage of Boomers have pensions, and they are said to care more about leaving an inheritance to their children than the Silent generation — who are reported to care about providing for their surviving spouses but not so much for their children.[28] The Silent generation is said to underestimate their needs for retirement and health care spending, and overestimate the earning power of their resources. Perhaps this is because they are the last generation with defined benefit plans, and a reliable Social Security safety net, and their parents are deceased and therefore not a burden. In sum, maybe the Silent generation will be less agitated about how the nonmarital trust should be structured, but future generations will find this to be critical.

The point of these snippets of data is that estate planners seldom considered demographics in the past. Perhaps because the data was not available, or because it didn't matter (as much). What do we learn that is useful when we see data that says Generation X is a bigger saving generation than the Boomers, just to pick an example? Generation X distrusts Social Security and will have greater retirement benefits from their own savings as a result. But will their planning choices differ? And when we're told that Generation X invests much more heavily in mutual funds than do the Boomers, is that useful either — perhaps in terms of knowing the network of advisors on the client's team, knowing whether professional advisors and fiduciary services will be needed or valued, or what? The point is that we haven't really focused on the notion that the generations are changing, much less on what it means.

Oh, say, would it surprise you to learn that most of the data collected by organizations in the private sector was compiled by LIMRA and MetLife — the insurance industry? That ought to tell us something too.

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28. An interesting element of this is the fact that very few Silent or G.I. generation clients were the recipients of large inheritances. These individuals were much more likely to have earned their fortunes, as compared to Baby Boomers who have inherited more. The Baby Boomers are more concerned about leaving an inheritance — maybe because they received one — and seem also to worry more about the effect of an inheritance on their beneficiaries — maybe because they saw too many of their peers who were damaged by inherited money? Are the next generations different, more irresponsible, more coddled, more in need of incentive trusts, or is this a reflection of their parents?

There definitely is a major difference between the way Baby Boomers were raised, and how they are raising their own children. Think about it: would any parent these days allow their 12 year old son to ride the subway to a Chicago Cubs game and sit in the bleachers with those unemployed fans who hung out there during the day — which my folks permitted my brother and me to do when we grew up in the Chicago suburbs? I don't mean to suggest that my folks were irresponsible, but we went everywhere on our own, never would have thought of being ferried about to ball games and play dates by our parents. Nowadays it seems as though very few parents would consider letting their children do most of the things we did as children. Is the world really all that more dangerous, or is something else involved too, and what might that tell us about planning for Baby Boomers and their children today?

III. Marital Bequest and Nonmarital Trust Planning[29]

This long introduction was more than throat clearing, but it did delay saying more about thoughts relating to nonmarital trusts, which were the genesis of this topic. In addressing marital deduction planning between 2001 and 2010, an aspect of great concern to estate planners in general has been how to adapt to the change and uncertainty of the rise in the applicable exclusion amount, elimination of the state death tax credit and corresponding rise in decoupled state death taxes, and the potential for either reform or absolute repeal of the federal estate tax. In working through various aspects of the planning implications of all that uncertainty and change I came to a conclusion about what I thought wise planners would provide in times of uncertainty. But it is very different from what most planners do. And as I thought about why most planners recommend a more classic alternative, it struck me that most planners produce the same plan today that estate planners did 40 years ago.[30] Even though the generations of clients have

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29. Some of the planning that informs the following discussion will differ for high net worth clients. I'm assuming that few planners' practice is so limited. But, for some, the reality is that some of what follows is garbage all the time, and for most some of it is garbage some of the time. In some cases, however, some of the following is actually more relevant for the super wealthy. For example, notions about equality, about group trusts, about the structure of a nonmarital trust, about support and the sandwich generation phenomenon, all may differ. So might adult adoption and the new biology.

30. The following colloquy is taken from a panel discussion, "Estate Planning for Human Beings," 3 *Univ. Miami Inst. Est. Plan.* Chapter 19 (1969), featuring several of the nation's then most prominent and highly respected estate planners, a senior trust officer, and two law professors. Consider the attitudes revealed, then consider whether the nonmarital trusts that you routinely see or use have changed significantly since that date, and finally whether those attitudes and that trust are consistent with what you know about clients and the endeavor today:

> *Prof.*: . . . What does [the estate planner] do about the practical problem of meeting with the wife? Does he meet with her separately? . . . [D]oes the estate planner just talk to the client or does he insist on a separate interview with the wife . . . ?
>
> *Mr. C*: Only to the husband.
>
> *Prof.*: The estate planner should talk only to the husband? So the picture he gets of that family is just whatever the client chooses to tell? . . .
>
> . . .
>
> *Mr. W*: . . . Not every husband wants his wife to know exactly what he is doing.
>
> *Mr. C*: Exactly right. The husband may not want his wife to know what he is doing, but there are many cases where he is happy to let her know what he has done after he has done it. But he doesn't want her knowing it before he does it.
>
> . . .
>
> *Prof.*: Does the estate planner have an obligation to give his client fair-minded disinterested advice and how can he give him such advice if he has not had a full description of the family situation? What kind of a life is the wife going to have after this client is gone? Is the property to be held in trust? Is she simply going to get periodic payments from the trust company? Is she a woman who has always been interested in investments? Is she likely to want to get employment? Are these the kinds of questions the estate planner ought to get into?
>
> *Mr. C*: No, he should not. Let's take a concrete problem. Let's say the marital deduction is to be used. If the estate planner has the wife present, does he ask her: "Well, which way to you want it, outright or in trust?" When she is present, there are some things that can be said and there are some things that cannot be said — whether the husband is present or not. What is the planner to

changed and the married couple clients who are the primary object of marital deduction planning today are different from the clients for whom this planning was developed.

Recall that it is my overwhelming sense that, as a profession, we haven't really considered the demographic dynamic, nor have we focused on other changes that are not a function of changed tax or state laws. These demographic and other changes have been occurring, seemingly without notice, while we have been preoccupied with the agenda Congress wrote for us with constant tax law changes (or, to a much lesser extent, by state legislatures and the Uniform law mavens). My thesis is that estate planners might do well to consider the demographic changes now, particularly if we benefit from an extended hiatus from the tax agenda, once Congress finally resolves the end story of the 2001 "repeal." As it is, the current hiatus in tax law changes is the longest in nearly 40 years — making the recent gridlock in Congress a good thing in this respect (albeit our slumber has been disturbed by the automatic phase-in of the 2001 changes, particularly the applicable exclusion amount).

In terms of the marital planning endeavor, the most common form of marital and nonmarital trust drafting entails a relatively simple structure, that estate planners all know well. The

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> do? If he talks to the wife alone and she asks: "Well, what's he going to do for me," what can the planner say but: "Oh, I'm sorry, that is a privileged communication."
>
> *Mr. W*: Can we agree it is a desirable objective to try to get the entire family into the action?
>
> *Mr. C*: No, I do not agree with that.
>
> *Prof.*: I do not agree either. On the business of having a family meeting the estate planner ought to know as much as he can. He ought to hear more than one witness but, surely, he would not want to hear them at the same time.
>
> . . .
>
> *Mr. W*: One difficulty may be that some husbands have a limited concern with their wife's future happiness and may very well not want her brought in.
>
> . . .
>
> *Mr. C*: Statements have been made before saying that the family should be called in. So how about a little family meeting about disposition of the family business with the wife and the children participating? It would be a holocaust — an absolute holocaust. . . . Nothing will usually come out of such family discussions except utter chaos.
>
> . . .
>
> *Mr. S*: . . . If the plan simply provides financial security for the wife — a means whereby she will be supported for the rest of her life — there really is not any particular need to bring her in. . . . If this kind of security is the objective of the plan, it doesn't make much difference whether the wife is in on the conversations or not.

Five years after this colloquy a presentation at this Institute addressed "the role of married women in the estate planning process," "to suggest that estate planners become more effective estate planners by becoming more aware of both our own attitudes toward women and those of our clients." My observation is that the basic nonmarital trust provisions we still use today were formulated at the same time as these presentations, which is to say at a time when it was thought necessary to encourage estate planners to regard the client's wife as a client whose wishes should be considered in the estate planning engagement. See Bonapart, "Estate Planning and Women: Consciousness Raising for Estate Planners," 8 *Univ. Miami Inst. Est. Plan.* Chapter 10 (1974). Because an attitude of exclusion is anathema today, it would seem that plans born of that attitude should be antithetical today too, yet they have not changed in any meaningful way.

nonmarital trust receives the largest amount of a married decedent's gross estate that can pass with the least amount of federal estate tax (with a potential state death tax cost in some "decoupled" jurisdictions — that part of this planning has not yet been resolved by most planners). In 2009 this meant the first $3.5 million went into the nonmarital trust.[31] The balance of the estate typically qualifies for the marital deduction. In 2010 it meant the entire estate went to the nonmarital trust.

The traditional marital deduction bequest passes into a QTIP trust that provides the surviving spouse with nearly the minimum entitlement required by law — a naked life estate (which is the absolute minimum enjoyment required — whether of the all-income or 3-5% unitrust variety) and typically a right to receive corpus distributions in the trustee's discretion. The typical nonmarital trust (which may hold the decedent's entire estate, depending on the size of the exclusion amount in the year of death) provides income and corpus in the discretion of the trustee, for needs such as health, education, maintenance, and support in reasonable comfort (a classic ascertainable standard), distributable among a class of beneficiaries that includes the surviving spouse and a host of other family-member beneficiaries (sometimes just dependent children, in other cases all descendants of the decedent, in rare situations descendants of the surviving spouse if that is a separate group, and virtually never a surviving parent of the decedent or a child's spouse). Although this is changing, the typical plan does not provide much added control to the surviving spouse, who might be named a (but often not the sole) trustee or may be given various levels of power of appointment, depending on the tax consequences sought and the extent to which the decedent trusted the surviving spouse.

My recommendation differs regarding marital bequest and nonmarital trust planning. In most cases my strongest recommendation is to combine traditional marital deduction formula "reduce-to-zero" tax planning with the use of marital and nonmarital trusts that are as nearly identical as possible. That is, my *default* recommendation (all other things being equal) would (to the extent the client is willing and the spouse is able) begin with a template or recommended plan that:

(a) mandates annual distribution to the spouse of all income from both trusts,

(b) provides a power in the surviving spouse to withdraw assets from the QTIP trust (or some portion of it) and a nongeneral inter vivos power to appoint the nonmarital trust,

(c) provides for no other beneficiaries of either trust during the surviving spouse's overlife, and

31. That figure jumped from $2 million for just 2009, and it remains anyone's guess what Congress will do following the one-year repeal in 2010. Putting this in perspective, in 2000 the top 1% of U.S. households each held personal net worth exceeding $2.7 million. That represented 35% of the total wealth in America. The top 10% held nearly 70% of America's wealth. Sometimes referred to as "the carriage trade," this is an estate planner's primary target client base. Leaving aside the slightly distasteful elements of that characterization, the point is that tax is less important to a growing slice of this population: at $2.7 million being in the top 1% would not necessarily make a client subject to the estate tax.

(d) makes the spouse trustee of each trust.[32]

By my lights, the first advantage of this approach is that it makes little (if any) difference to the spouse whether the decedent's wealth is in the marital or nonmarital trust — the spouse's enjoyment is nearly the same either way. Thus, the spouse has little incentive to object to or elect against the decedent's plan (nor must the plan change every time Congress alters the size of the applicable exclusion amount). I think this is critically important because I expect Boomer surviving spouses — men and women alike — to be very much less passive than their mothers in accepting a plan that is offensive to the surviving spouse.

The most deviant of these recommendations is mandatory income to the surviving spouse from the nonmarital trust, and making the spouse the sole beneficiary of that trust during the spouse's overlife. There are a number of reasons for this departure from the "accepted wisdom."

1. One reason is that the mandatory income serves a §2013 credit planning objective,[33] which also makes adding a five or five withdrawal power for the spouse in the nonmarital trust wise planning. See Appendix A for an illustration, if you are not familiar with the tax benefits of this approach.

2. It also may avoid the need to comply with the income tax separate share regulations.[34]

3. In addition, the withdrawal right in the QTIP trust[35] and the nongeneral power in the nonmarital trust allow the surviving spouse to incur the lowest wealth transfer taxes

32. I do not favor cofiduciaries, particularly if the reason for their selection is because each is adept at less than all the functions required. For example, a corporate fiduciary may be a wise choice for its investment and administrative expertise but an individual is desirable for making distribution decisions. My preference would be to name the corporate as fiduciary and designate the individual as distribution director. Or name the individual as trustee and authorize delegation of the investment and administrative functions. Limited function advisors, directors, and agents avoid cofiduciary liability and do not diminish the benefits sought in using multiple talents. See Cohen and Frimmer, "The New Breed of Quasi-Fiduciaries — Splitting Duties and Personal Liabilities for Wrongdoing," 6 *Univ. Miami Inst. Est. Plan.* Chapter 14 (1972).

33. Hoisington, "Modern Trust Design: New Paradigms for the 21st Century," 31 *Univ. Miami Inst. Est. Plan.* Chapter 6 (1997), makes the economic case for unitrust versus all-income entitlements. In addition to the §2013 issue, several other tax law implications are informed by a right to all income, which may not be met with the marital deduction equivalence of a 3-5% unitrust entitlement (as authorized in Treas. Reg. §§20.2056(b)-5(f)(1) and 1.643(b)-1). Further, his recommendation is based on the primary objective of preserving corpus long term, which may not be a client's principal objective. The critical aspect of the recommendation here is that the surviving spouse be the exclusive beneficiary during the spouse's overlife, which does not depend on whether the spouse's entitlement is to income, an annuity, or distributions of income and principal in the trustee's discretion (or any combination thereof). It also does not address Hoisington's principle that it is better to force a change in beneficiary life style (based on the available resource) rather than to invest or distribute to maintain current or expected spending.

34. Treas. Reg. §1.663(c)-1(a). My surmise is that it does not matter how the separate share rule would allocate DNI between the two trusts so long as the spouse receives all income from both trusts.

35. A client might create separate QTIPs, one with a power of withdrawal and one with no power of withdrawal, the latter to hold assets as to which a fractional interest valuation discount would be preserved in the spouse's estate or to guarantee a minimum entitlement for remainder beneficiaries.

possible by making inter vivos gifts, in the process generating valuation opportunities such as by making fractional or minority interest gifts during the surviving spouse's overlife. See Appendix B for an illustration, if you are not familiar with the tax benefits of this planning.

4. The nonmarital trust is QTIPable for state death tax purposes, meaning that the federal unified credit will shelter the entire trust and a state marital deduction may be available by partial election for state death tax purposes as to any portion that otherwise would not avoid a decoupled state death tax with a lower exemption. (Note that a state QTIP election may require that the nongeneral inter vivos power of appointment not apply to the state QTIP elected portion of the nonmarital trust.)

5. In addition to reducing the likelihood of the spouse rejecting the decedent's plan in favor of an elective share, it also should minimize the potential for conflict during the spouse's overlife, by making the spouse the sole beneficiary. It gives the spouse total discretion whether and how to benefit any other individuals, particularly by using taxable marital deduction wealth before invading a sheltered (and generation-skipping transfer tax exempt) nonmarital trust.

6. This plan also avoids the need to use disclaimers as an affirmative postmortem planning device. And it similarly avoids the potential that partial QTIP elections might generate gift tax issues if nonelected marital property passes into a nonmarital trust that is less beneficial to the spouse than the marital bequest.

If the income generated by such a plan runs the risk of over-inflating the spouse's gross estate at death, it may be possible under total portfolio investment standards (another change since estate plans for the G.I. generation were crafted) to configure the investment portfolio to favor growth over income, and to avoid making principal and income act adjustments that favor the income beneficiary.

But note: this plan may not satisfy if the spouse and other intended beneficiaries of the decedent are at war with each other. In that case, a different approach may be required if the client wants some form of peaceful coexistence with enjoyment by concurrent but contentious beneficiaries. Quaere whether you would want to be the fiduciary of such a shared-enjoyment plan, however, such as with discretion to distribute income and principal from the nonmarital trust. Also quaere whether divorce and remarriage among the Boomer and Silent generations are enough different from the G.I. generation that we should not base the template plan on a presumption of conflict.[36]

Also note that my suggestion gives the surviving spouse vastly more control than is common. If you think back, QTIP was enacted in 1981, along with adoption of the unlimited marital deduction, I believe because men like members of the House Ways and Means Committee that crafted this legislation did not want their widows to have control over that much of their estates. And didn't we embrace QTIP predominantly because of its "handcuff" nature? Now quaere

36. An interesting suggestion from an estate planner with 40 years of experience is to ask clients "to 'convince' us that we should not assume conflict." The point is that it may be true that theirs is a friendly family situation, but we should not assume so without some persuasion or proof.

whether that desire to hobble surviving spouses is appropriate in crafting your template marital and nonmarital plans today, nearly 30 years later.

IV. Do You Trust Your Spouse?

One of my primary concerns in the context of traditional marital deduction and nonmarital trust planning is the message that we send to surviving spouses about issues of trust, and perceptions of their ability to deal with wealth.

It has been my custom to ask audiences of estate planners the following question, about themselves: "Do you trust your surviving spouse to have control over marital deduction qualified wealth, to make gifts following your death"? The response usually is overwhelmingly "yes." This especially was true among ACTEC Fellows at the 2008 annual meeting. Then I ask whether these planners ask their clients the same question, and make it possible in the plan for the surviving spouse to take advantage of the incredible opportunities that are available for transfer tax minimization by making inter vivos transfers. The response usually is that hardly anyone empowers the surviving spouse in this manner.[37] (ACTEC Fellows in 2008 outperformed the norm in this regard, but many of them attended that lecture accompanied by their spouse, and my guess is that this skewed *both* responses). The customary response makes me wonder why planners think their clients trust their spouses less than planners trust their own spouses. Our traditional planning boxes assume that the client does not trust the surviving spouse. Many planners don't even ask the question.[38]

More than any other element of traditional estate planning, I believe this presumed distrust — which manifests itself in a lack of control granted over the marital bequest — reflects the thinking of the G.I. generation of men about their widows. The most frequently heard response is that the propertied spouse fears that the surviving spouse will remarry and disinherit their children in favor of that new spouse.[39] As confirmed by statistics (and probably also undeniable in practice experience), the likelihood of a surviving widower remarrying after the death of his wife is much greater than the likelihood of a surviving widow remarrying.[40] Do you believe this

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37. See the lukewarm response to Question 3 in the summary of the JPMorgan study in Appendix H regarding planning that allows a surviving spouse to make gifts out of QTIP marital deduction wealth. Note, however, that the dynamic involved may differ in community property states in which the surviving spouse has control over half the community property, which may suggest that the lukewarm response is lower than it should be for just non-community property situations.

38. One ACTEC Fellow, friend, and distinguished alumni of Emory Law School, said to me in a fit of candor that the answer might vary depending on whether both spouses were present at the time of asking, which made me ask why the joint representation with a share-all-secrets form of confidentiality agreement makes sense — yet that also is the "industry standard" among estate planners.

39. Some would say that they trust their spouse, but not predators who may prey on their spouse. Quaere whether those responses are consistent. Surely the "trust" response implies that the client is confident that the surviving spouse will stiff arm potential predators of any variety — be they charities, children, or suitors.

40. A 1989 study cited by Waggoner, "Marital Property Rights in Transition," 59 Mo. L. Rev. 21 at 49 n.71 (1994), reveals that only 8% of all surviving widows remarry and that they wait an average of 8 years before doing so, whereas over 20% of all widowers remarry and in less than 4 years on average. In the time since that study do you think these numbers have gotten more or less dramatic? For slightly more

will change, and in what direction, in the Silent and Boomer generations? More importantly, has our profession been thinking and writing about such questions, and planning accordingly? Curiously, the 2008 ACTEC annual meeting experience suggests that Fellows *have* been thinking about this, in a more robust manner than among planners in general. But note that this is not borne out in the usual form book documents that are produced for general consumption, often by the same ACTEC Fellows for their corporate fiduciary clients to disseminate.

I do not have a statistic that shows how often remarried spouses disinherit their own children by a former marriage in favor of a new spouse. But most estate planners of any experience will confirm that surviving remarried widows seldom engage in disinheritance planning, whereas surviving remarried widowers do so with much greater frequency. So, if control over the wealth of the first spouse to die is a problem, it ought to be the wife who articulates the concern, and then only if the husband is likely to be the survivor and has the smaller estate (meaning there is logic in using a marital deduction bequest), which was not a normal paradigm for planning purposes in the G.I. generation. Instead, in the more common but opposite situation, the statement of fear about remarriage and disinheritance probably is a manifestation of what the husband would do if *he* survived, rather than a legitimate fear of what the wife is likely to do if she survives and has the power to withdraw corpus to make gifts.

Do you reflect these gender differences in your normal husband-wife planning? And how do you think Boomer or Silent survivors — male *or* female — will resonate with the plan we traditionally recommend, with its message of distrust? Although the 2008 ACTEC annual meeting responses suggest that this *is* changing, the empirical results in Question 3 of the JPMorgan survey summarized in Appendix H belie that suggestion generally.

It is hard to predict what we will find in the Boomer or the Silent generations. So, why not let the clients decide? In that regard, do *you* ask your married clients the trust question, and then draft accordingly? I wonder how many planners are reluctant, because they don't know what answer they will get if both spouses are together when they pose the question. And I wonder whether they are reluctant to meet with either spouse separately — because of their mutual representation engagement agreement regarding secrets. You may know that I think a share-all-secrets approach is corrosive and, more important, that it appears that the ethics discussion has not yet reflected the change in the generations either.[41]

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recent information see Ken R. Smith, Cathleen D. Zick and Greg J. Duncan, Remarriage Patterns Among Recent Widows and Widowers, at links.jstor.org/sici?sici=0070-3370%28199108%2928%3A3%3C361%3ARPARWA%3E2.0.CO%3B2-1.

41. My sense is that "old school" estate planners still resist notions such as conflicts of interest in representing spouses, as informed by their years of experience in representing the G.I. generation of clients. In thinking about Boomer conflicts, however, I wonder if we have turned that demographic corner yet, in terms of our evaluation of ethics considerations. I also believe that planners who structure their ethics compliance approach based on the 999 cases out of 1,000 that go well are looking at the issue from the wrong end of the telescope. For example, a mutual representation agreement really isn't important in the cases (the vast majority) that go well. The time when all this matters is in the one case in 1,000 that goes sour, in which case a shared-secrets agreement is much more likely to crater. In any event, will Boomer spouses present real conflict in a greater percentage of cases? I am aware of no study or even prediction on that demographic change.

This is critically important because the better mechanism for moving property to the next generation at the lowest aggregate tax cost is to take advantage of the full optimum marital deduction amount needed to avoid estate tax in the estate of the first spouse to die, and then have the survivor make inter vivos gifts to the same beneficiaries who otherwise might be the intended beneficiaries of a larger nonmarital bequest. This is true because, even if the survivor is in the highest marginal bracket for gift tax purposes, the effect of the tax exclusive calculation of the gift tax means that the effective tax rate on gifts is significantly less than the lowest rate that could be incurred on the same property in either spouse's estate.[42]

With the advantages to be gleaned from inter vivos giving by a surviving spouse, it pays to explore the notion of giving the surviving spouse the discretion to make gifts. Unfortunately, no one, including the spouse, may have an inter vivos power to appoint QTIP property away from the spouse.[43] Thus, this form of planning cannot be accomplished with an inter vivos nongeneral power of appointment in the QTIP trust.[44] Instead it requires either that the trustee make distributions to the spouse (without condition on how the spouse may use that wealth) or that the spouse be given the authority to withdraw corpus from the trust and, in either case, independently make a gift to anyone. Empirical data shows that the latter approach is uncommon.[45] Quaere whether we are on the cusp of a change in that regard, driven (perhaps) by the change in generations.

One of the several advantages traditionally associated with inter vivos giving is the tax exclusive computation of the gift tax. Other advantages routinely noted for inter vivos transfers are the gift tax annual exclusion, the powerful ed/med exclusion, shifting future growth, and shifting future income. Shifting appreciation would not make sense unless progressive tax rates are restored,[46] but those other opportunities remain — and none are offset or diminished by the bankrupt time-value of money notion. Moreover, there is a much greater advantage to inter vivos transfers of wealth, being valuation differences between the estate and gift taxes. Those differences inform yet another topic of concern among married clients.[47]

Effective valuation discount planning is accomplished if a marital deduction is generated prior to division of property but the subsequent pay-back of wealth transfer tax inclusion to the spouse is delayed until after division of property (assuming the loss of control that is represented

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42. See Appendix B for an illustration, if you are unfamiliar with the tax benefits of this gifting approach.

43. See §2056(b)(7)(B)(ii)(II).

44. I wonder why that rule made sense in 1981 when QTIP was adopted, and why no one has lobbied for a change to it since.

45. See Question 3 in the summary of the JPMorgan study in Appendix H.

46. For example, if S's wealth totals $2x and a flat tax rate is 45%, a tax of $.90x could be paid presently, leaving $1.10x. If the $2x were to triple in value before tax is incurred, $6x would incur $2.7x of tax, leaving $3.3x after S's death. Had the tax been paid earlier (that is, if an estate freeze had been performed when it was worth $2x), the remaining $1.10x would have tripled to the same $3.3x, making the freeze a zero sum game in terms of shifting appreciation in a flat tax environment. There are *other*, closely related, advantages of inter vivos transfers, but a classic estate freeze is not among them.

47. See Appendix C for an illustration, if you are unfamiliar with the tax benefits of fractional interest planning.

by a division occurs without incurring a tax on the lost value). For our purposes the whole planning issue comes down to whether married couple clients trust each other to permit the surviving spouse to exercise the control needed to effect these results. The G.I. generation largely did not — or so our historic planning would suggest. Do we know whether Silent and Boomer spouses are different, or do we just assume that they all are the same? I don't hear discussions or read about studies that address these kinds of questions. Notwithstanding multiple marriages and blended families, my overwhelming sense is that times, and trust issues, have changed. Enough at least that we should not presume that my father's estate plan (and conclusions regarding trust) are right for current clients. From our unscientific empirical inquiry at the 2008 ACTEC annual meeting, on this I may be preaching to the choir. As a profession, however, I'm not so sure we don't have a way to go yet.

Note also the presumption represented in this discussion. Estate planners (me included) instinctively recommend the use of trusts — marital, bypass, generation-skipping trusts, whatever — for a dozen good reasons. But most clients, if given the choice, would prefer not to use a trust — not either a QTIP nor a nonmarital trust. We know that the latter is necessary for credit shelter purposes if the spouse is not to be disinherited from that wealth entirely, but do we inappropriately "push" marital deduction trusts even when they are not "necessary"? Or when we're pretty certain that the surviving spouse's estate will be nontaxable even if the credit of the first to die is not sheltered? Or, worse, do we use trusts when they are an affirmatively detrimental suggestion, as for example using a trust as a designated beneficiary of a qualified plan such that doing a rollover is hampered? Indeed, with so much wealth protected from creditors in a qualified plan, is the spendthrift trust really all that valuable? Do we recommend the trust out of habit, or because it is what clients really need? And how will that "need" change if Congress adopts portability of the unified credit — a notion that will change the traditional planning landscape for all except (perhaps) for ultra-high-net-worth clients?

Even without portability, my sense is that we ought to seriously contemplate whether our advocacy of trusts is justified by client desire or whether it is a function of planner habit. Breaking that habit would be very hard for me, given my training and scholarship, but I sometimes wonder if it is the right abstinence to embrace. Surprisingly, asset protection trusts seem to be all the rage — clients raise the technique with their planners much more than in the past. Is that a function of effective marketing, prodding by those who have made asset protection a cottage industry, or are clients genuinely concerned about this? My overwhelming sense is that asset protection has been blown way out of proportion by those who have seized on scaring clients as a marketing ploy. But I'm just guessing, because I know of no empirical study that does not skew the response by the way the question is phrased. An interesting test would be how often estate planners have seen a spendthrift provision provide protection that was needed for an impecunious beneficiary, versus how often a spendthrift clause precluded planning that would have been desirable. Spendthrift cases are so rare — is it because the clause is so effective that these issues never reach the courts? Or is it because the concern is vastly over promoted? And will any of this change with the generations — especially given the greater comfort with prevalent debt and lessons that should have been learned in the 2008 financial meltdown?

V. Group Trusts

Another illustration about changing paradigms that might be useful relates to a form of drafting that both experience and a few empirical studies suggest is not very common.[48] The typical estate plan anticipates a fund large enough to justify division of the family trust (typically after both spouses have died) into separate shares for lineal lines of descent — living children and descendants of deceased children. The alternative illustrated in Appendix D anticipates a single "group trust" that will be held until some time after the death of the surviving spouse (or after the death of the settlor, if the trust is not to be held for the benefit of a surviving spouse).

In some circumstances the family trust will be held as a group trust but never divided into shares, either for immediate distribution or to be separately held until a child reaches an older age. A good illustration of when this might be appropriate is a family with many children whose ages are quite disparate, or with children all beyond the age at which an inheritance would be meaningful (and so the trust will be held into the next generation), or some combination of these factors. Perhaps a blended family, as discussed earlier — in which his, hers, and theirs need to share a fund created by both spouses — although such a combination and sharing of their collective wealth traditionally has been very uncommon. The reflected reality is that separate shares may be uneconomical or unfair, because older children benefited from receiving their education and payments for other major expenses prior to the family wealth being divided into equal shares, while younger children will consume their separate shares to pay for similar items that arise after division. This is particularly relevant if the age spread among children is substantial or the amount of wealth involved is not.

A group trust also may be appropriate if some children have extraordinary needs, which ought to take priority above all else. And it might effect the desire of clients with a traditional or blended family to empower a trustee to continue providing for all of the children in a way that reflects different needs and abilities without what might be perceived as the "unfairness" of creating equal shares for individuals who are anything but homogenous or "equal." Finally, it can avoid one group of children benefiting substantially more than others, just because their parent was the more wealthy spouse. With a changing paradigm of marriage, remarriage, and blended families, G.I. generation notions of division and separate inheritances may not make sense in some Silent and Boomer situations. Nevertheless, both empirical and apocryphal responses reveal the very suggestion here is very bold.

In this regard, it is impressive that, absent the special circumstance of a special needs child (who needs added protection) or a black sheep (who is being disinherited), the G.I. generation of parents were nearly unanimous in saying that they wanted to treat their children *equally*, albeit that isn't what they did when they were alive. Instead, most parents treat their children *equitably* — maybe communistically is a more accurate (albeit a more hot button term) — in providing for their children inter vivos.[49] But they still think, and they say, that they intend to treat (and love)

48. Question 17 in the summary of the JPMorgan study in Appendix H shows a response that separate shares are created for children in over 95% of the cases the respondents normally review.

49. A variety of empirical studies suggest this dissonance, between inter vivos transfers and bequest behavior at death, yet none has posited a good explanation for why it occurs. For example, Light and

all their children equally at death. Why does being a good provider, in an appropriately equitable (not necessarily equal) manner, change when the client talks about their postmortem intent?[50] My mentor was a very wise and vastly experienced and sensitive estate planner who used to say that an effective estate plan is an extension of the decedent's pocketbook. And if the observation is correct that most decedents don't make equalizing distributions when providing for children

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McGarry, "Why Parents Play Favorites: Explanations for Unequal Bequests," suggests data showing that 75% of parents make inter vivos transfers that are unequal, but only as many as 20% do so at death. The results to Question 17 in the summary of the JPMorgan survey in Appendix H are nearly identical.

Ohlsson, in a study titled "The equal division puzzle — empirical evidence on intergenerational transfers in Sweden," suggests that inter vivos gifts are private while testamentary gifts are public, leading parents to make equal divisions at death to preserve their reputation. He and others suggest that bequests "signal parental affection" such that "[p]arents wish children to believe that they love them equally [so as] not to hurt their feelings." Many estate planners suggest that equality is the key to minimizing postmortem conflict among beneficiaries. But quaere why failing to even out inter vivos inequities is not as likely to yield conflict postmortem.

No study yet reveals the full measure of inequality, or explains it. One explanation for *unequal* bequests is an "altruism" model — that parents seek to equalize marginal utility among children by giving the most to the least wealthy of their children, to put them all on a level playing field. The fact that unequal bequests occur more often among older children suggests that parents have more information about the relative wealth (and prospects) of older children, and then more reliably embrace this "balancing" or leveling of wealth. Ohlsson's study suggests that inequality is more common in larger estates and with older children — the former presumably because differences in shares are less significant if everyone is receiving significant (albeit unequal) amounts, and the latter presumably because the parent is far more aware of the difference among the children and the likely trajectory of a child's life (and therefore need for differing amounts of the parent's largesse).

Some researchers posit an "exchange related" inequality, that repays extra efforts expended during a parent's life by one or more children.

And finally, a small cohort suggest that there is a biological prejudice to benefit natural children over step-children and adopted children.

Two other matters may affect the equality puzzle. One is that state laws default to equal distribution (albeit they differ on what they think "equal" means — per stirpes equality among blood lines, or per capita equality among similarly related beneficiaries) and — in Sweden (Ohlsson's social laboratory) and most civil law jurisdictions — legitime affects the extent to which inequality is permitted. The other is the fact that the estate planning boxes that we use typically predict a desire to make equal dispositions — making it more difficult for a client to select otherwise. This is a chicken-and-egg kind of notion, the boxes having been developed because of the perceived desire for equality and then the boxes themselves foster (or discourage deviation from) that paradigm.

50. Note also that, regarding grandchildren, clients also say that they love them all equally and want to treat them all the same, yet surveys like that done by Ray Young to support the Uniform Probate Code per capita alternative to the traditional per stirpes division show that estate planners routinely do not follow that approach. See Young, "Meaning of 'Issue' and 'Descendants'," 13 *ACTEC Prob. Notes* 225 (1988), and authorities cited therein. Indeed, the Uniform Probate Code got this reform "wrong" back in 1969, a reality that it admitted when it modified the rule to what is now known as per capita at each generation, as adopted in the 1990 revisions to §2-106(b). Still, estate planners routinely reject both forms of per capita equality, in favor of the more traditional different variety of equality (per stirpes among blood lines, rather than across or among similarly related beneficiaries). See Question 14 in the summary of the JPMorgan study in Appendix H, which shows that the use of per stirpes is the overwhelming drafting preference. My only point is that we dither over these notions of "equality" while clients tell us by their lifetime apportionment of wealth that they don't really want equality at all — instead, they want equity.

during life, it seems odd that this changes at death. What accounts for this dissonance — between what people do while alive and what they call for in their estate plan?

One estate planner whom I deeply respect suggests that group trusts are not realistic (they "sound great in theory") because most children want independence, they have different financial needs and, consistent with that, different investment perspectives and risk tolerance, all making consensus difficult. Further, children may have trouble accepting that their parent favored some over others, but they are much more reluctant to accept the judgment of a trustee. Worse yet, discretionary distributions generate resentment and manipulation (money "is all about keeping score" in some families), and beneficiaries "are pretty adept at rationalizing" why they deserve more and others should get less. So the next suggestion is very wise: "When I have done a pot trust long term, I usually give the trustee or someone the ability to split the trust per stirpes so the families can go their own way at some point, which they almost certainly will do eventually to keep peace." My personal sense is that this may boil down to two factors.[51]

One factor is the concern of parents that inequality will foment disharmony among their children, and potentially leave a legacy that suggested that the parent was playing favorites and somehow didn't love each child as much as the others. As their final message, they are reluctant to be thought about badly by those who were given less. I don't actually think that is persuasive if a group trust is involved, because each beneficiary has an equal chance to receive distributions. Moreover, if favoritism *did* exist inter vivos, the equal bequest at death will not undo years of knowing that poorly disguised reality.

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51. There may be a third factor. My Emory colleague, at the Business School, is Prof. Jag Sheth. He has done path breaking research into climate, culture, and consumption patterns that puts our concepts about equality in a different light. He suggests that the commonly articulated desire "to treat all my children equally" is a northern/cold climate notion. He says:

> Northern Europe features very high individualism, high equality, low uncertainty avoidance, and low focus on material achievement as compared to Southern Europe. . . . The Northern European climate is highly variable and dynamically uncertain compared to the Mediterranean or tropical climates. It is, therefore, important to avoid uncertainty, as it literally can impact survival. . . . Similarly, in colder climates, rugged individualism . . . would be valued highly. . . . Equality prevails because each person in the family (both men and women) is equally valuable in extracting scarce resources from unforgiving nature.

If Sheth is right, however, would we expect primogeniture to be a creature of English common law, or a hold over from some other construct (such as Roman law)? And what differences in inheritance laws would we find if we did a cross-climate comparison? See, e.g., Frances Foster, "Linking Support and Inheritance: A New Model From China," 1999 *Wis. L. Rev.* 1199; and Frances Foster, "Towards a Behavior-Based Model of Inheritance: The Chinese Experiment," 32 *U.C. Davis L. Rev.* 77 (1998), exploring the Chinese concept of inheritance. Again, quoting Sheth:

> Given that most of the Northern terrain is rugged, with very limited land for habitation, it is natural to assume that people will become territorial as a means to survive. On the other hand, when land is plentiful with significant potential for habitation, it is likely that people will be willing to share. . . . It is interesting to note that the expression "good fences make good neighbors" is a saying of Northern Europe and not Southern Europe.

I wonder whether a cold versus temperate climate study of prejudices and predilections about wealth would reveal important differences about such things as equality and equity. See further my ruminations about how we divvy wealth among natural objects of a client's bounty, at text accompanying note 49.

In the final analysis I suspect it boils down to a different factor, being fiduciary selection. I suspect we would find sharing more acceptable if we believed that a trustee would be efficient and insightful in discriminating between legitimate need and ineptitude, lack of ambition, greed, or other sources of demands for more than a fair share. Unfortunately, experienced fiduciaries think that discretion like this is the devil. Equal may not be equitable, but it surely is easy.

A Fellow at the 2008 ACTEC annual meeting recommended creation of a separate trust that benefits children as a group but eventually passes that portion of the client's wealth to grandchildren, per capita, whereas the bulk of the client's wealth is divided into traditional separate shares for children. I wonder how clients with enough wealth might regard creating one "extra" share, to be held as such a group trust. And what percentage of the total wealth should go into that fund — an equal portion as if this was the share of another child, or a larger or smaller chunk? I think this is a useful reminder that our vision tends to be black-and-white — either we do one thing (separate shares) or we do another (a group trust), rather than doing a combination of each.

Quaere also whether issues of equality need to be addressed only if there isn't enough wealth to satisfy all the needs that exist. That is, if there is more than enough money to go around, is there less need to parcel the wealth based on artificial restrictions such as equality? To wit, would Bill Gates' daughters care that one got (even as much as) $1 million more than the other? And if there really is *not* enough to go around, then might there be even more of an incentive to use what little there is to maximum advantage — without "wasting" any on those who have lesser (or no) needs? Note how odd these suggestions sound to experienced estate planners with high net worth clients (and recall that those are not the vast majority of clients). Note also that gifts to charity in lieu of family may be the result when no one has a need for the money. I wonder why a safety net group trust is any less acceptable, in such a situation. Most importantly, just as a thought experiment, I wonder how many estate planners have considered these aspects of their standard planning boxes.

When a family *does* need the money, however, we might give added thought to the notion of sharing in a less artificial manner than "equal" shares. In some situations a group trust until the last child dies might be appropriate. In other cases the client ultimately will want the children to be able to go their separate ways, and it may be unwise to make older children wait for distribution until their younger siblings have reached the age for distribution, because there is too wide a spread in their ages. In such a case an alternative compromise, illustrated in Appendix E, permits each child to "peel-off" a share as the child reaches a specified age.[52] In each of these cases, adapting our traditional planning boxes may be wise, because changing family dynamics make these options more important and acceptable. In all of these cases exploring creative solutions that are outside our traditions will pay dividends. Unfortunately, in my experience our

52. Although it would be more complex, the peel-off approach could make a fraction of a child's share subject to a power of withdrawal and hold the balance under a plan like a more traditional group trust. It even could give a child a testamentary power of appointment if death occurs before distribution. Administrative and valuation problems in identifying the relative shares of the various children may make these approaches undesirable in most cases, however.

profession has not discussed shared wisdom on matters such as these nearly as much as we have collaborated in dealing with tax law or state law changes.

VI. Withdrawal Right versus Force Out Distribution

Not all of these considerations are a function of the demographic changes that first informed this topic. Nevertheless, I hope it is useful to think about other aspects of our traditional planning while we're at it. For example, Appendix F contains an illustration that is designed to address a planning issue that has always made better sense to me than the traditional approach and, truth be known, I wonder whether I'm reflecting a Boomer sensibility or just being different. I don't have any reason to think that this may change with or because of the generations, other than that it always has resonated with me. I'm not sure why the traditional plan ever made sense, however, and I don't know what informs the "accepted wisdom." So, I simply ask you to consider the following.

Most planners provide for entitlement to a share that is not held forever (e.g., it is not in a dynasty trust) after a certain age (I refer to "the age of maturity."[53] Some planners prefer to use other "markers of maturity" than mere attainment of age) by a force-out distribution. My preference is to allow withdrawal after the specified age (or other trigger), and my simple question is why anyone would force a distribution rather than allow withdrawal? Empirics show that the approach illustrated in Appendix F is *very* rare.[54] Is that a function of "old thinking" that could benefit from a re-evaluation? If not, what informs it — why do we ever use force-out distributions?

VII. The New Biology

Your father's Buick did not have a variety of bells and whistles that today are standard equipment (like air bags, a voice activated GPS, or coil-on-plug ignition and computer assisted fuel injection). In a similar way plans drafted today need to reflect some realities that were not historically relevant or that have evolved rather substantially. An important illustration of this is "the new biology." Notwithstanding the Uniform Parentage Act and the Uniform Status of Children of Assisted Conception Act (which provide that the donor of genetic material ordinarily will not be treated as the parent of a child conceived after the donor's death),[55] caselaw in related areas generally is agreeable[56] (but not uniform)[57] to establishing an inheritance right in a child

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53. I first heard this term from John Warnick as the trigger or barometer of readiness for distribution or withdrawal rights.

54. See Questions 4 and 5 in the summary of the JPMorgan study in Appendix H.

55. See Uniform Parentage Act art. 7 (see §707 in particular: a decedent is *not* the parent of a child conceived postmortem unless the decedent otherwise "consented in a record" premortem); Uniform Status of Children of Assisted Conception Act §4.

56. See, e.g., Gillett-Netting v. Commissioner of Social Security, 371 F.3d 593 (9th Cir. 2004), Woodward v. Commissioner of Social Security, 760 N.E.2d 257 (Mass. 2002), In re Estate of Kolacy, 753 A.2d 1257 (N.J. Super. 2000), and In re Martin B., 841 N.Y.S.2d 207 (Surr. 2007).

who is the product of artificial conception. Therein lies the issue. State law may say that an artificially conceived birth is treated as natural, and the husband of the birth mother is treated as the natural father, even if there is positive proof that his paternity is a biological impossibility. Presumably this means that a man who provided the sperm or a woman who provided the egg would not be the parent of the resulting child (unless the woman carried the child to birth and the man was the birth mother's husband). Nevertheless, state law may deviate from that seemingly straight-forward result.

The easy question is whether a DNA provider wishes for any child subsequently conceived and born alive to be regarded as the DNA provider's heir. Presumably leaving the deposit (not in an anonymous manner) is pretty good evidence of the depositor's intent that a child, even one conceived and born after the depositor's death, will have inheritance rights.

A much harder question arises if a client's *descendant* was the DNA provider. In thinking about posthumous conception, imagine that your client's child has died and thereafter the child's surviving spouse uses the child's genetic material to produce a DNA offspring of the child. Should that offspring be regarded as a beneficiary of your client's estate plan? Does your client want to give a blank check to an in-law child to make more beneficiaries in this way, to share in the client's estate plan, after the child's death? And do you think your client might answer differently if it was a daughter-in-law using a son's sperm to become artificially inseminated, as opposed to a son-in-law using an egg or fertilized embryo to implant in a surrogate mother? Like the stranger to the adoption rule, this is a much more controversial issue, about which it might be wise to ask your clients the question and, in either direction, make a specific provision about intent. Do you ask your clients their intent regarding such matters, or is this another of those "ancillary" issues about which we do not feel the need to concern the client or generate added fees to garner an informed response? That is, do you think for your client in drafting for this issue (indeed, do you draft for it at all)? And, is a one-size-fits-all answer likely to be correct — whether you draft it in your normal documents or it is provided by a uniform state law?

Note that a client who allows products of posthumous conception to benefit is giving a descendant's surviving spouse more control than if the plan just included that surviving in-law (the "forgotten beneficiary") as a trust beneficiary until death or remarriage (or shacking up), which seldom is done.[58] The new biology is going to infect this, because allowing an in-law

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57. See, e.g., Vernoff v. Astrue, 568 F.3d 1102 (9th Cir. 2009); Finley v. Commissioner, Social Security Adm'n, 372 Ark. 103 (2008); Khabbaz v. Commissioner of Social Security, 930 A.2d 1180 (N.H. 2007); Stephen v. Commissioner of Social Security, 386 F. Supp. 2d 1257, 1260 (M.D. Fla. 2005).

58. See Question 6 in the summary of the JPMorgan study in Appendix H. It is odd to me that a child and the child's spouse are allowed to enjoy a life style funded with trust income while the child is alive, but when the child dies the in-law surviving spouse's life style declines immediately as their descendants instead become instantly rich. This does not occur if a child's share was distributed to the child before the child died, and the child therefore was able to provide for the in-law surviving spouse out of that wealth. Or if the trust granted a withdrawal power and a corresponding power of appointment, allowing the child to leave the wealth in the trust but still provide for the in-law surviving spouse by exercise of that power. But a dynasty trust that will continue for the full perpetuities period allowed under state law (which may be forever) poses the issue, which will become much more important as more perpetual trusts are created. In that regard see Question 16 in the summary of the JPMorgan study in Appendix H, showing the insurgence of this planning as more states alter or repeal their Rule Against Perpetuities.

survivor to produce more DNA offspring who are beneficiaries may be more invasive than allowing the in-law survivor to enjoy personal benefits as a trust beneficiary.

Also consider surrogate motherhood. In these cases the wife of the natural father may not be the mother, without a formal adoption, and the law will need to wrestle with the historical notion that motherhood is the easy side of most questions of status. In "the old days" the natural mother typically could prove the parent/child relationship and historically it was the natural father's paternity that was uncertain of proof. That issue has not been made any easier in cases of assisted conception involving implants or transplants of embryos. Today the risk of multiple "mothers" exists and raises questions of status that historically were reserved for fathers. Indeed, there is a potential for five parents in some of these situations: the two who provided genetic material, the two who adopted or treated the child as their own, and the one who was the birth mother. A well drafted estate plan presumably addresses these questions of status as well — which definitely is not your father's Buick (or grandchild)! Plus, what would you guess: will a G.I. generation intent be the same as a Silent or a Boomer reaction to these kinds of issues? As rapidly as this development has occurred, I would not assume to know the answer, or whether a provision drafted even half a decade ago might still be the "best/right" approach.

VIII. Adoption

Adoption statutes since the 1950s in most jurisdictions generally treat adopted children as natural born for all status or inheritance right purposes, in the process abrogating the common law "stranger-to-the-adoption" rule.[59] This has created problems with respect to strategic adoptions, often of an adult, usually to engineer an inheritance result and, unlike marriage, adoption is a bell that cannot be un-rung. So, a child (for example) who adopts with the intent to create a descendant with an inheritance right cannot later un-adopt if that act proved to be a mistake.

By statute in most jurisdictions today another consequence is that natural parents are treated as nonexistent (except, as discussed below, in the step-parent adoption context) and the adopting parents take their place for all purposes, making the adopted child the same as a natural born for all purposes, even to inherit through the adopting parents from their relatives.[60] Overlooked or overturned are rights vis-à-vis natural grandparents (or other natural relatives), about which few drafters appear to make special provisions.

Looking at a different set of issues, in some jurisdictions there are statutory provisions[61] directed at cases such as grandparent (or other relative) adoptions, in which the intent is to limit the beneficiary to only one share of a decedent's estate.

59. Historically an adopted child was treated as natural born to the adopting parent, but under the stranger-to-the-adoption rule that adopted child was not treated as a natural born descendant of the adopting parent's ancestors. In most regards, that result has changed, albeit not necessarily for the better — as the adult adoption laws now are seeking to correct.

60. See, e.g., UPC §2-118.

61. Such as UPC §2-113.

Example. Assume child (C) bears a child (G) and then dies, leaving G to be raised by C's parents, who adopt G. If C's parents die intestate the question is whether G should inherit from the adopting parents as a child, as a grandchild representing C, or as both. Adoption statutes typically cause G to inherit only as a child of C's parents.

Typically a special rule also applies if a natural parent is married to an adopting parent.[62] Many of the most thoughtful statutes provide that adoption in this context does not cut the child off from either natural parent, or from their ancestors. Such statutes allow the child to "triple-dip," in the sense that the child could inherit from and through both natural parents and the adopting step-parent as well.[63] With respect to the converse situation (and only with the natural parent who is not the spouse of the adopting parent), however, the parent/child relationship may be terminated by the adoption. That natural parent, *and their ancestors* or other relations, may be cut off from the adopted individual. In addition, the UPC more broadly disallows either natural parent, or their kindred, from inheriting from or through the child, unless the natural parent openly treated the child as his or her own and did not refuse to support the child.

Example. Father and Mother (natural parents of Child) divorce. Mother remarries and her new Husband adopts Child. (Note that, under most state adoption laws, such an adoption effectively terminates the parent/child relationship between Father and Child and could only occur if Father either consents to the adoption or has his parental rights terminated, such as for refusal to pay child support.) The inheritance issues are whether Child may inherit from or through Father, and whether Father or his relatives may inherit from or through Child.

Under the UPC, in such a case Child — and Child's descendants — may inherit from and through Father but neither Father nor his relatives may inherit from or through Child.[64] In some states the result may depend on whether the adoption occurred after Father's death, instead of after a divorce. The reason for the different treatment presumably is that an adoption of Child by Husband following a divorce typically would require Father's consent, whereas an adoption by Husband after Father's death would not. In the divorce context, Father's consent to the adoption may be regarded as significant in precluding Father (and his relatives) from enjoying any status as a relative of Child following the adoption. Thus, in some states, if the adoption by Husband occurs after Father's death (and Father did not consent to the adoption or otherwise had his parental rights terminated), Father's kindred could still inherit through Father from Child.

Application of these rules on inheritance rights can yield inappropriate and inequitable results when an adoption follows the deaths of natural parents.

Example. Father and Mother die in an automobile accident. Mother's sibling adopts Child. The unfortunate reality is that, in many states, this will cut the family ties on the Father's side. Under UPC §2-119(c) this will not cut off Child from Father's family but it

62. See, e.g., UPC §2-119(b).

63. See UPC §2-119.

64. See UPC §2-119(b)(2).

> will cut them off from Child. These results probably are an unintended and thoroughly inappropriate result. Further, in many states (including those that have adopted the UPC) Child would be cut off from both natural lines and they from Child if the adoption had been by someone not related to Mother, Father, or their families,.

The simple question here is whether these state laws have motivated planners to draft documents to produce different results. Especially as illustrated in the next section, empirics suggest not. Quaere whether this too is just a function of these state laws "getting it right" or inattention to the more recent of these changes.

IX. Adult Adoption

Few state laws specifically address the difficult question of adult adoption and its effect on an estate planning document such as a will or trust agreement that already is in force.[65]

> Example. Assume Grandparent created a trust for the benefit of Child for life, remainder to Child's descendants, and Child adopts Child's spouse to give Child's spouse inheritance rights under the trust remainder provision. Under UPC §2-705(c), an adopted child will not be treated as a child of the adopting parent for purposes of someone else's dispositive instrument unless the adopted child lived while a minor (either before or after the adoption) as a regular member of the adopting parent's household. Thus, Child's spouse probably would not take as a beneficiary of the trust created by Grandparent if the UPC applied to this example.

The question for an estate planner today is whether to embrace state law, override it instead, or say nothing at all. Further, in the context of demographic change, is adoption different for the Boomer or Silent generations than it was for the G.I. generation? Certainly there are more step-parent adoptions, and probably more divorces following step-parent adoptions. In that regard it is easier to get away from a spouse than it is from that spouse's child, which may inform more and better targeted drafting. Yet that does not appear to be happening.

X. Half-Bloods and Steps

In regard to all of this consider a real case that is ripped from the headlines, involving wrestler Chris Benoit, who allegedly killed his wife and their son before killing himself. Will her property pass to their son and through the son's estate to his half-blood siblings (Chris' children by another marriage), which may include nonmaritals? Quaere whether treating half-bloods the same as whole-blood relatives is the right result in that case — or any? And surely it is a bigger issue today than in the past. The law that regards a blended family differently based on whether various children are of the half-blood or have no common ancestor may be the exact opposite of what a married couple may intend for their children of different relations. Adult adoption rules

65. See UPC §2-705(f). Notice that §2-705(f) has no counterpart in §2-119 dealing with intestate succession, probably because the phenomenon of adoption to affect intestate inheritance rights from a living person is not very common. Many states have no rule dealing with the adult adoption issue at all, under any circumstance.

also may be very wrong. Yet not many drafters' documents address these issues.[66] Isn't it time to do so?

XI. Nonmaritals

Nonmarital (out of wedlock, illegitimate, or bastard) children are an even greater issue today, because National Vital Statistics Reports show that over 40% of total births in 2008 were nonmarital, as is over 30% of the total American population under the age of 18. Consider first how you would find out whether a client has a nonmarital child (or grandchild), particularly if other affected parties (such as the client's spouse) are unaware of the existence of the nonmarital. Worse, you can't assume that this is a gender specific issue. Women have secrets too — among them being that some are mothers of nonmarital children that their husbands don't know about. Sometimes that child was raised by someone else (including the not infrequent happenstance that a very young unwed mother's family raised her child as if it was the mother's sibling)[67] — raising interesting generation-skipping transfer tax issues because there was no formal adoption. Most importantly, unlike the G.I. generation of men, not all natural parents of nonmarital children want to *exclude* the child.

It is relatively easy to write a provision that disinherits any individual not mentioned by name in the document, effectively dealing with an unwanted nonmarital child (or grandchild) without mentioning that heir by name. But how do you *provide* for a nonmarital, without tipping off other parties? All of these are issues that we really didn't address in the way back — even as little as 40 years ago. Today it is anyone's guess what a client might intend. Do you ask? Especially in a joint representation of spouses with a share-all-secrets confidentiality agreement? Surely the mutual representation agreement and the incidence of nonmaritals both have increased geometrically since I began the practice of law, 35 years ago. But has the planning response kept pace with those changes?

XII. Lapse

One final illustration of changes in the law about which it makes sense to draft today in a way that may not have been relevant previously is a state law reform that many regard as counterproductive. So you may need to override it.

A gift fails if it "lapses," which applies if a named beneficiary predeceases the testator or, increasingly, dies before some designated future event. Lapse in a will results if the beneficiary predeceases the testator, because the common law implies a condition of survivorship on the beneficiary taking the bequest — even if the document is silent regarding the need for the beneficiary to be alive to inherit. Thus, if the decedent's will provides "Blackacre to A," without specifying whether A must survive the testator to take, the common law interprets the will as if it read "Blackacre to A if living at my death" or "Blackacre to A if A survives me," and not as if it read "Blackacre to A, or to A's heirs or devisees if A does not survive me." The gift lapses if A

66. See Question 10 in the summary of the JPMorgan study in Appendix H.

67. See, e.g., In re Estate of Fabian, 483 S.E.2d 474 (S.C. Ct. App. 1997), in which the family's secret was maintained, even from the child, for nearly half a century.

is required to survive and does not. The drafting alternative is to give it to A's estate (i.e., A's heirs or devisees) or to A's descendants, by representation.

The issues in a lapse case are whether a beneficiary who predeceases nevertheless is entitled to a share and, if so, where does it go. No well drafted document leaves either issue unresolved. It will specify whether survivorship is required and, if so, what happens if the devisee does not survive. If survivorship is not required, the document could so specify and state that — even if the devisee does not survive — the interest then would pass to the devisee's estate and through it to the devisee's heirs or devisees. More commonly, the document will require survivorship and direct disposition of the devise if the devisee predeceases. But absent an effective provision, most state "antilapse" statutes dispose of a lapsed disposition, usually (if the statute applies at all) to the predeceased beneficiary's descendants by representation.

Typical antilapse statutes apply only to dispositions that are made by will at the death of a testator. They usually do not apply to transfers under will substitutes, including inter vivos trusts, even if distribution occurs under the will substitute at the testator's death. Nor do they typically apply to future interests. This, however, is subject to exceptions such as UPC §§2-706 and 2-707, which treat will substitutes and future interests the same as immediate distributions under wills for antilapse purposes. All of which informs careful drafting in all documents because, any more, you just don't know whose law will apply or what it will address, or how.

Antilapse statutes supply default rules that apply only if the document does not effectively say what happens to a gift that otherwise would fail. There is no lapsed gift on which the statute can operate if the document addresses that possibility with a gift over to another beneficiary. And historically an express requirement that a beneficiary be alive to take was enough to override the statute. Thus, a survivorship condition would override or negate the need for the antilapse statute. But UPC §§2-603(b)(3), 2-706(b)(3), and 2-707(b)(3) now specify that survivorship conditions alone do not override the antilapse statute, absent additional sufficient indications of a contrary intent (such as an alternative disposition).

These controversial provisions of the UPC inform the need to specifically provide for the contingency of a named beneficiary predeceasing distribution by providing an alternative gift over. This is another "not your father's Buick" kind of development, albeit not one tied directly to demographics (although it *is* magnified by the increased probability of a parent surviving a child, both dying of natural causes, all due to increases in life expectancy).[68] The UPC results are widely criticized for being both illogical and complex. The good news? The criticism of the UPC provisions (which took their unpopular form in 1990) is so widespread that your documents can and should do better. Don't leave this to state law, even if your standard documents previously did not address the issue. The point is that things have changed since "your father's Buick" estate planning documents were developed for the G.I. generation.

68. An illustration is provided in Appendix G.

XIII. Conclusion

Some of this topic/discussion is driven by demographics, which we haven't really studied as a profession. Some of it is just keeping up with change — apropos a question in the margin[69] about computer drafting of wills and trusts by lay people using software developed for use without the involvement of a lawyer. And some reflects planning approaches that are unchanged and not a function of these demographic developments or other changes but that, frankly, have never made much sense (at least, not to me).

So much of our work has been overshadowed by the agenda that Congress has written for us, in the form of tax law change over the past 33 years (since 1976 to be sure, and maybe since 1969). To a lesser extent the same might be said about the uniform laws (although many who plan estates ignore those legislative developments as either irrelevant or as commanding no special response).

My purpose here is simply to suggest that mainstream estate planners will benefit from a focus that considers more than just the tax agenda, and to encourage consideration of whether planning and drafting has kept up. I don't intend to say that I know the right answers to so many of the questions, or even to know how a typical client would elect if given a choice. As a profession we have given others a free reign in dealing with some of these issues, perhaps with speckled success. And with respect to some others of these issues, as a profession we haven't even begun the conversation about what a new generation of clients would prefer. I hope we can do that.

What follows is just a list of various topics that might provide a foundation for setting a new agenda. It certainly is not complete, nor will anyone resonate with every item. It may just help to begin a conversation.

1. Marital bequests and nonmarital trust drafting:
    a. Should the surviving spouse be the sole overlife beneficiary of the nonmarital trust?

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69. Consider the computer literate cohort of clients with less than enough wealth to be taxable: will they eschew the traditional sources of estate planning and do their own, using the internet and software drafting systems made available to the public at large? Is their use of technology sufficiently different than any generation before, such that they may do it themselves if they perceive the plan to be simple enough? After all, they use tax preparation software (such as TurboTax), and rely on the internet for much of their medical care information too. Will our profession address that phenomenon? Will we litigate to cure the problems created, attempt to educate potential clients about the hazards, work to make the on-line advice and the software products more reliable, ignore the issue and focus solely on high-net-worth clients, seek to provide reasonably priced traditional planning available in competition with these developments, or what? Note that over 99% of the decedent population is nontaxable. And one recent study showed that over 50% of the estate planning clientele possess between $500,000 and $2 million, making them wealthy enough to consider sophisticated planning albeit not sufficiently wealthy to incur federal estate tax. How many of these individuals will be do-it-yourselfers? See 2007 Industry Trends Survey at www.wealthcounsel.com. It might be interesting to know what the medical profession is doing about/with/against the Web MD trend. Are estate planners in a similar state as medical-providers? Are clients the same as patients, as service-consumers? What other analogs are there — accountants and tax preparation software? And is there demographic data on those consumers, and information about results?

b. Should the surviving spouse have a power to make inter vivos gifts from the marital trust?

c. If the marital bequest is not outright, is the spouse the (or a) trustee, or does the spouse possess other appropriate and desirable forms of control?

2. Family trusts after the surviving spouse dies (or perhaps after remarriage):

   a. Do you create a group trust versus division into separate (equal?) shares, and what is the impact of having blended family beneficiaries?

   b. Should you asset protect the wealth for the life of certain beneficiaries, or provide for distribution?

   c. Do you force out distributions or provide powers to withdraw?

   d. Especially to add flexibility, particularly in dynasty trusts, do you include inter vivos and testamentary powers of appointment (and is there ever a legitimate use of a general power to appoint today — other than as a power to withdraw, a la item c)?

   e. Trustee selection: do you use family members, professional individuals, corporate fiduciaries, or some other option(s)?

   f. What is the appropriate use of agents, investment advisors, trust protectors, and cofiduciaries?

   g. Do you provide for the "forgotten" beneficiaries — surviving in-law descendants — at least until they remarry?

   h. How should provisions address higher life expectancy (children now inherit near their own retirement age), the new biology, (*adult*) adoption (in or out of the family), stepchildren, lapse, and the likely existence of nonmaritals?

   i. What special dynasty and other generation-skipping trust provisions are desirable?

   j. Are your trusts designed to make advancement-style down-payment or seed-money distributions versus asset-protected trust ownership of homes and businesses held for beneficiaries, potentially for life?

   k. What about incentive trust provisions (other than mere attainment of age)?

3. Planning for single parents — is it the same as planning family trusts after the second spouse dies, or do differences in the entire dynamic inform (very) different choices and objectives?

4. The use of charitable split interest trusts, and lead versus remainder interests.[70]

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70. Note from the executive summary of a 2007 Northern Trust Company survey based on 2006 Federal Reserve data:

> High-net-worth households in 2006 reported charitable contributions of $17,400, on average, up from $14,400 in 2005. Going forward, however, current attitudes toward philanthropy suggest a modest pull-back by wealthy households. Entering 2007, fewer millionaires feel it is important to donate time and money to charitable causes, fewer want to be personally involved in their charities and fewer plan to increase their charitable donations in the coming year. With regard to

5. Changes relating to economic factors and differences in wealth accumulations:
   a. Estate freezing — yesterday's game in a flat tax environment.
   b. First to die insurance instead of survivor life.
   c. Deferral versus acceleration of state or federal death taxes.
   d. Use of tenancy in common (especially to garner valuation discounts) versus joint tenancy with right of survivorship (or tenancy by the entireties).
   e. The role of debt, and differences in investment "wisdom" today.
   f. Spend down planning and the use of special needs trusts.

6. There are items involving drafting that may need renewed consideration in light of other changes, but they are not necessarily tied to the demographics of changing generations. Included here might be
   a. Tax payment provisions.
   b. Administrative provisions such as trust investment powers, principal and income provisions, reflections of the separate share rules (and other income tax developments), and changes that may be around the corner under a new trust code.

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specialized giving vehicles, charitable bequests are by far the most popular, being utilized by nearly one in four millionaire households.

www-ac.northerntrust.com/content/media/attachment/data/white_paper/0702/document/wealth_america2007.pdf. The Northern Trust's 2008 survey revealed that the average declined to $11,000 in 2007.

Decamillionaires are said to be "more philanthropically inclined than their less wealthy counterparts and, because of the complexity of their finances and their greater concern with their legacy, are much more likely to utilize specialized giving vehicles such as private foundations and charitable trusts."

Clarified in The Northern Trust's 2008 survey was giving differences between the generations — Gen X millionaires (of which there are far fewer) being over twice as generous on average as their Baby Boomer and Silent Generation counterparts. The extent to which the 2008 economic meltdown will have long lasting implications on charitable giving is not yet measurable.

Curiously, The Northern Trust's studies also show that the desire to generate more wealth to leave a larger inheritance is very small (3%). And the goal of protecting their estate from taxes is even smaller (2%).

One JPMorgan regional survey reports that 12% of decamillionaires *intend* to use a charitable lead trust. But in the survey in general, charitable remainder trusts were used in only 7% of all cases, and charitable lead trusts were used in just 2%. The 2008 Northern Trust survey reports *intended* use numbers of 8% for charitable remainder trusts and 5% for charitable lead trusts, but actual use was only 7% and 3% respectively. Nevertheless, lead trusts are receiving more consideration than ever before.

According to Schervish, "Today's Wealth Holder and Tomorrow's Giving: The New Dynamics of Wealth and Philanthropy," 9 *J. Gift Planning* 15 (2005), decamillionaires (435,000 households with more than $10 million in investable assets) gave $14 billion to charity in 2001 — about 7% of all charitable giving. Modeling the numbers out to year 2052, Schervish predicts charitable giving of somewhere between $21 and $55 trillion in 2002 spending power, making charitable giving a "growth" industry for estate planners. What he doesn't discuss is how this will interact with family demographics and whether new donors will give as have those donors studied to date. 18 *Nonprofit World* 10 (November 1, 2000), reported that Baby Boomers are more cynical and disillusioned donors than their ancestors, and more demanding of tangible results from their charities. See 2000 WLNR 7380767.

Appendix A

For any who may be unfamiliar, the following example is illustrative of the planning technique alluded to in item 1 at page 14:

§2013 Credit Maximizing Example: Postmortem planning of the size of the marital deduction should consider the effect of a §2013 credit for previously taxed property, if the surviving spouse may be expected to die within 10 years of the death of the decedent (and especially in the unfortunate case in which the spouse already has died before the marital deduction has been claimed on the decedent's Form 706). For example, in Technical Advice Memorandum 8512004, D left a will that bequeathed to S an amount equal to the maximum marital deduction allowable to D's estate, and bequeathed D's residuary estate to a nonmarital trust that gave S an income interest for life. S died three months after D, from causes not foreseeable at D's death. S's personal representative disclaimed the marital deduction bequest, with the result that D's entire estate passed under the residuary clause to the nonmarital trust. This meant that no marital deduction was available to D's estate. Aggregate estate taxes over both estates were minimized, however, because the estate tax generated in D's estate increased the amount of the §2013 credit available in S's estate. This was because S's income interest in the nonmarital trust was sufficient to qualify for a §2013 credit notwithstanding that no part of that trust was includible in S's estate at death (and notwithstanding the nondeductible terminable interest rule for marital deduction purposes).

Under the actuarial tables, the value of S's life income interest (and the §2013 credit based thereon), was far in excess of the income actually received by S during the three months that S survived D. Nevertheless, because the actuarial tables must be used (because S's death was not clearly imminent due to an incurable physical condition that was known at D's death),[71] S's estate was able to maximize the credit at a nominal cost. The same result would be reached today under the final §7520 regulations.[72] This tax minimizing opportunity may exist even if income is payable only in the trustee's discretion rather than as an absolute entitlement of the surviving spouse.[73] However, Technical Advice Memoranda 8717006 and 8944005 denied the credit for discretionary income interests, so the better approach is to guarantee income to the survivor.

This being the case, some planning choices need to be made inter vivos, such as whether the death of both spouses within 10 years of each other is sufficiently likely that planning the nonmarital trust to maximize the value of the surviving spouse's income interest is better than use of an accumulation or spray trust. This may become even more true, depending on the

71. Rev. Rul. 80-80, 1980-1 C.B. 194.

72. In a less well planned manner, essentially this is what generated a sizeable savings in Estate of Howard v. Commissioner, 91 T.C. 329 (1988), and was the opportunity at stake in the simultaneous death cases of Estate of Carter v. United States, 90-1 U.S. Tax Cas. (CCH) ¶60,003 (E.D. La. 1989), rev'd, 921 F.2d 63 (5th Cir. 1991), and Estate of Marks v. Commissioner, 94 T.C. 720 (1990). These three cases involved tax savings of approximately $600,000, $300,000 and $200,000, respectively.

73. Estate of Weinstein v. United States, 820 F.2d 201 (6th Cir. 1987), and Technical Advice Memorandum 8608002.

applicable exclusion amount that can be sheltered in a nonmarital trust (but use caution — this will not matter if the unified credit will make S's estate nontaxable). Addition of a five or five withdrawal power will further maximize the value of a nonmarital trust interest in the surviving spouse for §2013 planning.[74] In a recent calculation with a 77 year old surviving spouse the five or five power added over 22% in value to the life estate calculation.

> Example: D has an estate of $10.0 million and S has an estate of $3.5 million. S dies within nine months after D's death but, because S was not terminally ill when D died, valuation of S's life estate in D's property is based on the actuarial tables, as required by §7520 and Treas. Reg. §20.7520-3(b)(3). Using 2009 rates and credits:

Optimum Marital		§2013 Maximizing Marital
$10,000,000	D's gross estate	$10,000,000
(6,500,000)	marital deduction	(2,181,063)
3,500,000	D's taxable estate	7,818,937
0	D's federal estate tax	1,943,522
10,000,000	S's taxable estate	5,681,063
2,925,000	S's tax before §2013 credit	981,478
0	§2013 credit	(981,478)
2,925,000	S's tax after §2013 credit	0
2,925,000	tax over both estates	1,943,522

The §2013 credit was computed based on S's life estate being worth 50.5% ($2,968,600) of the $5,875,415 nonmarital trust after paying $1,943,522 in tax. The assumptions underlying this computation will change monthly with the §7520 interest rate and annually with S's age. To make this hypothetical computation the assumptions made were that S is age 80, the §7520 rate is 3.0%, and S is given a five or five power of withdrawal over the nonmarital trust.

In this case D and S saved $981,478 in tax paid over both estates, representing a 28% tax saving (in this case, over 2.5% of the aggregate wealth of D and S). This planning requires some balancing, however, to ensure that S has sufficient assets to generate enough tax to consume the §2013 credit produced from the tax on D's estate, and D's estate is large enough to produce enough tax to generate the necessary credit. Several computations may be needed to strike the proper balance, and more computational complexity will be encountered if a state death tax is involved.[75] Software *is* available to do the calculation.

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74. See, e.g., Estate of Shapiro v. Commissioner, 66 T.C.M. (CCH) 1067 (1993) (91 year old surviving spouse died within five months of decedent; five or five power added 13.5% to value of lifetime annuity).

75. No state death tax, nor the §2058 state death tax deduction, is reflected in the sample calculation of S's tax liability, on the theory that there would be no state death tax if there is no federal estate tax payable after the §2013 credit is applied. That concept is not universally accepted, but was recognized as proper in a §2011 pick-up tax environment by Comptroller v. Phillips, 865 A.2d 590 (Md. 2005), Riethmann Trust v. Director of Revenue, 62 S.W.3d 46 (Mo. 2001), and In re Estate of Lacks, 662 N.W.2d 54 (Mich. App. 2003). With state tax variations in the wake of repeal of §2011 after 2004 it is impossible to generalize about how state death tax might be affected by such planning.

Appendix B

To illustrate the tax benefits of lifetime giving rather than incurring estate tax in either spouse's estate, assume the surviving spouse receives $1 million more property than needed, and is willing to part with that amount in the form of a taxable gift and the gift tax thereon. Even if the marginal gift tax bracket is 55%, the spouse could transfer $645,161 (after 2010) from the $1 million that is not needed; at 55% the tax on this gift would equal the remaining $354,839 that the survivor would pay to the government (assuming for illustration purposes that no unified credit is available).[76] This 35.48% tax rate on the $1 million that the survivor was willing to part with is significantly less than the 55% estate tax (after 2010) that could have been incurred in either estate, and the differential would be even greater if the gift tax bracket is lower than the maximum 55%.

The risk to consider is that the spouse may not live three years after making the gift, in which case the gross up rule of §2035(b) will apply. Like other aspects of postmortem planning to minimize the aggregate tax burden imposed on spouses, this concept also requires a little crystal ball gazing. If living three years appears to be a bad gamble, however, the alternative to seriously consider is §2013 planning of the ilk illustrated in Appendix A.

To confront these risks, the plan that makes sense for family and tax planning purposes is to create a QTIPable nonmarital trust that pays all income to the surviving spouse so that, if a postmortem partial QTIP election is made to incur some tax in the estate of the first to die, a full §2013 credit will be available based on the income interest. And to permit gifting by granting a power to withdraw from the QTIP marital trust.[77] The withdrawal power creates the ability to make the inter vivos gifts, which is the second aspect of the plan that makes sense.

Granted, there is a capital gain issue if the surviving spouse makes gifts of appreciating property rather than holding them until death to permit a §1014 basis adjustment, but pushing the pencil will show that the new basis at death (avoiding a typical, potential *worst case* 20% capital gain tax) may not make up for the tax saving attributable to making the gift. Saving the differential in tax will be a benefit of 19.52% after 2010 — between a 55% estate tax and a 35.48% maximum effective gift tax. The saving could be even greater — between the maximum estate tax and the minimum effective gift tax rate. The gift may fall behind holding property until death if death occurs within three years after making the gift, §2035(b) therefore applies, and low basis assets must be sold to generate liquidity to pay the estate tax generated by that event. Usually the assets used to pay the tax attributable to that event receive a basis adjustment at death, so this would be relevant only if transferee liability is imposed on the donees who hold low basis property — not a very likely scenario. Otherwise, holding property until death to garner the new basis under §1014 may be a fool's errand — it may not compensate for the gift tax saving otherwise available.

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76. The formula to make this computation is: transfer ÷1 + tax rate = taxable gift.

So: $1 million ÷ 1.55 = $645,161

77. Beginning after some delay — making this a QTIP trust and not a §2056(b)(5) trust, which would not affect the marital deduction but it might deny the partial QTIP election ability if the power were available immediately (because then the (b)(5) marital is automatic).

Appendix C

Assume that your client's estate includes a control block of corporate stock. Because the ultimate destination of the stock is irrelevant for inclusion valuation purposes, the stock will be valued under §2031 as a single block and, if a control portion of it is transferred to a marital deduction trust (or to the surviving spouse outright), case law confirms that a control block premium is available in determining the amount of marital deduction satisfied.[78] If corporate control does not change during the overlife of the surviving spouse and the stock is includible in the survivor's estate, the amount taxable will reflect the same control premium. But a significant valuation swing can be generated by a potentially small inter vivos transfer (itself with a minority interest discount) if the surviving spouse is given the power to make a gift just large enough to reduce the amount includible in the second estate to a minority interest.

Consider: assume D owns 75% of Family Corporation stock and makes an inter vivos gift of just over one-third of that interest to D's spouse, S.[79] Both the gift tax value and the gift tax marital deduction generated by the gift of that minority interest would be the same, reflecting a minority interest discount. When the slightly less than 50% interest remaining in D's hands is subject to tax (either at death or on a subsequent gift), it too would be valued at a discount to reflect its lack of control in the corporation.[80] Assuming D is not reluctant to part with absolute control over a portion of the stock during life, this division would ensure that no greater value would be subject to gift or estate tax in D's hands than would qualify for the marital deduction. A similar plan would entail a 100% owner giving 49% to S, giving a child 2%, and holding the remaining 49% to be taxed at death, all with appropriate minority discounts.

Assume, however, that D is unwilling to part with any of the stock during life. A second alternative that guarantees a marital deduction in the same amount as the value subjected to tax is for D to bequeath a control block of the stock to S (or a marital deduction trust), followed by S making an inter vivos gift of a minority interest that will leave a minority interest to be included in S's estate, both valued at a discount. This postmortem division of a control block of stock requires, however, that S be given some inter vivos control over the ultimate destination of the stock. For example, in a QTIP marital deduction trust, S would need an inter vivos power to withdraw the stock to make a gift thereof.[81] Alternatively, D could create a §2056(b)(5) marital deduction trust that grants S an inter vivos nongeneral power of appointment to make the same division of the stock. If either alternative is acceptable to D, then the value subject to gift tax would be discounted to reflect its minority status, and the remaining minority interest includible at S's death similarly would be discounted, meaning that D's controlling interest would be subjected to wealth transfer tax at a net minority discount.

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78. Ahmanson Foundation v. United States, 674 F.2d 761 (9th Cir. 1981); Estate of Chenoweth v. Commissioner, 88 T.C. 1577 (1987).

79. See, e.g., Estate of Frank v. Commissioner, 69 T.C.M. (CCH) 2255 (1995).

80. An issue might arise if that remaining block were given to S, although traditional valuation principles appear to hold that destination of the stock is not relevant for this valuation purpose. See, e.g., Technical Advice Memorandum 9432001, in which the decedent died owning 48% of the stock of a family corporation; the decedent's legatee was the 52% shareholder and the government held that the stock should be valued without reference to the number of legatees or the stock they already held.

81. Because §2056(b)(7)(B)(ii)(II) precludes anyone, including S, from possessing a power to appoint assets from a QTIP trust to a third party during S's overlife.

Appendix D

The excerpts in Appendices D, E, and F are from my Wealth Transfer Planning and Drafting classroom text, with forms that were reproduced with permission from The Northern Trust Company. The annotations are my comments, not typical footnotes — and reflect alternatives and explanations about the forms themselves rather than just legal references or asides.

5.05 <u>Group Trust</u>: After the death of my spouse, or after my death if my spouse does not survive me, the Family Trust, including any amounts added thereto from the Marital Trust, shall be held and disposed of as hereafter provided.

5.06 <u>Income and Principal Distributions</u>: Until the time hereafter fixed for division into shares, the trustee shall pay so much or all of the income and principal of the Family Trust to any one or more of my children and descendants of a deceased child of mine from time to time living, in equal or unequal proportions and at such times as the trustee deems appropriate, for the health, education (including postgraduate), maintenance, and support in reasonable comfort of my children and those descendants, individually and as a group, considering their needs, other income and means of support, and any other circumstances and factors that the trustee deems pertinent, adding to principal any income not so paid. No payment made for a child or other descendant of mine shall be charged against the share hereafter provided for the child or descendant or his or her ancestor or descendants.[a/]

5.07 <u>Division into Shares</u>: If upon or whenever after the death of the survivor of my spouse and me there is no living child of mine under the age of ** years,[b/] **the trustee shall**

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a. The gray tone background represents deletions to make this an all-descendants trust. Note that this form might be appropriate for a blended family, with the trustee making critical choices about relative needs. To open the class of beneficiaries might require reference to "my descendants and descendants of my spouse" or such. Also consider adding the "forgotten" children — in-law surviving spouses — as potential recipients. In that regard, is providing for in-law children different if there are grandchildren involved? And if a power to withdraw is given to a child, as illustrated in Appendix F, the beneficiary really should be given a power to appoint at death, that would include the spouse as a permissible appointee, because otherwise the powerholder is forced to withdraw and leave the trust property to that spouse, if that is the powerholder's intent. Finally, what is the fear of providing for the forgotten children? If the surviving in-law spouse has an estate for life or until remarriage, is the notion of bleeding family wealth to outsiders really true?

b. I admire how elegantly this provision anticipates division regardless of the order of deaths of the settlor and the settlor's spouse and the ages of the children at the death of the survivor. It also does not describe the "youngest living child" reaching the specified age, thus reflecting the possibility that the *youngest* child may never reach that age or (even more unlikely but still possible) that *no* child will reach that age. This provision applies when all living children have reached the designated age *or* if all children have died. In either case, no *living* child would be *under* the specified age.

The age you select is a function of why you used a group trust. For example, if the motivation was equality of treatment in paying for education, most folks would select an age such as 25. That is not too low as to thwart graduate school education or to hamper a child on "the extended plan," but not so high as to delay everyone while a "perpetual student" continues to defer getting on with their life. If the rationale for the group trust was to provide a safety net for a disabled child, however, it may be that division or

divide the Family Trust into equal shares to create one share for each then living child of mine and one share for the then living descendants, collectively, of each deceased child of mine.[c/]

5.08 Distribution of Descendants' Shares: Each share created for the descendants of a deceased child shall be distributed[d/] **per stirpes to those descendants, subject to postponement of possession as provided below. Each share created for a living child shall be held as a separate trust and disposed of as hereafter provided.**

Here the provisions of a typical trust (one that divides immediately into shares) would appear and be used for the balance of the trust provisions.

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distribution should not occur until that child's death. Note that with an older age it might be wise to include descendants and surviving spouses of deceased children. Also consider how these criteria inform selection of trustee, the size for a small trust termination provision, and other elements in the draft.

All of this likely has ripple effects of a variety of elements — including the role of women, their education and experience in the working and financial world, the appropriate age for children to inherit or take a share outright relative to the plans being created, and so on. None of which appears to have been studied or reflected in our day-to-day estate planning. Inheritance, and the "people aspect" of estate planning, is bound to change with these changes.

c. Substitute the following if distribution is to occur immediately upon division, rather than having the shares held for children until a later age:

5.07 Distribution of Shares: If upon or whenever after the death of the survivor of my spouse and me there is no living child of mine under the age of ** years, the trustee shall distribute the Family Trust per stirpes to my then living descendants, subject to postponement of possession as provided below.

Notice that such a plan could disfranchise the surviving spouse of a deceased child, who might become destitute at the same time as the settlor's grandchildren become independently wealthy. Also note that a per stirpes distribution need not be selected; other alternatives are available.

d. A predeceased child could be given a power to appoint this share, effective immediately upon division. Such a power might be a good way to finesse the in-law child surviving spouse problem, although consider the default provision to the extent the child does not effectively exercise the power.

Appendix E

5.05 <u>Group Trust with Peel-Off Provision</u>: After the death of my spouse, or after my death if my spouse does not survive me, the Family Trust, including any amounts added thereto from the Marital Trust, shall be held and disposed of as hereafter provided.

5.06 <u>Income and Principal Distributions</u>: Until complete distribution of the Family Trust, the trustee shall pay so much or all of the income and principal of the Family Trust to any one or more of my children from time to time living (exclusive of any children to whom or to whose descendants distribution has been made pursuant to the following provisions),[a/] in equal or unequal proportions and at such times as the trustee deems best, for their health, education (including postgraduate), maintenance, and support in reasonable comfort, considering the needs, other income and means of support, and best interests of my children, individually and as a group, and any other circumstances and factors that the trustee deems pertinent, adding to principal any income not so paid. No payment of income or principal to a child of mine shall be charged against the share hereafter provided for the child or his or her descendants.

5.07 <u>Distribution of Shares</u>: If upon or whenever after the death of the survivor of my spouse and me a child has reached the age of ** years,[b/] the trustee shall distribute to the child that fraction of the then principal of the Family Trust of which the numerator is one and the denominator is the number of children of mine then living and then deceased leaving one or more descendants then living, exclusive of any child or children to whom or to whose descendants a distribution previously has been made.[c/]

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a. This parenthetical is essential to preserve the pattern of this plan that a child benefits only until distribution of the child's portion of the trust. This parenthetical might be deleted if a hybrid plan were used by which a child did not receive a full share by peel-off distribution, although distributions to such a child probably should be only for extraordinary purposes and then only if other funds are not available to that child. And the sentence to which this note is attached could be altered to expand the group of current beneficiaries to descendants of all degrees, and in-law surviving spouses as well.

b. This age probably needs to be higher than in the group trust illustration in Appendix D, so as to hold more of the wealth for the younger beneficiaries, but not so high as to deny benefits while a child is most in need of the money. That notion itself may be silly, if the surviving spouse is likely to be quite old and the class of beneficiaries therefore also will be quite advanced in age upon creation of this trust. A consideration of age is another demographic change that has not been studied. E.g., my mother is 88 and I expect her to live another decade. If that's correct, I'm going to be over 70 when I become an orphan. Boomers and Silents were older at their first child, but will live longer. G.I. generation parents were delayed by the war in having their children — my father was 30 when I was born — so maybe all this is going to wash out. In which case I wonder if the traditional ages *ever* were right.

c. To understand how this provision works, consider a trust with three children: the oldest will receive one-third of the corpus upon reaching the specified age, the next child will receive half, and the last will receive the balance. A withdrawal right could be used instead of mandatory distribution, but the accounting and valuation problems this would raise probably dictate against it in most cases. Again, this could be tailored for a situation involving in-law surviving spouses.

5.08 <u>Share of Deceased Child</u>: If a child dies before reaching the age of ** years, then upon the death of the last to die of my spouse, the child, and me,[d/] the share of the principal of the Family Trust that the child would have received if the child had then reached the age of ** years shall be distributed[e/] per stirpes to his or her then living descendants or, if none, then per stirpes to my then living descendants, subject to postponement of possession as provided below, except that the share otherwise distributable to a child of mine who has not then reached the age of ** years shall be retained as a part of the principal of the Family Trust[f/] and except further that any share distributable to a descendant other than a child of mine for whom a share of the Family Trust then is being held hereunder shall be added to that share.

Here typical provisions like postponement of possession and facility of payment could be used for the balance of the trust provisions. And, again, in-law surviving spouses of deceased children could be provided for.

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d. This terse but understandable triggering provision will operate regardless of the order of the three possible deaths.

e. Work an example to persuade yourself that this distribution of the deceased child's peel-off share is essential and properly crafted to make certain the entire trust is distributed if the last child dies before reaching the specified age and, on the death of any other child, to preserve equality to those children to whom (or to whose descendants) a distribution previously has been made. A predeceased child could be given a power to appoint this share, effective immediately upon division. Again, this could be tailored for a situation involving in-law surviving spouses.

f. The net effect of this provision is to give a share of the deceased child's peel-off entitlement to those children (or their descendants) who already have received distributions, while retaining the balance of the deceased child's share for those children to whom distribution has not yet occurred. Again, work an example, only now assume it was the second child of three who died, childless, after one received distribution and while the third child still is a beneficiary of the trust. Half of the second child's "share" would go to the oldest child and the other half would remain in the trust for the youngest child, awaiting final distribution when that child reaches age. Again, this could be tailored for a situation involving in-law surviving spouses.

Appendix F

5.05 Division into Shares: Upon the death of my spouse, or upon my death if my spouse does not survive me,[a/] the trustee shall divide the Family Trust, including any amounts added thereto from the Marital Trust,[b/] into equal shares to create one share for each then living child of mine and one share for the then living descendants, collectively, of each deceased child of mine.[c/]

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a. A very common drafting error is the assumption that the settlor's spouse will survive the settlor. This simple clause avoids the dispositive glitch that otherwise would exist if division were dictated only "upon the death of my spouse." Another, more terse, way to state the time for division would be "upon the death of the survivor of my spouse and me."

b. The typical pattern would be to combine both spouses' property in this one trust following the surviving spouse's death. Even if the surviving spouse wishes to plan separately, this form combines all the wealth of the first spouse to die in this one trust after the survivor's death.

If the settlor does not wish to divide into shares *for descendants* the language following the death of the surviving spouse needs to be a little different, but the model is not that difficult. Consider the following template:

. . . divided into as many equal shares as needed to distribute * share(s) to X if (s)he survives me, * share(s) to Y if (s)he survives me, and * share(s) to Z if (s)he survives me. [The share that would have been distributed to a named individual if he or she had survived me shall be distributed to his or her descendants by right of representation or, if there are none, the bequest to that individual shall lapse.]

c. Another common drafting error is failure to anticipate death of a child before division of the trust into shares for children, especially if the deceased child left descendants who should represent the child. Or a spouse who should be provided for.

Another important issue is dealing with survivorship and "simultaneous" death (which is the term used loosely to refer to the situation in which two people die under circumstances such that the order of their deaths cannot be established by proof). State law often addresses this issue as between a testator and a beneficiary, but in this context the issue can be important as between one beneficiary (the second spouse to die, for example) and another (children), because the disposition of property could change if, for example, a child was deemed to have survived the division event and died immediately thereafter or died an instant before the time for division. One way to address this issue is to require that the child survive the division event by a period of time (such as 120 hours under the Uniform Probate Code or, probably preferable for a number of reasons, 30 days). A second approach is to include a simultaneous death provision such as the following, geared to the order of deaths between beneficiaries:

In all events notwithstanding any state law to the contrary, if the order of deaths between my spouse and me cannot be determined by sufficient evidence my spouse shall be treated as [surviving/predeceasing] me, and if the order of deaths between any other individuals cannot be determined by sufficient evidence the order of their deaths shall be treated as the younger of them having died first.

The presumption adopted in this provision is probably the exact opposite of what most folks would predict and is informed predominantly by tax motives. Consider the net result, for example, if a child and a grandchild were to die in a common disaster and the order of their deaths could not be determined. The grandchild will be presumed not to have survived, which makes the dispositive document govern disposition of the share the grandchild would have received if living rather than any estate plan of the grandchild (or state law intestacy if the grandchild had no other estate plan). That likely is what the average client would prefer if they thought about the issue. In a case like the grandchild it probably would send the grandchild's share to other grandchildren if the grandchild died without descendants, and that probably produces the same result as if the grandchild survived long enough to take and died intestate.

5.06 Distribution of Descendants' Shares:[d] **Each share created for the descendants of a deceased child shall be distributed per stirpes to those descendants, subject to postponement of possession as provided below.**[e] **Each share created for a living child shall be held as a separate trust and disposed of as hereafter provided.**

5.07 Income Distributions From Child's Share: The income from a child's share shall be paid in convenient installments, at least quarterly, to the child until complete distribution of the share or his or her prior death,[f] **except that, while the child is under the**

But perhaps not (for example, if the grandchild was married it might preclude the grandchild's surviving spouse from benefiting — which may or may not be appropriate), and drafting for those uncertainties is what this endeavor is all about! If there was only the one grandchild who was the child's descendant it likely would send the property to the child's siblings, which would be a taxpayer-preferable result because it would reduce or eliminate the generation-skipping transfer tax that otherwise would apply if the property went to the grandchild for an instant and then passed from the grandchild's estate to potentially the same individuals. Avoiding such a tax result is the true motivation for this provision. With longevity on the rise, this is more important than in the past.

d. In this plan division into shares for the children is postponed until death of the surviving spouse, on the assumption that the typical client wants to provide first for the spouse, making the children wait until the survivor's death before being in line to take a share outright. In some circumstances this will be contrary to the client's intent, especially if the children are from a former marriage or the client wants the children to receive some property during the years of their greatest need, regardless of whether a surviving spouse still is alive. In such a case, the following provision would be substituted for the normal provision that would benefit the surviving spouse during his or her overlife and the succeeding paragraphs would be renumbered accordingly.

5.02 Division into Shares: The trustee shall forthwith divide the Family Trust into equal shares to create one share for each child of mine living at my death and one share for the then living descendants, collectively, of each deceased child of mine.

In addition, the first clause of the contingent disposition paragraph would be altered to read **"If upon my death, or at . . . ,"** to account for the possibility that it might apply while the surviving spouse still was alive. Furthermore, the marital deduction pour over provision would be altered to provide for addition:

proportionately to the shares into which the Family Trust has been divided, provided that, if any share has been distributed in whole or in part, the property directed to be added thereto shall be distributed in the manner and to the extent provided with respect to the share as if it or the part or parts thereof were then being distributed.

e. The theory behind this treatment is to vest shares in grandchildren or more remote descendants to avoid Rule Against Perpetuities (which, today, may be a silly concern) and certain generation-skipping transfer tax problems (which, given the total lack of governmental enforcement of that tax, also may be silly) and to minimize administrative problems in what are likely to be smaller shares (due to the number of descendants involved). A full-fledged trust for this level of beneficiary could be drafted along virtually the same lines as the illustrative provisions in the text, if it is likely that sufficient assets will be involved and if these other issues are addressed properly. Those multiple trusts are likely to be pretty small in most cases, which accounts for this form being less concerned about them. But the converse might be true, depending on growth in the assets and size of the family. And again consider whether the deceased child's share should be held for the child's surviving spouse, at least until the spouse remarries.

f. Delete the balance of this provision if mandatory income is desired. Substitute the following if a unitrust distribution is desired in lieu of an income entitlement (supplemented by invasions of principal):

In each calendar year the trustee shall pay to the child an amount (the unitrust amount) equal to *% of the net fair market value of the trust assets (including all accrued and accumulated income)

age of ** years,[g/] **the trustee shall pay to or for the benefit of the child so much or all of the income from the child's share as the trustee deems necessary or advisable from time to time for the child's health, education (including postgraduate), maintenance, and support in reasonable comfort, adding to principal any income not so paid.**

5.08 Principal Distributions From Child's Share: The trustee shall pay to the child such sums from the principal of his or her share as the trustee deems necessary or advisable from time to time for the child's health, education (including postgraduate), maintenance, and support in reasonable comfort, considering the income of the child from all sources known to the trustee.[h/]

5.09 Right of Withdrawal:[i/] **After division of the Family Trust into shares and after**

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valued as of the first business day of each calendar year of the trust. The unitrust amount may be distributed in convenient installments, at least quarterly, it shall be paid first from income and then from principal to the extent income is not sufficient, and any income in excess of the unitrust amount shall be added to principal.

Note that unitrust drafting can become much more complex (for example, by using a "smoothing" approach that distributes a percentage of the average fair market value for a three year or longer prior period).

g. Any age could be selected here. Usually something in the early to mid 20's is appropriate. Delete all of this provision prior to this point if discretionary income for the life of the child is desired. Note that you could then marry paragraphs 5.07 and 5.08 together and eliminate some redundancy. Conversely, if the age were increased substantially it might be appropriate to also allow distributions to a child's spouse and descendants.

h. Consideration of more than just income may be appropriate, such as with the following substitution for the clause following the last comma: **"considering the income and other assets available to the child and the advisability of supplementations, the child's character, habits and diligence, progress and aptitude in acquiring an education, ability to manage money prudently and usefully, and ability to assume responsibilities of adult life and self support."** Incentive trust provisions such as this are discussed very briefly in note 8. As noted there, they are not in widespread use, and this is not the place to explore that topic further. Also consider whether this paragraph should permit invasions for a child's spouse, dependents, or descendants.

i. The theory behind this right of withdrawal (rather than a mandatory distribution provision) is to avoid forcing beneficiaries to accept property that they would prefer to leave in trust. This right eliminates the need for a child to accept a distribution and then create a new trust (which would be particularly unfortunate if the child were incompetent at the time for distribution, if the child could not be located, or if spendthrift protection would be lost in the process). For all tax purposes, however, to the extent the beneficiary does not exercise the withdrawal right the ongoing trust would be treated as if the share had been created by the beneficiary.

Substitute the following for paragraph 5.09 if mandatory distribution of the child's share is desired:

5.09 Distribution of Shares: When a child reaches the age of ** years, or upon division of the Family Trust into shares if he or she has then reached that age, the trustee shall distribute to the child half in value of the principal of his or her share then held hereunder; ** years thereafter the trustee shall distribute to the child the balance of his or her share.

Quaere whether a mandatory force out provision ever is appropriate. Yet the vast majority of forms mandate distribution. Compare Questions 4 and 5 in the summary of the JPMorgan study in Appendix H.

The foregoing provisions need not use a two stage withdrawal or distribution. See comment *l* for an illustration of a three stage provision. Also note how this provision anticipates the issue explained in the next comment below of a child already being the specified age when the trust or share is created ("when .

a child has reached[j/] the age of ** years (the first withdrawal opportunity),[k/] the child may withdraw up to half the value of the principal of his or her share, and may withdraw any part or all of the principal of his or her share at any time or times more than ** years after the first withdrawal opportunity.[l/] The value of the share shall be determined as of the child's first exercise of this withdrawal right, plus the value of any additions made thereafter (determined at the time of the addition). The trustee shall make payment without question upon the child's written request. This right of withdrawal shall be a privilege that may be exercised only voluntarily and shall not include an involuntary exercise.[m/]

5.10 <u>Testamentary Power of Appointment</u>:[n/] Upon the death of the child before

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. . or upon . . .").

j. Note that this does not say "*When* the child reaches" the specified age, because this provision must apply even if the child reached that age before division of the trust into shares, and this right is an on-going entitlement, not a one-time event, making an occurrence-"triggering" provision inappropriate. This is going to be more important because of aging — the children are likely to be so old when their surviving parent dies.

k. This could be any age, although typically it will be later than the age used in paragraph 5.07 to determine when (if ever) the beneficiary will begin receiving all income from the trust.

l. This number typically is five to ten years after the first withdrawal opportunity, the expectation being that the beneficiary will learn a few lessons from any mistakes that were made with respect to earlier withdrawals, without risking his or her entire inheritance. If the child's share will be large enough to justify withdrawal in three stages, substitute the following for the provision prior to this point:

5.09: <u>Right of Withdrawal</u>: After division of the Family Trust into shares and after the child has reached ** years of age (the first withdrawal opportunity), the child may withdraw from the principal of his or her share not to exceed in the aggregate:

One-third in value at any time or times after the first withdrawal opportunity;

Half in value (after deducting any amount subject to withdrawal but not actually withdrawn) at any time or times more than ** years after the first withdrawal opportunity; and

The balance at any time or times more than ** years after the first withdrawal opportunity.

Notice that allowing withdrawal of "one-third" of the share following *each* triggering date will not permit withdrawal of the entire share, making the declining denominator the necessary drafting method. If you don't believe this just run a simple illustration: the trust is $30 to begin and the child withdraws $10. When it is worth $20 the child should be able to draw down $10, not one-third of $20.

m. This provision is similar to a spendthrift clause, which otherwise might not apply to this withdrawal right. This provision may not be effective, but what is to be lost for inclusion?

n. This is a general testamentary power of appointment for wealth transfer tax purposes, but only to the extent the child is treated for tax purposes as the owner of the trust because of the power of withdrawal in paragraph 5.09. In some cases it will be preferable for this power to be available inter vivos as well. Furthermore, for generation-skipping transfer tax purposes some drafters make the entire trust subject to §2041 inclusion in the child's estate at death by granting a general power of appointment over the entire trust even if death occurs before the age specified for withdrawal. That approach is not recommended here because, generally, the generation-skipping transfer tax is the more attractive (and more malleable) of the two taxes. Another method of causing inclusion is appropriate exercise of a nongeneral power of appointment to trigger the Delaware tax trap of §2041(a)(3), as explained in Blattmachr & Pennell, *Adventures in Generation-Skipping, or How We Learned to Love the "Delaware Tax Trap*," 24 REAL PROP., PROB. & TRUST J. 75-94 (1989), abridged in *Using "Delaware Tax Trap" to Avoid Generation-Skipping Taxes*, 68 J. TAX'N 242-248 (1988).

receiving his or her share in full, the child's share shall be held in trust hereunder or distributed to or in trust for such appointee or appointees, with such powers and in such manner and proportions as the child may appoint by his or her will making specific reference to this power of appointment, except that any part of the child's share not subject to withdrawal prior to the death of the child may be appointed only to or for the benefit of any one or more of the child's surviving spouse, the child's descendants and their respective spouses, and my descendants (other than the child) and their respective spouses. For purposes of this provision, the term "spouse" shall include a widow or widower, regardless of remarriage.[o/]

5.11 Default Distribution: Upon the death of a child any part of his or her share not effectively appointed[p/] **shall be distributed per stirpes to his or her then living descendants, or if none, then per stirpes to my then living descendants, subject to postponement of possession as provided below, except that each portion otherwise distributable to a descendant of mine for whom a share of the Family Trust is then held hereunder shall be added to that share.**[q/]

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o. Why does this form not provide similar breadth elsewhere? For example, a child's descendants become beneficiaries after a child's death, even if the child's surviving spouse is still alive. If the child and spouse were dependent on this trust the child's death could be devastating to the spouse's well being. The standard trust does not provide for the child's surviving spouse unless the child does so through exercise of this power of appointment, which is just one of several reasons why powers are so important. As is a general reconsideration of that basic planning decision.

p. Notice that this provision refers to a failure to *effectively* exercise the power, not to a mere failure to exercise the power, making this default provision applicable if the beneficiary exercised in violation of the Rule Against Perpetuities or in favor of impermissible appointees or otherwise in violation of the power of appointment.

If a mandatory distribution of the child's share is dictated, substitute the following for the foregoing: **"If a child dies before receiving his or her share in full, then upon the death of the child his or her share . . . ."**

q This "add to shares" provision is designed to avoid a multiplicity of shares for any particular descendant.

Appendix G

The following examples come from the Comment to Uniform Probate Code §2-603.

> G's will devised "$10,000 to my surviving children." G had two children, A and B. A predeceased G, leaving a child, X, who survived G. B also survived G.

This is a class gift. At common law, B — as the only surviving member of the class — would have taken the entire $10,000. If an antilapse statute is in effect, and if it covers class gifts (as does the UPC and most other state antilapse statutes), the question is whether the word "surviving" in the devise negates application of the antilapse statute. In many jurisdictions it does (in which case B still would take the entire $10,000); under UPC §2-603 it does not, so B and X each receive $5,000. Which result would your client intend?

Implicit in the language used — "to my surviving children" — is an equal division; without some added indication that G would prefer the survivor to take everything, the UPC antilapse statute assumes to accomplish equality by bloodline. The survivorship condition alone is viewed as expressing no intention as to how the $10,000 should be distributed if one or both of the children predecease G, and the UPC antilapse statute therefore applies. (Note that the antilapse statute will not apply if there is additional evidence that the survivorship language was intended to defeat application of the antilapse statute, such as a designated alternative disposition of a deceased child's entitlement.)

> G's will devised $10,000 "to my two children, A and B, or to the survivor of them." Again assume that A predeceased G but A's one child, X, survived G; B also survived G. Does X take the $5,000 A would have received if A had survived, or does B take the entire $10,000?

Unlike the prior example, the UPC Comment states that B takes the entire $10,000. The gift is viewed not as a class gift, but as a gift of $5,000 to A and $5,000 to B, with the contingency of either of them dying before G addressed with an alternative gift to the other ("or to the survivor of them"). The alternative gift provision overrides the antilapse statute; the will is deemed to state G's intention that the antilapse statute not apply if either of A or B survives G.

> G's will made preresiduary bequests of "$5,000 to my child A if living at my death; if not to my child B" and "$7,500 to my child B if living at my death; if not, to my child A." A and B both predeceased G, both leaving descendants who survived G. Who takes what?

With respect to each gift, G provided for an alternative disposition; the problem is that neither of the alternative dispositions (A's $5,000 to B and B's $7,500 to A) can be given effect, and there are no additional alternative takers named. Does the antilapse statute apply in the face of G having named alternative takers if they do not survive? In some jurisdictions it would not (in which case the $12,500 would fall into the residue of G's estate); under UPC §2-603, it does — A's descendants take $5,000 and B's descendants take $7,500. Is that your client's intent?

> G’s will devised “$10,000 to my child A if living at my death; if not, to A’s children (X and Y).” A and X predeceased G. Y and X’s children (M and N) survived G.

X and Y each would have received $5,000 if both had survived G. As it is, Y takes $5,000, and it may seem clear that X’s $5,000 should go to M and N as X’s representatives. But the $5,000 X would have received if living was first left to A. It would be divided $2,500 to Y and $1,250 to each of M and N (giving Y a total of $7,500 and X’s descendants $2,500) if A’s descendants, by representation, are substituted under the antilapse statute for A with respect to that $5,000. That inequitable result is not reached under the UPC: §2-603(c)(2) takes the $5,000 to X’s representatives rather than §2-603(b)(1) taking it to A’s representatives.

Appendix H

The following responses of interest were extracted from JPMorgan surveys conducted at events in Florida, New York, and Connecticut, and reflect responses from approximately 120 JPMorgan Private Bank clients (unless otherwise noted).

28% said they want to provide for their descendants in perpetuity

52% want just two generations of trust duration

32% said they would limit a child’s outright share to $5 million

51% said they would limit a child’s outright share to $10 million

20% said they did not know how much was appropriate for a child’s outright share

26% said they worry most about spoiling their children

42% said they worry most about others taking advantage of their children

12% said they worry most that their children won’t be able to manage their money

0% said their children did not deserve the money

To an “age-of-maturity” question asked in NY of 60 clients only, 43% said by age 35, 42% said over age 35. JPMorgan said “from our experience, clients seem most comfortable with the age range of 30 to 45” and suggests that all income begin at age 30 — not age 21 found elsewhere.

The survey responses on the following pages reflect a JPMorgan survey done of 67 employees acting as senior fiduciary officers or wealth advisors. This survey asked these individuals to identify what trends they see in their client base. Several notable items deserve explanation:

Question 2, about the nonmarital trust providing for both the surviving spouse and children, shows surprising results, in that 30% of the respondents say they find these multiple beneficiaries together in a nonmarital trust less than 60% of the time, which seems high. The probable explanation is that the spouse may not be a beneficiary of the nonmarital at all, either in high net worth situations, or in cases of a second marriage with children by a prior relation. Mostly these responses indicate that the spouse is not the sole beneficiary.

In Questions 4 and 5, the apparent dissonance between the responses for withdrawal power after a certain age and mandatory distribution at a specified age may reflect trusts that will not distribute ever.

In Question 11, the very low response to inter vivos asset protection trust use is surprising, but not due to the lack of a Delaware presence — JPMorgan has a local presence. I have been told two things, which may be questioned by others: (1) JPMorgan does not promote this planning, and (2) Wilmington Trust’s numbers are not significantly different.

In Question 13, regarding incentive trust provisions, it was said that more settlors use a letter of intent/wishes instead.

Pie Charts 1 through 17 go here.

Estate Planning in the 21st Century
It's Not Your Father's Buick, Anymore

TABLE OF CONTENTS

I.	My Thesis	1
II.	A Few Demographic Factoids	5
III.	Marital Bequest and Nonmarital Trust Planning	11
IV.	Do Your Trust Your Spouse?	16
V.	Group Trusts	20
VI.	Withdrawal Right versus Force Out Distribution	24
VII.	The New Biology	24
VIII.	Adoption	26
IX.	Adult Adoption	28
X.	Half-Bloods and Steps	28
XI.	Nonmarital Children	29
XII.	Lapse	29
XIII.	Conclusion	31
	Appendices	34

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