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TABLE OF CONTENTS

FAMILY LIMITED PARTNERSHIPS
AND SECTION 2036:
NOT SUCH A GOOD FIT .... *Mitchell M. Gans* 253
and Jonathan G. Blattmachr

SOCIAL CONTROL OF WEALTH IN
ANTEBELLUM NEW YORK .... *William P. LaPiana* 279

DEMOCRACY AND TRUSTS .... *Carla Spivack* 311

HONORING PROBABLE INTENT
IN INTESTACY: AN EMPIRICAL
ASSESSMENT OF THE DEFAULT RULES
AND THE MODERN FAMILY .... *Danaya C. Wright* 341
and Beth Sterner

Family Limited Partnerships and Section 2036: Not Such a Good Fit

*Mitchell M. Gans and Jonathan G. Blattmachr**

Abstract

The IRS has struggled to close down abusive family limited partnerships. At first unreceptive to IRS arguments, the courts eventually embraced section 2036 as an estate-tax tool for attacking such partnerships. Because the section was not designed to apply to partnerships, difficulties have arisen as the courts have struggled with the fit. In its most recent encounter, the Tax Court in Powell *grappled with a fit-related issue that implicates the Supreme Court's landmark decision in* Byrum. *The* Powell *court, it will be argued, misread* Byrum*, conflating the majority opinion with the dissent – and converting the rule-based approach adopted by the majority into the standard-based approach advocated by the dissent. The article examines* Powell*, its reading of* Byrum *and its struggle with fit-related issues. Before concluding, planning suggestions will be offered.*

Introduction

Use of family limited partnerships to achieve estate-tax discounts is a very common estate-planning strategy. The IRS has tried to close it down in the case of abusive partnerships. At first, the courts were not accommodating, rejecting various arguments that the IRS had asserted. Eventually, the courts embraced a novel argument: that the partnerships could in effect be disregarded and the discounts denied under section 2036. While this section of the Code was certainly not drafted with such

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partnerships in mind, it has become the IRS's most effective weapon in its battle against abusive partnerships. But since the fit between the section and partnerships is less than perfect, the courts have had to reexamine or adjust conventional principles to maintain the effectiveness of the section in the partnership context.

In its recent decision in *Powell*,[1] the Tax Court grappled with two such principles in the context of a difficult-to-defend deathbed partnership. First, it revisited a theme first sounded by the court fourteen years ago in its well-known decision in *Strangi*,[2] where in dicta the court indicated that, despite the Supreme Court decision in *Byrum*,[3] a partnership could be disregarded and discounts denied under section 2036(a)(2). While the courts have not elaborated on this theme to any significant extent in the intervening years, fifteen Tax Court judges in *Powell* have now endorsed the *Strangi* theme.

In a post-Strangi article,[4] the authors critiqued the decision, arguing that it failed to respect the "bright line" rule established in *Byrum*. The *Powell* court cites the article but indicates its disagreement, maintaining that there is no need to read *Byrum* as establishing such a rule. As will be argued, *Powell* conflates the majority opinion in *Byrum* with the dissent.[5] It reads the majority as having established a standard, rather than a bright-line rule, as the methodology for implementing section 2036(a)(2) – when, in fact, it was the dissenting justices who argued for a standard-based methodology.

Perhaps, the *Powell* court's expansion of the provision beyond what was contemplated by the majority in *Byrum* can be understood as an attempt to compensate for its now-perceived error: seeking to minimize harm from its rejection of IRS arguments that would have more directly addressed family-partnership abuse. Indeed, the effect of *Powell* will be to require more family partnerships to satisfy a non-tax-purpose requirement – a requirement the IRS had sought to impose in its earlier arguments as a threshold test for all partnerships implicating gift or estate tax discounts. In any event, given the importance of a fifteen-judge consensus, it is time to reconsider the issue — and for practitioners to adapt their planning strategies to accommodate this new line of attack that the IRS will presumably be pursuing.

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[1] Estate of Powell v. Comm'r, 148 T.C. No. 18, 2017 WL 2211398 (T.C. May 18, 2017).

[2] Estate of Strangi v. Comm'r, T.C. Memo. 2003-145, 85 T.C.M. (CCH) 1331 (2003), *aff'd on other grounds*, 417 F.3d 468 (5th Cir. 2005).

[3] United States v. Byrum, 408 U.S. 125 (1972).

[4] *See infra* note 22 and accompanying text.

[5] *See* discussion *infra* Part III.

Second, the *Powell* court grappled with the applicability of section 2043 in the context of a partnership that runs afoul of section 2036. Simply put, the question concerns the treatment of partnership units received by the decedent in exchange for a partnership interest: how to avoid including in the gross estate the units as well as the partnership assets. The *Powell* majority applied section 2043. While doing so effectively avoided a double inclusion, it conceded that in other cases its approach could produce problematic outcomes. The concurring opinion, in contrast, rejected the application of section 2043, arguing instead that the partnership units should be disregarded once it is determined that the partnership assets are subject to inclusion.

This article will explore *Powell*, its reading of *Byrum* and the implications. Before concluding, some planning suggestions will be provided for practitioners who are concerned about the possible application of section 2036(a)(2) to partnerships in light of the court's approach.

I. *Powell* Facts and the Issues Before the Court

A. Facts

One week before the decedent's death, her agent under a power of attorney withdrew approximately $10 million in cash and marketable securities from her revocable trust and contributed these assets to a limited partnership in exchange for a 99% limited partnership interest. The decedent's son was the general partner, having contributed a promissory note to the partnership in exchange for his interest. The son formed the partnership by filing the necessary certificate with the appropriate state authority two days before the contribution of the decedent's assets was effected. At the time of the transfer, the decedent was apparently incapacitated.[6] While, under the partnership agreement, the son, as general partner, had exclusive authority to determine the timing and amount of distributions, dissolution of the partnership could only be accomplished with the written consent of all partners, including the decedent – i.e., the consent of both the decedent and her son was required to effect a dissolution.

Either before the partnership was created or at about the same time, the decedent gave her son the power of attorney. On the same day the decedent's assets were transferred to the partnership, the son again used the power of attorney to transfer the decedent's entire lim-

[6] Two hospital doctors indicated, on the day before the partnership was funded, that the decedent lacked capacity and "could not act on her own behalf." *Powell*, 2017 WL 2211398, at *2.

ited partnership interest to a CLAT.[7] Under the terms of the CLAT, the decedent's son and his sibling were entitled to the remainder on the death of the decedent.

B. Issues Before the Court

The court resolved four issues on the summary judgment motion: 1) whether the value of the partnership's assets had to be included in the decedent's gross estate; 2) how, if the assets were included, to apply section 2043 in calculating the amount of the net inclusion under section 2036 or 2035; 3) whether the limited partnership units transferred to the CLAT were includible in the decedent's gross estate; and 4) whether the transfer of the limited partnership units to the CLAT constituted a taxable gift.

C. IRS Arguments

The IRS argued that the partnership's assets had to be included in the decedent's gross estate under section 2036(a)(1), 2036(a)(2) or section 2038, which would have the effect of eliminating the discount the estate had claimed. The IRS also argued that gift tax was due in connection with the funding of the CLAT.

D. Estate's Concessions

The estate made two critical concessions. First, it agreed that the decedent's ability to cause a dissolution of the partnership by joining together with her sons, the other partners, could serve as a predicate for inclusion under section 2036(a)(2): She had retained the right in conjunction with her sons to control the possession or enjoyment of the transferred property through dissolution.[8] Second, the estate conceded that the decedent's transfer of cash and marketable securities to the partnership did not qualify for the bona fide exception in section 2036 (i.e., the estate did not argue that the transfer to the partnership was a

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[7] A charitable lead annuity trust, or "CLAT," is one that provides for annuity payments to be made to charity for a time (either a term of years or until a measuring life dies), and then for what remains in the trust to pass to or for others who are not necessarily charitable organizations, such as the descendants of the trust's grantor. *See* I.R.C. §§ 170(f)(2)(B), 2055, 2522. There is a definition of charitable lead trust for generation-skipping transfer tax purposes under section 2642(e)(3)(A). Properly structured, a deduction is allowed for income, gift and estate tax purposes for the actuarial value of the interest in the trust committed to charity but, for income tax purposes, only if the trust is a so-called "grantor trust" whose treatment is described in section 671. *See generally*, Jonathan G. Blattmachr, *A Primer on Charitable Lead Trusts: Basic Rules and Uses*, 134 Tr. & Est., Apr. 1995, at 48.

[8] Estate of Powell v. Comm'r, 148 T.C. No. 18, 2017 WL 2211398, at *5 (T.C. May 18, 2017).

bona fide sale for adequate and full consideration). The only argument the estate advanced in its attempt to avoid section 2036(a)(2) inclusion was that the decedent, having transferred her limited partnership units to the CLAT before her death, did not own the units at her death and therefore did not retain the right to effect a dissolution for her life, as the section requires.

E. Court's Analysis: Overview

Utilizing the estate's concessions, the court held that section 2036(a)(2) applied, obviating the need to consider inclusion under section 2036(a)(1) or section 2038.[9] The court rejected the estate's argument that the decedent had not retained the rights within the scope of section 2036(a)(2) on two alternative grounds. First, the court held that the transfer of the partnership units to the CLAT was either void or voidable given that the gift was not within the scope of the agent's authority under state law.[10] In either case, the decedent should be treated as owning the units on the date of death and therefore holding whatever rights inhered in the units. Second, the court held that, assuming the gift was valid, the partnership assets would still be included in the gross estate under section 2035 provided that section 2036(a)(2) would have required such inclusion had the decedent not made the transfer to the CLAT[11]– a transfer that had occurred one week before death and therefore within section 2035's three-year window.

The court did not explain its rationale for focusing exclusively on section 2036(a)(2). It is possible that the court concluded that inclusion under section 2036(a)(1) would be questionable – perhaps because no distributions had been made to the decedent during the one-week period between partnership formation and her death and that, therefore, the basis for a finding of an implied understanding concerning distributions to the decedent would have been tenuous.[12] Or perhaps the court wanted to use this clearly abusive case – a deathbed partnership with no non-tax purpose – as a vehicle to establish a clear precedent concerning the applicability of section 2036(a)(2).[13]

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9 *See id.* at *4 n.4 (indicating that the court intentionally expressed no view on the applicability of section 2036(a)(1) or section 2038).

10 *Id.* at *12.

11 *Id.* at *5.

12 Note, however, that a failure to retain sufficient non-partnership assets to pay estate tax can serve as a basis for an implied understanding under section 2036(a)(1). *See* Strangi v. Comm'r, 417 F.3d 468, 477 (5th Cir. 2005).

13 The court's decision not to consider section 2038 is not surprising given its overlap with section 2036(a)(2). *See, e.g.*, Estate of Wall v. Comm'r, 101 T.C. 300, 313-14 (1993).

In any event, in invoking section 2035, the court turned to the question whether section 2036 would have applied had the transfer of the partnership units to the CLAT not occurred – i.e., whether the partnership assets would have been included in her estate under section 2036 had she not severed her ties to the assets through the gift of the units to the CLAT.[14] The court therefore had to determine whether the partnership units conferred rights on the decedent that could serve as a basis for applying 2036(a)(2) with respect to the partnership assets – and, if so, how to treat the limited partnership units.

II. Section 2036 and Family Limited Partnerships: Evolution

In practically all of the cases in which the courts have invoked section 2036 in the context of a family limited partnership, section 2036(a)(1) has served as the basis for the analysis.[15] The inclination to rely on section 2036(a)(1) is not surprising. The IRS can invoke this provision where the decedent retained a legally enforceable right or where there was a mere implied understanding concerning the assets transferred by the decedent even if the understanding was not legally enforceable. In contrast, in the case of section 2036(a)(2), the statute itself requires the presence of a "right" in the decedent. And, in *United States v. Byrum*,[16] the Supreme Court held that an understanding that is not legally enforceable is an insufficient basis for inclusion. Until the courts began to consider the applicability of section 2036 to partnerships, this was the considered reading of *Byrum*.[17]

In the partnership context, there are often, as a practical matter, facts from which an inference of an implied understanding can be drawn: e.g., a pattern of distributions to the decedent based on the decedent's needs; or the decedent's failure to retain sufficient assets outside of the partnership to cover the decedent's cost of living or potential estate tax obligations.[18] Where such facts are present, the IRS can bring

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[14] *See also* Estate of Hurford v. Comm'r, T.C. Memo. 2008-278, 96 T.C.M. (CCH) 422 (2008) (section 2035 applicable where tie to assets contributed to the partnership severed by reason of a sale within three years of death).

[15] *See, e.g.*, Estate of Bigelow v. Comm'r, 503 F.3d 955 (9th Cir. 2007); Estate of Korby v. Comm'r, 471 F.3d 848 (8th Cir. 2006); Estate of Abraham v. Comm'r, 408 F.3d 26 (1st Cir. 2005); Estate of Thompson v. Comm'r, 382 F.3d 367 (3d Cir. 2004); *but see* Estate of Bongard v. Comm'r, 124 T.C. 95 (2005), *and* Estate of Turner v. Comm'r, T.C. Memo. 2011-209, 102 T.C.M. (CCH) 214 (2011).

[16] 408 U.S. 125 (1972).

[17] *See Wall*, 101 T.C. at 313-14. The IRS itself agreed with this reading. *See* PLR 9415007 (Apr. 15, 1994); PLR 9310039 (Mar. 12, 1993); TAM 9131006 (Aug. 2, 1991).

[18] *See, e.g.*, Strangi v. Comm'r, 417 F.3d 468, 477-78 (5th Cir. 2005).

the partnership's assets into the gross estate without having to establish the existence of a legally enforceable right.[19]

But what about cases where the decedent is careful to avoid taking partnership distributions and retains sufficient assets outside of the partnership? With decedents who take such care, there may well be no facts from which an inference of an implied understanding can be drawn, making section 2036(a)(1) unavailable to the IRS – even if the partnership is designed for the sole purpose of reducing estate tax. In such cases, the question becomes whether the IRS can deploy section 2036(a)(2).

While, as indicated, the *Byrum* Court concluded that the term "right" in section 2036(a)(2) required a "legally enforceable" or "ascertainable" right or power, the Tax Court in a memorandum opinion in *Estate Strangi v. Commissioner*[20] disregarded restrictions on the decedent's right in concluding that section 2036(a)(2), as well as 2036(a)(1), required the inclusion of the partnership's assets in the gross estate.[21] The application of section 2036(a)(2) was entirely academic given the inclusion under section 2036(a)(1). Nonetheless, the decision did not go without notice among practitioners. It led to precautions in the drafting of partnership documents designed to preclude the IRS from invoking section 2036(a)(2).[22] With no court adopting a full-throated defense of the section 2036(a)(2) analysis in the fourteen years since *Strangi* was decided, concern among practitioners had presumably abated. The court's decision in *Powell*, however, should bring an abrupt end to this period of quiescence. Of the seventeen judges participating in the *Powell* decision, fifteen endorsed *Strangi* and its use of section 2036(a)(2) – with the two judges concurring in the result but without offering any rationale. And while the issue may well continue to percolate in the courts, it would not be surprising if such a solid Tax Court consensus had a substantial impact at the appellate level.

As the *Powell* court explains, *Strangi*'s application of section 2036(a)(2) was based on two grounds. First, the *Strangi* court pointed to the decedent's ability to join together with the other partner (or share-

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19 For a less conventional application of section 2036(a)(1) in the partnership context, see *Estate of Bongard v. Commissioner*, 124 T.C. 95 (2005).

20 T.C. Memo. 2003-145, 85 T.C.M. (CCH) 1331 (2003), *aff'd on other grounds*, 417 F.3d 468 (5th Cir. 2005).

21 *Strangi*, 417 F.3d at 478 n.7. *But see* Estate of Hurford v. Comm'r, T.C. Memo. 2008-278, 96 T.C.M. (CCH) 422 (2008) (applying section 2036(a)(2) in the partnership context); *see also* Estate of Turner v. Comm'r, T.C. Memo. 2011-209, 102 T.C.M. (CCH) 214 (2011).

22 For a discussion of *Strangi* and the planning implications, see Mitchell M. Gans & Jonathan G. Blattmachr, Strangi: *A Critical Analysis and Planning Suggestions*, 100 TAX NOTES 1153 (2002).

holders in the corporate partner) to cause a partnership dissolution.[23] Second, it focused on the fact that the decedent's son-in-law had discretion under the partnership agreement concerning the timing and amount of partnership distributions.[24] The *Strangi* court attributed this discretion to the decedent on the theory that the son-in-law was the decedent's attorney in fact under a power of attorney. Thus, on either of these grounds, inclusion was required under section 2036(a)(2), according to the court.

III. Does *Powell*, as Well as *Strangi*, Misread *Byrum*?

Shortly after the decision in *Strangi*, the authors wrote an article that was critical of the decision.[25] In the authors' view, *Byrum* established a bright-line test, precluding the application of section 2036(a)(2) where the decedent lacked a legally enforceable right. The majority opinion in *Powell* acknowledges the critique with a "but see" citation, arguing that *Byrum* need not be so read.[26] As the *Byrum* Court indicated, however, in order for section 2036(a)(2) to apply, by its express terms, the decedent must have retained a "right."[27] The Court reasoned that the term "right" "connotes a legally enforceable power."[28] If not legally enforceable, it is "not a right in any normal sense of that term."[29] And, according to the Court, one cannot be deemed to have a legally enforceable right if exercising it would be actionable.[30]

A. Fiduciary Duty Constraint

Thus, the Court in *Byrum* turned its focus to the question of fiduciary duty: To the extent that the decedent was constrained by such a duty, it would be inappropriate to treat him as having retained a right.

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[23] Estate of Powell v. Comm'r, 148 T.C. No. 18, 2017 WL 2211398, at *5-6 (T.C. May 18, 2017).

[24] *Id.* at *6.

[25] Gans & Blattmachr, *supra* note 22.

[26] The *Powell* majority says: ". . . Byrum need not be read as having established a 'bright-line test' under which control rights circumscribed by fiduciary duties owed to minority owners (whether related or unrelated to the holder of the rights) prevent the rights from triggering the application of section 2036." *Powell*, 2017 WL 2211398, at *6 n.7.

[27] United States v. Byrum, 408 U.S. 125, 136-37 (1972).

[28] *Id.*

[29] *Id.*

[30] *Id.* at 137-44. "[T]his case concerns a statute written in terms of the 'right' to designate the recipient of income. The use of the term of 'right' implies that restraints on the exercise of power are to be recognized and that such restraints deprive the person exercising the power of a 'right' to do so." *Id.* at 139 n.14.

In holding that the decedent was so constrained, the Court considered each of the following questions:

> Did the decedent, as a majority shareholder in a corporation conducting an active business, owe fiduciary duties to the minority shareholders, some of whom were unrelated, that constrained him from ignoring the corporation's business interests in favor of his personal or familial predilections?
>
> Did the corporation's directors owe a fiduciary duty to the minority shareholders that would constrain them from simply carrying out the decedent's directions concerning dividend-related decisions?
>
> And would the corporate trustee of a trust holding stock in the corporation for the benefit of the decedent's descendants seek to hold the decedent accountable for any breach of his duty in order to discharge its own duties as trustee?

Concededly, the Court did in fact reach an affirmative answer in the case of all three questions. The decision makes more sense, however, if it is understood to require a finding of constraint sufficient to negate estate-tax inclusion based on an affirmative answer to *any one* of these questions.

Consider, for example, the last question. If the decedent had sought to force the directors to withhold dividend distributions based on an argument he had with his children, the trustee would have been obliged to sue him as a matter of its own fiduciary duty. Given the constraint of such a possible suit, the decedent could not be treated as having retained a legally enforceable right to force his dividend-related preferences on the directors. This would be true even if there were no unrelated minority shareholders – i.e., if the only other shareholder were the trust for the benefit of the descendants – or if the corporation held only investment (portfolio-type) assets rather than operating an active business. And even though claims based on a failure to pay dividends have a very low likelihood of success,[31] the potential for the assertion of such a claim was a sufficient constraint, according to the *Byrum* majority.[32]

Undeniably, as a matter of state law, one cannot owe oneself a fiduciary duty. Or, put differently, a person cannot possess a breach-of-duty claim against herself. For example, if the decedent owned a ninety-nine

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31 *Id.* at 158-59 (White, J., dissenting) (indicating that such claims are often unsuccessful).

32 *Id.* at 137-38.

percent limited partnership interest and owned all of the membership interests in an LLC that owned the one percent general partnership interest, no argument could be made that fiduciary-duty constraints so impaired the decedent's interest under state law so as to render it other than a legally enforceable right. On the other hand, once other parties have an interest in the entity, even if related and irrespective of the passive nature of the assets in the entity, fiduciary duties cannot be ignored under the *Byrum* framework.[33]

To suggest, moreover, as *Strangi* and *Powell* do, that a fiduciary duty can only serve as a sufficient constraint if it runs in favor of unrelated parties or if an active business is involved is contrary to the premise of both the majority and the dissent in *Byrum*.[34] To be sure, the majority and the dissent did disagree about the kind of fiduciary duty that could serve as a sufficient constraint. But, as will be explained, both opinions endorsed the notion that a fiduciary duty in and of itself can constitute a constraint that negates inclusion even where the duty runs only to family members or passive assets are involved.[35]

B. Fiduciary Duty and *O'Malley*

The two *Byrum* opinions divided over the significance of the Court's earlier decision in *United States v. O'Malley*.[36] The settlor in *O'Malley* was one of three trustees of a discretionary trust for the benefit of his children and wife.[37] Under the instrument, the trustees had discretion concerning distributions to the beneficiaries.[38] No standard limiting or guiding the trustee's discretion was included in the instrument.[39] Despite the settlor's fiduciary duty as trustee and the resulting possibility that he could have been held accountable by the beneficiaries for breaching his duty, the Court held that section 2036(a)(2) applied

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[33] The IRS itself acknowledged as much, concluding that, under *Byrum*, fiduciary-duty constraints precluded the application of section 2036(a)(2) in the case of family limited partnerships. *See* PLR 9415007 (Apr. 15, 1994); PLR 9310039 (Mar. 12, 1993); TAM 9131006 (Aug. 2, 1991).

[34] Although not directly applicable, for valuation purposes, it may be noted that the identity of parties or their relationship to a decedent normally is generally not relevant. *See, e.g.*, Estate of Bright v. United States, 658 F.2d 999 (5th Cir. 1981); Rev. Rul. 93-12, 1993-1 C.B. 202.

[35] *See also* Estate of Gilman v. Comm'r, 65 T.C. 296 (1975), *aff'd*, 547 F.2d 32 (2d Cir. 1976) (fiduciary duties owed to family members sufficient constraint under *Byrum* to preclude application of section 2036(a)(2)); Estate of Cohen v. Comm'r, 70 T.C. 1015 (1982) (finding fiduciary duties in the familial context was a sufficient constraint under *Byrum* in the context of a trust owning rental real estate).

[36] 383 U.S. 627 (1966).

[37] *Id.* at 629.

[38] *Id.*

[39] *Id.* at 629 n.3.

because the settlor could exercise his discretion in conjunction with his co-trustees.[40]

The *Byrum* dissent argued that since the fiduciary duty normally imposed on trustees was determined not to constitute a sufficient constraint in *O'Malley*, the corporate fiduciary duty in *Byrum* could not negate inclusion.[41] It argued that *O'Malley* was controlling on the theory that the corporate fiduciary duty in *Bryum* was no different from the trustee's fiduciary duty in *O'Malley*.[42] The majority replied that, under the terms of the *O'Malley* instrument, the settlor had explicitly retained the legally enforceable right to exercise discretion concerning distributions, whereas, in *Byrum*, the decedent had not inserted in any of the documents such a right[43] to make decisions based on personal (non-corporate) interests.

Most important, in the course of arguing that *O'Malley* was controlling, the *Byrum* dissent acknowledged that, if a provision had been inserted in the *O'Malley* trust instrument limiting the trustees' discretion by an ascertainable standard (i.e., one enforceable under state law) – for example, a standard based on health, education or support – it would have constituted a sufficient constraint to negate inclusion.[44] The dissent referred to a line of authority holding that an ascertainable standard creating a duty to family members does constitute such a constraint without regard to the active or passive nature of the trust's investment.[45] The majority implicitly agreed with the dissent on this point. Indeed, even the IRS accepts that such an ascertainable standard is a constraint.[46] Thus, all nine Justices, as well as the IRS itself, agree that a fiduciary duty owed to family members is a sufficient constraint without regard to the active or passive nature of the underlying investments.

C. *Powell*'s Reading of *Byrum* Belied by *Byrum* Dissent

Although not acknowledged by the *Powell* court, the nature of the divide between the majority and the dissent in *Byrum* supports the reading that section 2036(a)(2) cannot apply in the absence of a legally enforceable right. The principal point of contention between the majority and dissent concerned the decedent's raw or *de facto* power to control dividend policy. The dissent argued that the *O'Malley* Court, having

[40] *See* United States v. Byrum, 408 U.S. 125, 135-38 (1972) (summarizing and explaining *O'Malley*).

[41] *Id.* at 157 (White, J., dissenting).

[42] *Id.*

[43] *Id.* at 136.

[44] *Id.* at 166 (White, J., dissenting).

[45] *Id.* The dissent cited *Jennings v. Smith*, 161 F.2d 74 (2d Cir. 1947).

[46] *See* Rev. Rul. 73-143, 1973-1 C.B. 407.

used the word "power," contemplated a focus on the practical reality of the settlor's retained power, not a theoretical inquiry as to whether the decedent had retained a legally enforceable right.[47] But the majority categorically rejected this argument, saying that the use of the word "right" in section 2036(a)(2) requires that it be legally enforceable.[48]

Indeed, the majority repeatedly used the phrase "legally enforceable" or some variation on the phrase. The dissent openly acknowledged the majority's "legally enforceable right" holding, arguing at some length that Congress, in using the word "right," did not devote sufficient "care in the articulation" to warrant a literal construction.[49] Thus, although the dissent obviously did not agree with the majority's holding, it is nonetheless clear that all nine Justices understood that, under the majority approach, estate-tax inclusion under section 2036(a)(2) required a legally enforceable right. In short, to read the majority as contemplating a focus on raw or *de facto* power, rather than legal enforceability, would be nothing short of conflating the majority opinion with the dissent.

D. Rules versus Standards

A second aspect of the majority-dissent divide – which also supports the "legally enforceable right" reading – stems from the jurisprudential distinction between rules and standards.[50] According to the *Byrum* majority, the dissent's raw-power approach entailed the creation of a standard, rather than a rule.[51] The majority was of the view that a standard would create uncertainty, permitting courts to decide on a case-by-case basis the facts that should be given determinative consider-

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[47] United States v. Byrum, 408 U.S. 125, 161 (1972) (White, J., dissenting) ("[I]t is quite repugnant to the words and sense of our opinion in *O'Malley* to read it as though it pivoted on an interpretation of 'right' rather than a power. The opinion could hardly have been more explicitly concerned with the realities of a settlor's retained power rather than the theoretical legal form of the trust.").

[48] *Id.* at 136 n.9 ("Although Mr. Justice White's dissent argues that the use of the word 'power' in *O'Malley* implies that the Court's concern was with practical reality rather than legal form, an examination of that opinion does not indicate that the term was used other than in the sense of legally empowered.").

[49] *Id.* at 159 (White, J., dissenting).

[50] *See generally* Kathleen M. Sullivan, *The Supreme Court, 1991 Term – Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (indicating that a rule must be followed even if inconsistent with the underlying principle or policy, whereas a standard gives the court more discretion to take into account the underlying policy); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994) (citing Professor Sullivan).

[51] *Byrum*, 408 U.S. at 137 n.10 ("The 'control' rationale, urged by the Government and adopted by the dissenting opinion, *would create a standard* – not specified in the statute – *so vague and amorphous as to be impossible of ascertainment* in many instances." (emphasis supplied)).

ation.[52] A rule, in contrast, would enable taxpayers to engage in planning their transactions without fear of having a court pull the proverbial rug out from under them. Other aspects of the majority opinion further support the conclusion that the majority was sensitive to the plight of taxpayers and their need for reliance.[53]

This is not, however, to suggest that the majority was correct as a policy matter or that rules are universally preferable to standards. The application of a standard can produce salutary outcomes. For example, a standard might enable a court to close down an abusive transaction that would otherwise escape a rule[54] – which explains the dissent's preference for the use of a standard. But the majority traded off abuse for certainty – i.e., accepted the possibility that abusive cases might escape from section 2036 in return for a clear rule on which taxpayer could rely. Whatever one may think about this tradeoff in the abstract – and different judges will certainly hold different views depending on the context – it is difficult to deny that the *Byrum* dissent would have preferred to implement section 2036(a)(2) as a standard and that the majority emphatically rejected this in favor of a legal-enforceability rule.[55]

Without discussing or mentioning the *Byrum* majority's characterization of the dissent's approach as a standard and its concern that it would be "so vague and amorphous as to be impossible of ascertainment in many instances," the *Powell* court simply says that "*Byrum* need not be read as having established a 'bright-line test.'"[56] Although the majority, as well as the dissent, in *Byrum* repeatedly references the majority's "legally enforceable right" approach, the *Powell* court never once

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52 *Id.*

53 *Id.* at 135 ("When courts readily undertake such tasks, taxpayers may not rely with assurance on what appear to be established rules lest they be subsequently overturned.").

54 For example, the economic substance doctrine, now codified in section 7701(o), is an example of a standard.

55 It is worth noting that Congress has not altered the *Byrum* Court's construction, although it had an opportunity to do so when it enacted section 2036(b) to deal with retained voting rights in transferred stock in 1978. And given the strong claim to stare decisis enjoyed in the statutory-construction context and particularly in the tax realm, see *Battat v. Commissioner*, 148 T.C. No. 2, 2017 WL 449951 (T.C. Feb. 2, 2017), it would seem unlikely that the Supreme Court would be willing to revisit the issue. Perhaps, the Court's holding could be overturned by a regulation, see *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478 (2012) (leaving open the possibility that a regulation could overturn a Supreme Court decision), but that would seem equally unlikely given that the holding was based on the unambiguous word "right" contained in the statute. *See also* JONATHAN G. BLATTMACHR & MITCHELL M. GANS, THE CIRCULAR 230 DESKBOOK, ch. 1 (Practising Law Inst. 2017) (discussing *Home Concrete*).

56 *Battat,* 2017 WL 449951, at *1 n.5.

mentions this phrase.[57] Instead, it twice uses the word "illusory" in the course of deciding whether there were sufficient fiduciary-duty constraints to negate inclusion.[58] The *Powell* court has thus unwittingly converted the bright-line test adopted by the *Byrum* majority into a standard that will turn on whether a constraint on the decedent's right is found to be illusory.[59]

In *Powell*, the court determined that there were two grounds on which application of section 2036(a)(2) could be predicated. One of the grounds related to the general partner's discretion concerning the timing and amount of partnership distributions. Although the decedent's son was the general partner and not the decedent, the court nonetheless in effect attributed the general partner's discretion to the decedent based on the fact that the son was also the decedent's attorney in fact under a power of attorney. As the court indicates, the facts relating to the power of attorney were also present in *Strangi* and led the court to apply section 2036(a)(2).[60] Thus, applying *Strangi*, the court concluded that inclusion was appropriate on this basis.

Two premises would appear to underlie the court's analysis of the power of attorney: 1) that it is appropriate to attribute to the decedent the powers held by the son as a general partner; and 2) that any fiduciary duty that the decedent would have owed to his son in the exercise of these attributed powers is to be ignored. Both of these premises may be difficult, however, to square with *Byrum*. Unless, under state law, the powers held by the son as general partner must be attributed to the decedent by reason of the power of attorney, the son's powers did not give the decedent a legally enforceable right. Similarly, unless, under state law, the son's ability to enforce his rights as a partner were somehow eliminated by reason of the power of attorney, the decedent, again, did not have a legally enforceable right. But the court does not supply a careful analysis of these two issues under state law. Instead, the court finds that any constraints on the decedent were "illusory" as a matter of federal law and must therefore be disregarded in making the *Byrum*

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57 This is to be contrasted with *Estate of Wall v. Commissioner*, 101 T.C. 300 (1993), where the court repeatedly referenced *Byrum*'s conclusion that section 2036(a)(2) requires a legally enforceable right.

58 Estate of Powell v. Comm'r, 148 T.C. No. 18, 2017 WL 2211398, at *6-7 (T.C. May 18, 2017).

59 This is reminiscent of the common law approach used in determining whether a non-probate form of transfer should be considered in calculating the elective share – an approach that has largely been rejected in favor of clear-cut statutory rules. *See, e.g.*, Newman v. Dore, 9 N.E.2d 966 (N.Y. 1937); John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP. PROB. & TR. J. 303 (1987).

60 *Powell*, 2017 WL 2211398, at *6.

analysis.[61] In effect, the question became, not whether the decedent had a legally enforceable right, but rather whether the more amorphous standard favored by the *Byrum* dissent was satisfied.

E. Right to Vote on Dissolution: *Powell* versus *Byrum*

The second ground on which *Powell* relied in invoking section 2036(a)(2) was the provision in the partnership agreement that permitted the decedent, as a limited partner, to effect a dissolution of the partnership with the consent of the other partner.[62] In *Strangi*, the court had engaged in a similar analysis, pointing, as did *Powell*, to the language in the statute making it applicable if the decedent's right could be exercised alone or in conjunction with others.[63] While the *Powell* analysis is similar to the *Strangi* analysis, there may be a subtle difference. In *Strangi*, the court appeared to contemplate that if the ability to liquidate was constrained by a fiduciary duty, inclusion would not be appropriate.[64] In contrast, in *Powell*, although not entirely clear, the court appears to intimate that such ability is a *per se* ground for inclusion, thus rendering superfluous a fiduciary-duty analysis.[65]

Perhaps the court assumed that, as a matter of state law, a limited partner does not owe a fiduciary duty to other partners. Such an assumption may not, however, be entirely accurate.[66] Moreover, the Tax Court itself has previously suggested that a limited partner holding a substantial interest in the partnership could face litigation from the other partners should he or she force a liquidation on the partnership.[67] Given the possible state law constraints on the ability of a limited part-

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[61] *Id.* at *7.

[62] *Id.* at *6.

[63] *Id.* at *5 (citing Estate of Strangi v. Comm'r, T.C. Memo. 2003-145, 85 T.C.M. (CCH) 1331 (2003)).

[64] *Strangi*, T.C. Memo. 2003-145, at *17-18.

[65] The *Powell* court says: "And although decedent's ability to dissolve NHP [the partnership] is sufficient to invoke section 2036(a)(2), the second factor we relied on in *Estate of Strangi* is also present here." Estate of Powell v. Comm'r, 148 T.C. No. 18, 2017 WL 2211398, at *6 (T.C. May 18, 2017).

[66] *See* Sletteland v. Roberts, 16 P.3d 1062, 1067 (Mont. 2000) (fiduciary duty can be imposed on a minority-interest holder who "has power to do damage" to the entity); Gilbert v. El Paso Co., 490 A.2d 1050, 1055 (Del. Ch.1984) (non-controlling equity holder who can dominate the entity owes fiduciary duty).

[67] *See* Estate of Jones v. Comm'r, 116 T.C. 121 (2001); *see also* Estate of Curry v. United States, 706 F.2d 1424 (7th Cir. 1983) (holding that, in valuing a majority interest, a discount should be permitted to reflect a fiduciary-duty constraint on liquidation); *but see* Estate of Koons v. Comm'r, No. 16-10646, No. 16-10648, 2017 WL 1501062 (11th Cir. Apr. 27, 2017) (indicating that there is no fiduciary-duty constraint with respect to forcing a liquidation provided that all equity holders receive a pro rata share).

ner to force a liquidation, any suggestion that such an ability constitutes a *per se* ground for inclusion is questionable.

The ability-to-liquidate rationale is questionable on other grounds, as well. The in-conjunction-with language in the statute is not a limitless concept. Courts have held that a power to persuade other equity holders is not within the scope of the concept.[68] In addition, in *Byrum*, the majority rejected the government's argument that the ability to force a liquidation should trigger section 2036(a)(1), saying that any such ability is speculative and should not serve as a basis for inclusion.[69] Given that section 2036(a)(1) is broader in scope than section 2036(a)(2) – in the sense that, under the former provision, there is no requirement that the decedent retain a legally enforceable right – it would be surprising if an attribute found speculative under section 2036(a)(1) could serve as a basis for inclusion under section 2036(a)(2).[70]

F. Is an Implied Understanding Sufficient to Trigger Section 2036(a)(2) Under *Powell*?

The *Powell* court's standard, focusing on whether a fiduciary-duty constraint is illusory, presumably has its limits. It should not, for example, be used to import into section 2036(a)(2) the section 2036(a)(1) principle that a legally unenforceable understanding is a sufficient predicate for inclusion.

To illustrate, assume that a decedent had created a trust qualifying as a so-called SLAT (spousal limited access trust), naming her husband as trustee and giving him discretion unconstrained by any standard to make distributions for the benefit of their descendants. *Byrum* should preclude application of section 2036(a)(2) inasmuch as the decedent, who was not a trustee, did not retain the legally enforceable right to make distribution decisions. And even if the decedent had an under-

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[68] *See* Estate of Tully v. United States, 528 F.2d 1401, 1404 (Cl. Ct. 1976) (power to persuade co-shareholder outside the scope of "in conjunction with" language); *but see* Estate of Levin v. Comm'r, 90 T.C. 723, 730-31 (1988) (applying the "in conjunction with" principle over an argument that other board members were not likely to acquiesce and saying that "the ability of the other board members to go against decedent's wishes is largely illusory.")

[69] United States v. Byrum, 408 U.S. 125, 149 (1972) ("The first of these, the power to liquidate or merge, is not a present benefit; rather, it is a speculative and contingent which may or may not be realized.").

[70] See *Tully*, 528 F.2d at 1405 (concluding that section 2038, which is substantially the same as section 2036(a)(2) in all relevant respects, does not apply where the power is speculative).

standing with her husband that he would defer to her wishes, the section should still not apply given the absence of a legally enforceable right.[71]

It would be inappropriate to read *Powell* as suggesting that, under its illusory standard, section 2036(a)(2) could be invoked in such a case. For if *Byrum* is to retain any vitality, the illusory standard must be limited, applying for the sole purpose of determining whether a fiduciary-duty constraint imposed on the decedent is real or illusory. To apply *Powell*'s illusory standard more broadly – to require, for example, 2036(a)(2) inclusion in the posited SLAT on the rationale that the lack of legal right should be ignored as illusory – would leave little of *Byrum* intact.

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In sum, despite the abusive nature of the *Powell* partnership, it is difficult to square the court's use of section 2036(a)(2) with *Byrum*, proving the adage that hard cases make for problematic law.

IV. The Difficulties with Section 2036 as Applied to Partnerships

As suggested, the outcome in *Powell* makes sense in policy terms. For it is difficult to view *Powell* as other than an abusive case: The partnership was literally created on the decedent's deathbed, and the estate did not even attempt to establish a non-tax purpose for its formation. Indeed, the estate conceded the applicability of section 2036(a)(2).[72] The discounts that the family sought through the partnership arrangement simply cannot be justified. Why, after all, should a family like the Powells be permitted a discount based on this kind of deathbed planning while other families must pay tax on the full value of transferred assets? Simply put, equity cannot tolerate a discounted estate tax for families who manage to implement such a partnership paper shuffle.

A. Alternative Approaches: What Might Have Been?

The difficulty with *Powell* is the analytical methodology on which it is based, not the outcome. The methodology stems from the Tax Court's first decision in *Estate of Strangi v. Commissioner*,[73] where the court failed to embrace a more appropriate methodology for closing down abusive partnerships. The IRS had made two arguments that, if success-

[71] *See* Jay A. Soled & Mitchell Gans, *Related Parties and the Need to Bridge the Gap Between the Income Tax and the Transfer Tax Systems*, 62 Ala. L. Rev. 405, 420-21 (2011).

[72] Estate of Powell v. Comm'r, 148 T.C. No. 18, 2017 WL 2211398, at *5 (T.C. May 18, 2017).

[73] 115 T.C. 478 (2000), *rev'd on other grounds*, 293 F.3d 279 (5th Cir. 2002).

ful, would have permitted a denial of discounts for tax-driven partnerships: 1) that a partnership formed to avoid the estate tax should be disregarded;[74] and 2) that a taxable gift can occur upon the formation of a partnership.[75]

Under either of these approaches, the question of inclusion would appropriately turn on the presence of a non-tax purpose, rather than the applicability of section 2036. Under the first approach, a partnership such as the Powells', with no non-tax purpose, would be disregarded at the time of death, leading to inclusion of the partnership assets in the estate on an undiscounted basis. Under the second approach, a contribution of assets to a partnership in exchange for a partnership interest having a lesser value, based on discount, would make a taxable gift equal to the difference, unless it could be shown that the partnership was formed in the ordinary course of business.[76]

To illustrate the second approach, consider a contribution of $1 million in securities to a partnership in exchange for a limited partnership interest having a discounted value of $700,000. If it could be shown that the partnership was formed in the ordinary course of business – in an arm's length transaction that is bona fide and free from donative intent[77] — no gift would occur on formation. But if the partnership were formed to move wealth on a discounted basis, it would not be in the ordinary course of business and the difference of $300,000 would constitute a taxable gift.[78]

B. Section 2036 in Partnership Context: Square Peg into Round Hole

Having closed down these paths in its first *Strangi* decision and having been affirmed in the Fifth Circuit,[79] the Tax Court on remand[80] opened a new path for the IRS in its second *Strangi* decision: section

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74 *Id.* at 484.

75 *Id.* at 489. The IRS had also unsuccessfully argued against the discounts based on section 2703. *See id.* at 488.

76 The ordinary-course-of-business exception is contained in Treas. Reg. § 25.2512-8.

77 *Id.*

78 If a transaction is driven by a tax-avoidance motive and desire to pass wealth to family members, it should not qualify for the ordinary-course-of-business exception in Treas. Reg. § 25.2512-8. For a suggestion that the regulation be amended to incorporate such an analysis, see Mitchell M. Gans, *Deference and Family Limited Partnerships: A Case Study*, 39 U. Miami Heckerling Institute on Est. Plan. ch. 5 (2005).

79 293 F.3d 279 (5th Cir. 2002).

80 The Fifth Circuit remanded for the Tax Court to consider the applicability of section 2036. *Id.* at 281-82.

2036.[81] But the use of section 2036 to combat abusive partnerships is like trying to put a square peg into a round hole, raising several issues.

First, the courts had to determine whether the decedent had retained a sufficient interest with respect to the partnership's assets. The courts have issued many decisions that wrestle with this issue, most of which hinge on whether there was an implied understanding that the decedent would continue to have access to partnership assets.[82] If the court can find such an implied understanding, it can apply section 2036(a)(1). The difficulty with these decisions, however, is that, if the decedent does not receive any distributions and retains sufficient assets outside of the partnership to cover the cost of living, there may well be no basis for finding an implied understanding.[83] This difficulty is exacerbated by a practical reality: Wealthier clients, who may be more comfortable "locking up" a portion of their assets in a partnership while retaining sufficient non-partnership assets, may find it easier to exploit these cases. The use of section 2036(a)(2), as in *Powell*, addresses these difficulties by expanding the IRS arsenal and thereby erecting another hurdle for taxpayers seeking to avoid the impact of section 2036. Perhaps, the expansion reflects the Tax Court's discomfort with its earlier rejection of IRS arguments that would have imposed a threshold requirement of non-tax purpose on all partnerships – compensating for its perceived error. In any event, as suggested, the expansion comes at the price of muddying up the contours of the provision: It converts the *Byrum* majority's rule into the standard sought by the dissent, in effect accepting the uncertainty that concerned the *Byrum* majority in order to close down abuse.

Second, the courts had to consider how to apply the bona fide exception in section 2036. Under conventional thinking, the exception applies if the decedent had received adequate consideration in the exchange (i.e., a consideration equal in value to the transferred asset). The exception in effect prevents against the double inclusion that might otherwise result: section 2033 inclusion of the consideration received by the decedent in addition to section 2036 inclusion of the assets transferred to the partnership. Even if the exchange or transaction were tax-

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81 The IRS had previously sought to invoke section 2036 in the partnership context in *Estate of Harrison v. Commissioner*, T.C. Memo. 1987-8, 52 T.C.M. (CCH) 1306 (1987).

82 For a case where the court had difficulty with this issue but nonetheless concluded that section 2036(a)(1) applied, see *Estate of Bongard v. Commissioner*, 124 T.C. 95 (2005).

83 *See, e.g.*, Estate of Stone v. Comm'r, T.C. Memo. 2003-309, 86 T.C.M. (CCH) 551 (2003) (refusing to apply section 2036(a)(1) on the ground, in part, that an accountant's analysis at the time of partnership formation showed that the decedent had retained sufficient assets outside of the partnership).

driven, the exception appropriately applied to prevent double inclusion as long as adequate consideration was received.[84]

With the application of section 2036 to partnerships, the exception had to be modified to take into account whether a non-tax purpose for forming the partnership was present. Otherwise, section 2036 would be rendered useless in the partnership setting: A contribution of assets to a partnership in exchange for a partnership interest could be seen as an exchange for adequate consideration if the contribution of the transferor partner were properly reflected in the capital accounts, thus making the exception applicable – and section 2036 inapplicable – in all partnership cases as long as its formation was properly implemented. To make sure that section 2036 had teeth in the partnership context, it was necessary to make the exception turn on the presence of non-tax purpose. Thus, even if the decedent's contribution to the partnership were properly reflected in the capital accounts, the exception would not be available in the absence of a non-tax purpose.[85]

The question that arises is whether the non-tax-purpose requirement will now be made applicable in non-partnership cases. In effect, the requirement aids in distinguishing between tax-driven (abusive) partnerships and those formed for a legitimate business reason. Had the court in its first decision in *Strangi* embraced one of the IRS arguments, it could have more easily integrated such a requirement into the analysis. But, having rejected those arguments, it became necessary for the courts to "smuggle" a non-tax or business requirement back into the analysis via the bona-fide exception – reshaping the exception and raising questions about its contours in the non-partnership context.[86]

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[84] *See* Wheeler v. United States, 116 F.3d 749, 763-64 (5th Cir. 1997) (explaining, in a case arising prior to the use of section 2036 in the partnership context, the limited function of the "bona fide" component in the application of the exception and how the exception should apply to prevent double inclusion where the decedent received a substitute asset with a value equal to the transferred asset).

[85] *See* Estate of Bongard v. Comm'r, 124 T.C. 95, 124 (2005) (requiring non-tax purpose as well as proper crediting to the capital account for an estate seeking to invoke the "bona fide" exception).

[86] *See* Estate of Trombetta v. Comm'r, T.C. Memo. 2013-234, 106 T.C.M. (CCH) 416, at *10 (2013) ("Although a number of cases have applied the 'legitimate and significant nontax reasons' to determine whether a bona fide sale exception was satisfied, all of the cases applied the standard in the context of a transfer to a family limited partnership."). *Cf.* Estate of Hughes v. Comm'r, T.C. Memo. 2005-296, 90 T.C.M. (CCH) 630 (2005) (intimating that the exception requires a showing of good faith in addition to a showing that the decedent had received adequate consideration). For a discussion of *Trombetta*, see Mitchell M. Gans & Jonathan G. Blattmachr, *Private Annuities and Installment Sales:* Trombetta *and Section 2036*, 120 J. TAX'N 227 (2014). Note also that, in 2009, Treas. Reg. § 20.2053-4(d)(5) was amended to provide that a deduction for a claim against the estate is only permitted if it was the product of arm's length bargaining. To

The third type of difficulty engendered by the application of section 2036 in the partnership context relates to the offset permitted under section 2043. Where a transfer is made that triggers section 2036 and the transferor receives consideration in the exchange but not consideration equal to the value of the transferred asset, the bona fide exception cannot apply. Nonetheless, under section 2043, the amount of the inclusion under section 2036 is offset (reduced) by the amount of the consideration received by the decedent (based on the value of the consideration at the time of the exchange). In the absence of the offset, both the transferred asset and the asset received as consideration for the transfer would be included in the transferor's gross estate. Such double inclusion would not be consistent with the purpose of section 2036 – to prevent the transferred asset from escaping taxation where the transfer is in substance testamentary by reason of rights or access retained by the transferor.[87] Thus, even though the transferor did not receive full consideration and the bona fide exception therefore cannot apply, the section 2043 offset nonetheless applies to prevent double inclusion.

Having decided that section 2036 can be used to eliminate partnership discounts, the courts had to address the double-inclusion problem in the partnership setting: If the section is used to include the partnership assets in the gross estate, how should the partnership interest be treated?[88] If the partnership interest is included under section 2033 and the partnership assets are included, as well, under 2036, a mechanism is needed to prevent double inclusion. Assuming the bona fide exception does not apply because the estate fails to establish a sufficient non-tax purpose for the partnership, there would appear to be two alternative mechanisms: disregard of the partnership units or a section 2043 offset.

In *Powell*, the court divided on this question. The concurring opinion argued that, once it is determined that the partnership assets must be included under section 2036, the partnership units should be disregarded, resulting in the section 2036 inclusion of the partnership assets and no 2033 inclusion of the units.[89] The majority, on the other hand,

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what extent this additional requirement stems from the reshaping of the bona fide provision in the partnership context is not clear.

[87] Comm'r v. Estate of Church, 335 U.S. 632, 646 (1949) ("Testamentary dispositions of an *inter vivos* nature cannot escape the force of this section by hiding behind legal niceties . . . .").

[88] See Jonathan G. Blattmachr, Mitchell M. Gans & Diana S.C. Zeydel, Turner II *and Family Partnerships: Avoiding problems and Securing Opportunity*, 117 J. TAX'N 32 (2012), for a discussion of this double inclusion issue.

[89] Estate of Powell v. Comm'r, 148 T.C. No. 18, 2017 WL 2211398, at *17 (T.C. May 18, 2017) (Lauber, J., concurring). As a technical matter, the Code, surprisingly, fails to provide a mechanism that would prevent double inclusions. Nonetheless, given that such inclusion would be inconsistent with the fundamental principles underlying the estate tax,

concluded that the section 2043 offset is the proper mechanism.[90] Under the majority's approach, the offset is equal to the value of the limited partnership units measured at the time the assets were contributed to the partnership.[91]

To illustrate, assume the decedent transferred $10 million in assets to a partnership and received in exchange a limited partnership unit with a value of $7 million (the partnership unit is hypothesized to be worth less than the contributed assets on account of an assumed thirty-percent discount). If, at the time of death, the assets still have a value of $10 million, the net section 2036 inclusion would be $3 million (the $10 million value of partnership assets at the date of death less the $7 million value of the partnership units on the date of the initial transfer to the partnership). In addition, the limited partnership units, having a value of $7 million, would be included under section 2033. Since the objective is to tax the estate on the value of the partnership's assets, $10 million, the majority's approach produces the correct result on these facts. The approach taken in the concurring opinion would also lead to the same (correct) result inasmuch as it would require a $10 million inclusion under section 2036 and a disregard of the limited partnership units (i.e., no inclusion under section 2033).

Difficulty arises, however, if the value of the partnership's assets has fluctuated by the time of death. If, in this example, the partnership assets doubled in value by the time of death, the net section 2036 inclusion would be $13 million: the value of the partnership assets at the time of death, $20 million, less the value of the units at the time of the transfer to the partnership, $7 million. In addition, the units would produce a section 2033 inclusion of $14 million (the units having doubled in value, as well). Thus, under the majority approach, the total inclusion would be $27 million (section 2033 inclusion of $14 million and a net section 2036 inclusion of $13 million) – a problematic result given that only $20 million would have been in the gross estate had the partnership never been formed.

An equally problematic result arises, as the majority acknowledges,[92] if the partnership assets decline in value. For example, if in the example the partnership assets had declined in value to $5 million by the date of death, the net section 2036 inclusion would be zero (i.e., value of the partnership assets at death of $5 million reduced under section 2043 by the $7 million value of the limited partnership units at the time of

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one might conclude that a prohibition against double inclusion is implicit in the Code. *Cf.* Rev. Rul. 84-25, 1984-1 C.B. 191. *See also* Blattmachr, Gans & Zeydel, *supra* note 88.

90 *Powell*, 2017 WL 2211398, at *9.

91 *Id.*

92 *Id.* at *9 n.7.

formation – with the section 2043 offset being available to reduce the amount otherwise includible under section 2036[93]) And, of course, the date-of-death value of the limited partnership units would be included in the gross estate under section 2033. Thus, assuming again a thirty-percent discount, the $5 million in partnership assets would produce a section 2033 inclusion of $3.5 million — a problematic outcome given that a discount is permitted even if there were no non-tax purpose for forming the partnership. Put differently, the example illustrates that section 2036 can be ineffective in combating abusive partnerships.

It also suggests that the approach taken by the concurring opinion in *Powell* might be preferable. On the assumed facts, under the concurring opinion's approach, the $5 million in partnership assets would be included under section 2036, and the limited partnership interest would be disregarded. Given that the decedent's intended beneficiaries would receive $5 million in assets, including $5 million in the gross estate and thereby denying the estate any discount would appear to be consistent with the policy objective of denying discounts for tax-driven partnerships.

In sum, section 2036 is not a perfect fit in the partnership context. As suggested, other approaches might have been a more effective, and less problematic, weapon to close down partnership abuse. But having chosen section 2036, the courts are left with the complications such as those that surfaced in *Powell*.

V. Planning

The principal focus in partnership planning has been section 2036(a)(1). Thus, in addition to documenting a non-tax purpose for the partnership, conservative planners seek to avoid an IRS implied-understanding argument: recommending that sufficient assets be retained outside of the partnership to cover the cost of living, as well as anticipated estate tax, and that distributions be avoided. While *Strangi* suggested the need to consider the threat of section 2036(a)(2), many may have dismissed it as a memorandum decision and its analysis as mere dicta given the conclusion that section 2036(a)(1) applied as well. But things have now changed. With fifteen Tax Court judges now endorsing *Strangi*, it is important for planners to rethink their approach.

Planners may therefore want to consider a few possible approaches in terms of *Powell*'s section 2036(a)(2) analysis. First, *Strangi* and *Powell* involved what might be considered "low-hanging fruit" in the sense

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[93] Section 2043 would offset the amount otherwise includible under section 2036, but it would not permit a deduction for the amount of the offset in excess of the amount of the inclusion.

that the general partner, who had discretion with respect to distributions, was also the decedent's attorney in fact under a power of attorney. Given *Powell*, it would not be prudent to permit the person designated as general partner to serve as such an agent.

Second, the partnership agreement should eliminate any right in the limited partner to vote on the question of dissolution.[94] In the case of an existing partnership, the agreement could be amended to eliminate this right, although exposure under section 2035 would continue for three years after the elimination of the voting right.[95] While it is plausible that the elimination of the voting right could be treated as an applicable restriction under section 2704(b) and therefore disregarded,[96] this would not permit the IRS to argue that the decedent should be treated as having retained the right for purposes of section 2036(a)(2).[97]

Third, the use of trusts as the owner of limited partnership interests could be helpful. In *Byrum*, a trust owned a minority interest in the corporation. In finding that the decedent did not have a legally enforceable right, the Court relied on the fact that the corporate trustee had a fiduciary duty to the beneficiaries, i.e., the decedent's descendants, to enforce the decedent's duties as a controlling stockholder and corporate director.[98] Thus, the presence of a trustee with a duty to enforce the decedent's fiduciary duties could be effective in undercutting an argument based on *Powell* that the decedent's duties were illusory. Whether

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[94] The IRS might plausibly argue in reply that the right to vote on dissolution could have been conferred on the decedent with the consent of the other partners, invoking the "in conjunction with" principle in the section. Faced with such an argument, the estate would have two replies: 1) that the decedent's mere ability to persuade other partners to confer such a voting right is not within the scope of the "in conjunction with" principle, *see supra* note 68 and accompanying text; and 2) the mere possibility that the right could have been conferred on the decedent does not satisfy the requirement in the section that the right be retained.

[95] *See* United States v. Allen, 293 F.2d 916 (10th Cir. 1961), *cert. denied*, 368 U.S. 944 (1961) (applying section 2035 in the case of a transfer within three years that would have defeated the application of section 2036).

[96] *See* Treas. Reg. § 25.2704-2(b) (defining an applicable restriction as "a limitation on the ability to liquidate the entity (in whole or in part)"). Note that, in *Kerr v. Commissioner*, 113 T.C. 449 (1999), *aff'd on other grounds*, 292 F.3d 490 (5th Cir. 2002), the court, in construing this regulation, concluded that a restriction on a put right was not an applicable restriction. It would seem, however, that a restriction on the right to vote on dissolution is somewhat distinguishable from the limitation in *Kerr* and perhaps, therefore, an applicable restriction.

[97] Section 2704(b) provides that applicable restrictions "shall be disregarded in determining the value of the transferred interest." While this provision could therefore affect the value of the transferred interest, it cannot be used as a predicate by the IRS to claim that the decedent should be treated as having retained a right for purposes of section 2036.

[98] United States v. Byrum, 408 U.S. 125, 143-44 (1972).

a corporate trustee, or some other independent trustee, would be necessary to support this argument remains unclear.[99]

In addition, if *all* of the limited units are held in trust, the estate would have two additional arguments: that the trustee, not the decedent, had the right to vote on dissolution; and that, even if a partnership liquidation were to occur, partnership assets would be distributed to a discretionary trust over which the trustee, not the decedent, could control distributions.[100] The use of trusts to accomplish these objectives need not entail the making of a taxable gift or the payment of gift tax.[101]

Fourth, less conventional forms of planning might be considered. For example, the authors have previously suggested that, in the case of a married couple, one spouse can transfer assets to a partnership in which the other spouse is the limited partner. Even if the bona fide exception is inapplicable because of insufficient non-tax purpose, neither section 2036(a)(1) nor section 2036(a) should apply: When the spouse who makes the transfer dies, neither provision can apply because there was

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[99] In *Byrum*, the corporate trustee could have been removed and replaced by the decedent. *See id.* at 127. The Court nonetheless relied on the corporate trustee's fiduciary duty to hold the decedent accountable. *Id.* at 142-43.

[100] The authors have previously suggested the use of such a "buffer trust," under which the trustee who is not the decedent had discretion with respect to distributions. *See* Gans & Blattmachr, *supra* note 22. The Court in *Byrum* indicated that, in such a case, the decedent could not be treated as having a right within the scope of section 2036(a)(2). *See Byrum*, 408 U.S. at 143 ("Even had Byrum managed to flood the trust with income, he had no way of compelling the trustee to pay it out rather than accumulate it.").

[101] First, it may not be necessary to have all of the limited units held in trust. As indicated, in *Byrum*, only a minority interest was held in trust, and the Court nonetheless found that the decedent could be held accountable by the trustee. Thus, a gift of only a portion of the limited units might suffice. Second, if all of the units are to be held in the trust and there is a concern about gift tax, an installment sale might be utilized. Or, as an alternative, the units could be transferred to a trust the terms of which render the gift incomplete for gift tax purposes. For a further discussion, see Gans and Blattmachr, *supra* note 22.

Note, however, that if a transfer of the units to an incomplete-gift trust were made, the retained modification power would cause the partnership units to be included in the gross estate under section 2036(a)(2). The IRS might then seek to use this as a predicate for inclusion of the partnership assets as well: Once the decedent is treated as having owned the partnership units, she must also be treated as having held the rights inherent in the units, including the right to vote on liquidation, triggering application of section 2036(a)(2) to the partnership assets under *Powell*. *Cf.* Rev. Rul 79-7, 1979-1 C.B. 294 ("Consequently, the value of property included in the decedent's gross estate under section 2035 should be treated, for purposes of the estate tax, in the same manner as it would have been if the transfer had not been made and the property had been owned by the decedent at the time of death."); *Compare* Estate of Fontana v. Comm'r, 118 T.C. 318 (2002) (aggregating for valuation purposes property subject to a general power of appointment, includible under section 2041, and property includible under section 2033), *with* Estate of Mellinger v. Comm'r, 112 T.C. 26 (1999) (refusing to aggregate in the QTIP context and distinguished on this ground in *Fontana*).

no retention by the transferor of any right or access with respect to the transferred assets; and when the non-transferor spouse (who is the partner) dies, neither provision can apply given that the section is only applicable in the case of a decedent who made the transfer.[102]

The decision in *Powell* will presumably reignite interest in the *Strangi* court's application of section 2036(a)(2) in the partnership context. And while *Powell*, as argued, misreads the bright-line test established by the *Byrum* majority, practitioners cannot ignore the decision given that fifteen judges endorsed this approach. With proper planning, however, the threat that *Powell* poses can be neutralized.

Conclusion

As the title of this paper suggests, the application of section 2036 in the partnership setting can be problematic. First, as the courts have construed the section, the presence of non-tax purpose is irrelevant if it can be established that the decedent did not retain a right or interest within the scope of section 2036(a)(1) or 2036(a)(2). This, of course, creates the potential for a well-planned partnership to escape the section even where the partnership was formed for the sole purpose of tax minimization. Second, conventional principles, such as the bright-line rule established in *Byrum*, need to be reshaped, or recast as a standard, to make the section more effective in combating abusive partnerships. And even with such reshaping or recasting, the section's effectiveness can still be undercut with proper planning – thus producing less upside on the policy front than a threshold rule requiring non-tax purpose for all family partnerships. Third, as the divide between the majority and concurring opinions in *Powell* reflect, application of the provision in the partnership context can create other difficulties – for example, the double-inclusion problem, which produced a disagreement between the two opinions. Ultimately, while other lines of attack might have been more effective, the courts have made their choice and will be required to continue sorting through the resulting complexity.

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[102] *See* Mitchell M. Gans & Jonathan G. Blattmachr, *Family Limited Partnership: Dueling Dicta,* 35 Cap. U. L. Rev. 1 (2006).

Social Control of Wealth in Antebellum New York

*William P. LaPiana**

I. Introduction

Trusts are often portrayed as the quintessential invention of the common law legal world, born of lawyerly and judicial ingenuity in the service of clients' desires to frustrate taxation by first fashioning and then discharging a rocket launcher through a loophole in a statute carefully designed end to put an end to existing tax evasion.[1] More broadly, the conventional history of the trust most often portrays it as a device for the perpetuation of individual control over wealth in opposition both to governmental attempts to limit that control through taxation and to attempts by family members to control the use of inherited wealth.[2] The two great nineteenth century innovations in American trust law, the spendthrift trust and the formal rule that a trust cannot be terminated by the consent of all the beneficiaries if to do so would subvert a "material purpose" for the settlor's creation of the trust, were both premised on the idea that the settlor has every right to control the enjoyment of the property the settlor has placed in trust for the benefit of the beneficiaries.[3] Those two particular manifestations of the idea that the intent of the settlor controls are the products of the 1880s, yet their viability is undiminished today.

That continuing strength has manifested itself in many of the discussions of whether or not a particular state should adopt the Uniform Trust Code, promulgated by the Uniform Law Commission and offered

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[1] This view of the trust informs the conventional understanding of the workings of the Statute of Uses, 27 Hen. 8 ch. 10, which sees the statute's enactment as part of Henry VIII's campaign to shore up the Crown's revenue from feudal incidents, an aim frustrated by the subsequent invention of the trust. *See* Cornelius J. Moynihan & Sheldon f. Kurtz, Introduction to the Law of Real Property 222 (3d ed. 2002).

[2] *See, e.g.*, Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 Real Prop. Prob. & Tr. J. 445, 445-48 (2006) (discussing how trusts are often used to control the spending of children of wealthy families or provide incentives to effect particular behaviors or particular uses for the wealth).

[3] *See* Broadway Nat'l. Bk. v. Adams, 133 Mass. 170, 173 (1882) (employing the concept of a spendthrift trust); Claflin v. Claflin, 149 Mass. 19, 455-56 (1889) (employing the material purpose rule).

for adoption in the states. Under its former name, the National Conference of Commissions on Uniform State Laws, the Commission was the author of the Uniform Commercial Code, its most successful effort at bringing uniformity to the laws of the states, and the Uniform Probate Code, its somewhat less successful but nonetheless influential attempt to do the same for the law of wills and probate procedure. The Uniform Trust Code has been adopted in 30 states and the District of Columbia since was promulgated in 2000 (although it has been amended several times).[4] The UTC's spendthrift trust provisions (sections 502-503) are a codification of existing law and its provision dealing with termination of a trust with the consent of all of the beneficiaries (section 411) requires that the termination not be "inconsistent with a material purpose of the trust" and expressly states that the existence of a spendthrift provision is not presumed to express a material purpose. The Comment to section 411 quotes from Restatement (Third) of Trusts section 65, comment d to the effect that material purposes "are not readily inferred." The comment to the termination provision, and by extension the Restatement provision, has been widely criticized as not giving sufficient deference to the settlor's reasons for creating the trust and the provision removing the presumption that the existence of spendthrift provision is not enough to prevent termination, that is, that its inclusion in the trust terms expresses a "material purpose," has been so widely scorned that the Commission has placed the provision in brackets, indicating that a state can omit the provision and still adopt the "Uniform Trust Code."[5]

There is, however, an alternative American trust law, traces of which still exist in the law of its place of origin, New York State. The trust provisions of the Revised Statutes of 1830 were a radical transformation of the law of trusts as it then existed in the Anglo-American legal world.[6] The Revised Statutes as a whole and the story of their adoption has not received a thorough treatment in many decades, and

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[4] The Nat'l Conf. of Comm'rs on Unif. State Laws, *Trust Code*, UNIF. LAW COMM'N, http://uniformlaws.org/Act.aspx?title=trust%20Code (last visited July 3, 2017).

[5] There is a large amount of literature on both the spendthrift and the trust modifications provision of the U.T.C. *See, e.g.*, Kevin D. Millard, *Rights of a Trust Beneficiary's Creditors Under the Uniform Trust Code*, 34 ACTEC J. 58 (2008); Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property is it Anyway?*, 38 AKRON L. REV. 649 (2005); Alan Newman, *Spendthrift and Discretionary Trusts Under the Uniform Trust Code*, 40 REAL PROP. PROB. & TR. J. 567 (2005); Alan Newman, *The Rights of Creditors of Beneficiaries Under the Uniform Trust Code: An Examination of the Compromise*, 69 TENN. L. REV. 771 (2002); *see also* Gail Boreman Bird, *Trust Termination: Unborn, Living and Dead Hands—Too Many Fingers in the Trust Pie*, 36 HASTINGS L.J. 563 (1985).

[6] The portions of the Revised Statutes dealing with the law of real property which are the provisions dealt with here, were enacted in 1827 and 1828 with an effective date of January 1, 1830. *See* N.Y. Revised Stat. § 8 (1830) [hereinafter R.S.]. The Revised

this paper certainly is not an attempt to fill that gap. Rather, it illustrates the radical nature of the trust provisions of the Revised Statutes by examining the first case to apply them to a will contest. Some background, however, is still necessary.

II. THE REVISED STATUTES

In 1828 and 1829 the legislature enacted the Revised Statutes which had been prepared by a committee of three appointed by legislative act in 1824.[7] The work undertaken was much more than systematization and reordering of existing statutes. The revisers, Benjamin Butler, John Duer, and John C. Spencer, submitted to the legislature an extensive revision of the law of New York which one commentator describes as "the first true revision of statute law among English speaking peoples."[8] Some of the most dramatic changes were made in the law of real property. Many of these involved the complexities surrounding uses and their role in conveyancing. Others completely transformed the law of trusts of real property and it is those provisions examined here.

The trust provisions of the Revised Statutes are easy to summarize, although they proved difficult to put into practice. There are only two types of trust. The first class includes trusts arising by implication of law which are necessary to prevent fraud. The classic example is A provides money to B which is to be used to purchase real property. B does purchase the property but takes title in B's name without A's knowledge or consent or in violation of A's legitimate expectations. An implied trust therefore arises which requires B to convey title to A. The second class includes active or express trusts "where the trustee is clothed with some actual power of disposition or management, which cannot be properly exercised without giving him the legal estate and actual possession."[9] The statute then authorized only four types of express trusts: 1) to sell lands for the benefit of creditors, 2) to sell, mortgage or lease lands to raise cash to satisfy legacies in wills, 3) to receive the rents and profits from lands "and apply them to the use of any person," and 4) or to accumulate the rents and profits for eventual application to the use of any person.[10] The third sort of trust is closest to what today we identify with the idea of a trust; that is, a trust set up by one person for the benefit of another person. The object of the arrangement is to entrust

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Statutes are therefore usually referred to as the Revised Statutes of 1830; that convention will be followed here.

7 1825 N.Y. LAWS. ch 324 (1909).

8 Ernest H. Breuer, *The New York Revised Statutes-1829*, 55 L. LIBRARY J. 33, 33-34 (1962).

9 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 309 (4th ed. 1840).

10 R.S. § 55.

the trustee with the management of property for the benefit of the beneficiary. It is a gift, often made at death, and often made by one member of a couple to the survivor or by an older generation member to relatives of a younger generation.

The limitation of these provisions to trusts of lands, of course, does not make sense in the twenty-first century. Today most private express trusts are invested in financial assets. For the revisers, however, it was land that was the source of wealth that provided a stream of income for beneficiaries of trusts.[11] In addition, the revisers believed that the existing law of trusts was particularly pernicious as applied to trusts of real property.[12] The law allowed the creation of what were called "formal" trusts. These trusts gave legal title to the land to the trustee but gave the beneficiaries of the trust total control over the land. It was thus possible to hide the real ownership of land behind the person of the trustee. Not only did this arrangement cause confusion in the records of title to land, but it created opportunities for deception and bedeviled the courts of equity with litigation to sort out the resulting tangles. As the Revisers themselves put it in their Notes to the statutes they proposed to the legislature,

> [I]t is plainly needless to retain them ["formal trusts"]. They separate the legal and equitable estate, for no purpose that the law ought to sanction. They answer no end whatever, but to facilitate fraud; the render titles more complicated, and to increase the business of the court of chancery. They are, in truth, *precisely what uses were before the statute of uses, and are liable to many of the same objections.*[13]

While not mentioned in the Revisers' Notes, one example of the questionable use of trusts had already been addressed by legislation. It appears that while most property qualifications for voting were part of the New York Constitution prior to the adoption of the Constitution of 1821 (complete abolition required some additional legislation), the practice of temporarily enfranchising voters by transferring to them for a very short period of time sufficient freehold land to meet the requirements was a common practice.[14] Known in England as "fagot holdings,"

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[11] The situation in contemporary Boston, for example, may have been different. *See* Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 554 (1964).

[12] CHARLES M. COOK, AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM (1981).

[13] NOTES OF THE ORIGINAL REVISERS OF THE REVISED STATUTES, *reprinted in* ROBERT LUDLOW FOWLER, THE REAL PROPERTY LAW OF THE STATE OF NEW YORK 1293 (Baker, Voorhis & Co. 3d ed. 1909).

[14] DIXON RYAN FOX, THE DECLINE OF ARISTOCRACY IN THE POLITICS OF NEW YORK 144 (1918).

the practice was perceived to be common enough in New York to be addressed by legislation, prescribing a new oath to be taken by electors who must swear that they possess a freehold of sufficient value and "that I have not become such freeholder fraudulently, for the purpose of giving my vote at this election, nor upon any trust or understanding, express or implied, to reconvey such freehold during or after this election."[15]

In short, the Revisers meant what they said in section 45 of Article II, "Of Uses and Trusts": "Uses and trusts, except as authorised and modified in this Article, are abolished . . . ."

A. Perpetuities

The revisers took an even more radical approach to another aspect of the law of trusts, limiting the control of the dead hand. Today, almost every law student learns to dread the very phrase "rule against perpetuities," and the rule's gradual abolition in this country is probably a source of satisfaction to many who have struggled with its complexities. The rule against perpetuities that is taught in the classroom today is a rule based on remoteness of vesting of future interests.[16] A future interest, of course, is property. It can be analogized to a claim check. At some time in the future, a person who has the claim check can surrender it in return for the ownership of property. All trusts create future interests. There are current beneficiaries and those who will benefit in the future. The latter have future interests and in order for those interests to be valid they must "vest in interest" within a period that begins to run when the future interest is created and lasts for the length of a life or lives in being when the interest is created plus twenty-one years plus a period of gestation. A future interest is vested in interest when the person who has the interest can be identified and the quantity of property that will be received when the future interest turns into possession is certain.[17] The classic example is a trust to pay the income to the creator of the trust's child for life, then to pay the income to the child's children for their lives, then to terminate the trust and to distribute the trust property to the child's then living descendants. The child's children

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[15] 1811 N.Y. L. 287 (intending to prevent frauds and perjuries at elections and to prevent slaves from voting).

[16] Before too long the Rule Against Perpetuities may be an historical curiosity. It has been abolished in as many as 20 states and the "dynastic" trust, a trust for a family line drafted to be perpetual, or at least of many centuries duration, is now a staple of estate planning for the wealthy. *See* LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 132-136 (2009).

[17] WILLIAM M. MCGOVERN, SHELDON F. KURTZ & DAVID M. ENGLISH, WILLS, TRUSTS AND ESTATES, INCLUDING TAXATION AND FUTURE INTERESTS 491 (4th ed. 2010).

have future interests in the trust income, and all of those children will be known at the child's death and the share of income to which they will be entitled will also be known. The future interest, which when it is "cashed in" will result in obtaining fee simple ownership of the trust property, however, is created in the child's descendants who are living at the death of the last to die of the child's children, and it will not be certain who will receive the trust property nor how much each person will receive until that future date. Because the child can have more children after the trust is created, the time for the termination of the trust could be the death of a person who was not alive when the trust was created. Thus the persons who will receive the trust property might be determined at the death of a person who was not a life in being and therefore the interest in the child's descendants is void ab initio.[18]

It is worth repeating that the income interests in the hypothetical trust discussed above are perfectly valid under the "no remoteness of vesting" rule. The child's interest in the income vests at the creation of the trust; the child's children's interests vest when the child dies and no more children can come in to being; the class is "closed" at that time, a time which occurs at the death of the child who was him or herself a life in being when the trust was created.[19] Because the Rule Against Perpetuities invalidates only the remainder, the trust will be established and will pay income to child and child's children just as the trust terms require. When the last of child's children die the trust will terminate and the trust property will most likely be distributed through the estate of the creator of the trust.[20] For example, if the trust was created in the will of child's parent from the residuary probate estate, the interest representing the right to have possession of the trust property when the trust finally ends must go to parent's intestate heirs—property not properly disposed of by will must pass in intestacy. Determining who actually gets possession of the property at the termination of the trust will certainly require tracing that reversionary interest through several intermediate estates until the ultimate takers of the property are properly identified.

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[18] *Id.* at 492.

[19] In the modern world, the notion that the class of a child's own children closes at child's death is obsolete. The technology of storing sperm and ova makes it possible for an individual's child to be conceived and born after the individual's death. The status of such children is generally uncertain and while there are numerous reported cases involving claims for Social Security benefits on behalf of such children as the survivors of their "predeceased" parent or parents, there appear to be no cases involving perpetuities issues. A handful of states have legislation dealing with the status of posthumously conceived children for property law purposes like inheritance. *See* N.Y. EST. POWERS & TRUSTS LAW § 4-1.3 (McKinney 2017).

[20] MCGOVERN, KURTZ & ENGLISH, *supra* note 17, at 492.

The revisers, however, took a different approach. They ignored vesting and focused instead on the suspension of the power of alienation. The rule was set forth in two sections of Part II, Chapter I, Article I:[21]

> Section 14. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this Article. Such power of alienation is suspended, when there are no persons in being, by whom an absolute fee in possession can be conveyed.
>
> Section 15. The absolute power of alienation, shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of not more than two lives in being at the creation of the estate . . . .

The limitation to two lives was an innovation, directly inspired by *Thellusson's Case*,[22] in which the English courts allowed accumulation of income and the postponement of vesting during the lives of nine persons living at the testator's death.[23] The question left open by the drafting of section 14 is the meaning of "future estate." In the example above does the term apply only to the ultimate remainder, or does it mean the income interests as well? That is a question that the first case to deal with these provisions would answer.

B. Indestructibility

But there is more. The third type of permitted trust described above, corresponding most closely to modern donative express trusts, were made indestructible by section 63:[24] the right of the beneficiary of such a trust to the rents and profits of the real property in the trust "cannot be transferred by assignment or otherwise."

In addition, section 65 states, "where the trust shall be expressed in the instrument creating the estate, every sale, conveyance or other act of the trustees, in contravention of the trust, shall be absolutely void." Taken together, these two provisions are the source of the "statutory spendthrift trust," one of the distinguishing features of New York trust

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[21] R.S. §§ 14, 15.

[22] Thellusson's Case (1805), 32 Eng. Rep. 1030; 11 Vesey 112; JOHN F. HARGRAVE, A TREATISE ON THE THELLUSSON ACT, 39 & 40 GEO. III. C. 98: WITH PRACTICAL OBSERVATIONS UPON TRUSTS FOR ACCUMULATION (1842).

[23] Parliament reacted to the result by passing the Accumulations Act, 40 Geo. III (c. 98). *See* HARGRAVE, *supra* note 22, at xviii.

[24] R.S. § 63.

law.[25] In addition, the prohibition on the trustees doing anything that contravenes the terms of the trust is the provision which has made New York trusts indestructible, no matter what the beneficiaries might desire.

C. Supplanting the Common Law

These provisions are indeed revolutionary. James Kent referred to "the statutory demolition of the system of trusts."[26] Many would assume Kent to have a conservative bias, but sympathetic sitting judges said the same. In the first high court case to deal with these provisions, Chief Justice Savage refers to the express abolition of all expectant estates, uses and trusts and that the revisers and the legislature intended to effect "great and radical changes."[27] In the course of delivering his opinion in *Hawley v. James*, one of the most important early cases applying the new statutory scheme, Judge Bronson wrote,

> To give effect to the statute in the spirit in which it was enacted, we must, as far as practicable, eradicate from our minds all that we have learned in relation to the doctrine of trusts as they existed before the late revision, and read the statute as though the particular kinds of express trusts which it specifies were now for the first time authorised by law. We may resort to the common law for definitions and rules of construction where the statute itself is deficient. But in attempting to ascertain whether any particular trust can now be created, we cannot resort to the common law, for the obvious reason that this light has been extinguished by the legislature.[28]

The view of a more modern commentator is similar. As George Canfield put it in the Columbia Law Review in 1901, "The revisers undertook to abolish the old law of uses and trusts of real property and to establish a brand-new system, simple and intelligible after a few days' study."[29] In the standard study of the American codification movement, Walter Cook describes the revisers' work in this area as striking "at the

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[25] The "statutory spendthrift" label is not accurate. Section 57 made the income from the trust property "beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created" liable to pay the beneficiary's debts. The substance of the section appears today in N.Y. EST. POWERS & TRUSTS LAW § 7-3.4 (McKinney 2017).

[26] KENT, *supra* note 9, at 310.

[27] Coster v. Lorillard, 14 Wend. 265, 298 (N.Y. 1835).

[28] Hawley v. James, 16 Wend. 61 (N.Y. 1836) (involving the will of Henry James, the grandfather of the psychologist William James and the novelist Henry James).

[29] George F. Canfield, *The New York Revised Statutes and the Rule Against Perpetuities*, 1 COLUM. L REV. 224, 477 (1901).

very roots of the common law."[30] All in all this was radical reform. And it was radical reform that was put into practice.

III. *Coster v. Lorillard*

A. George Lorillard's Estate Plan

The first important case dealing with these provisions decided by the highest court of New York, the Court for the Correction of Errors, was *Coster v. Lorillard* in 1835.[31] The case involved the validity of the trusts created under the will of George Lorillard who died in 1832 leaving an estate worth approximately $3,000,000 and producing an annual income of $80,000 to $100,000. The total value of the estate represented economic power equal to more than $54.4 *billion* in 2015 and the buying power of the annual income in 2016 dollars was between $2,280,000 and $2,860,000 although as a share of per capita GDP, which is regarded as a better measure of standard of living, the income was worth about $68,000,000 a year. This was a fortune.[32]

George Lorillard was one of the sons of Pierre Lorillard, the founder of the tobacco company that bore his name for more than two centuries, and Catherine Moore.[33] According to the reports of the cases dealing with his will, he had three brothers: Jacob and Peter, who survived him, and Blaze (spelled "Blaze" in the transcription of the codicil) who predeceased him, leaving a daughter, Maria Barstow, who survived George, and two grandchildren, children of a deceased son of Blaze, George and Blaze Lorillard. George was also survived by two children of his mother's second marriage to Daniel Holsman, a half-sister, Catherine, wife of John Coster, and a half-brother, Daniel Holsman. The two living brothers, the niece and grand-nephews, his half siblings, and his mother were his heirs-at-law. His mother, however, died only a few

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30 Cook, *supra* note 12, at 149. The term "common law of trusts" is not strictly accurate. Trusts are the creatures of equity and "common law" refers to the law created and applied by the English law courts as opposed to equitable principles that made up the jurisprudence of the Court of Chancery. Yet the nineteenth century lawyers, judges, and commentator who dealt with the Revised Statutes regularly referred to the common law of trusts in ways that show it was unexceptional. It may be that in the legal culture of the antebellum United States the term "common law" encompassed all of the legal rules and precedents "received" from English law.

31 14 Wend. 265.

32 *See* Measuring Worth, https://www.measuringworth.com/ (last visited July 3, 2017).

33 In 2014 the company agreed to be purchased by Reynolds American. The company long before had passed out of the family's control. *See* Michael J. De La Merced & Chad Ray, *To Compete With Altria, Reynolds American Is Buying Lorillard*, N.Y. Times, July 15, 2014, https://dealbook.nytimes.com/2014/07/15/reynolds-american-to-buy-lorillard-for-27-4-billion/?_php=true&_type=blogs&_r=1.

days after George's death in September of 1832. George and his brother Peter (or Pierre) succeed to their father's tobacco business and we could say they certainly made a go of it, given the value of George's estate.

The basic plan was straightforward.[34] Unmarried and childless, Lorillard wanted to benefit his twelve nieces and nephews of the full blood during their lives and then to have the property pass to their descendants. The will creates two trusts. The first is to hold all the testator's real estate in New York City and from the rents and profits to pay two charitable legacies, annuities to a half-brother, to children of his full-blood nieces and nephews, and to his half-blood nieces and nephews, and the remainder of the income in equal shares to his twelve full-blood nieces and nephews (who were also named executors and trustees). After the death of the last to die of the twelve nieces and nephews the trust property is to be distributed to their then living descendants.[35] The second trust is to be funded by selling all of the rest of his real and personal property and investing the proceeds in real estate in New York City, with the rents and profits to be paid to the twelve nieces and nephews for their lives, with the same remainder as the first trust.[36] George Lorillard's nieces and nephews and their families were going to be filthy rich, although their parents, Lorillard's siblings, were skipped over. In addition the trustees would presumably be people of great influence in New York City real estate circles, although we might wonder how well twelve people would cooperate in the management of extensive real estate holdings. The question before the court was the effect of the provisions of the Revised Statutes discussed above on the trusts created in the will.

The question remains, however, why did George Lorillard adopt this particular estate plan? Passing property to the next generation is not at all unusual, of course, and since George Lorillard had no spouse or children, his decision to benefit his siblings' descendants while giving something to his half siblings and making some charitable gifts is not at all surprising. George was the co-owner of a profitable business, but his plans do not appear to be at all related to ensuring that the next generation succeed to control of the enterprise.[37] P&G Lorillard was almost

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[34] The following is drawn from the transcription of the will and codicil in the court records accessed through Ancestry.com [hereinafter *Will* and *Codicil*] (on file with author). The provisions of the instruments are also summarized in the three opinions in the case. *See Coster,* 14 Wend. at 265-72.

[35] *Will*, Article First.

[36] *Will*, Article Second.

[37] The date of the senior Lorillard's death is uncertain, although there is a persistent story that he was killed by the British during the occupation of New York City, a story repeated by the New York City Parks Department, see *Belmont Playground*, N.Y. CITY

certainly not a corporation and was more likely a partnership, whether formal or not. There were no shares of stock to give to the next generation, but even if there were the command in the will that his personal property and real property situated outside the City of New York be sold and the proceeds invested real estate in the City means that no matter how George owned his share of the family business it would not be part of the property held by his trustees. Even the snuff mill where the company carried out its manufacturing operations was at that time located in a part of Westchester County that would become part of the City of New York only much later in the nineteenth century.[38]

Even more interesting is the lack of a role for his brother and business partner Peter in George's plans. His other surviving brother, Jacob, was named executor and trustee along with the twelve nieces and nephews of the whole blood. Jacob does not appear to have been active in the family business, but was a tanner, and apparently as successful in turning hide into leather as his brothers were in turning tobacco into snuff and other products.[39] He was also closely associated with the Mechanics' Bank "which, while its president, he twice delivered from serious embarrassment."[40] A prominent abolitionist, his death was marked by a laudatory editorial in the *Colored American* of September 29, 1838 which described him as being "in principle, a true abolitionist" and as "the now sainted Lorillard."[41] Perhaps George intended his nieces and nephews to use the wealth he left him to be more like his brother Jacob, less active in "trade" and more in philanthropic activities. It is also possible that George's death was not unexpected and that he

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DEP'T OF PARKS & RECREATION, http://www.nycgovparks.org/parks/belmont-playground _bronx/history (last visited July 3, 2017) and EDWIN G. BURROWS & MIKE WALLACE, GOTHAM: A HISTORY OF NEW YORK CITY TO 1898, at 345 (1999).

[38] One of the landmarks in the early history of Lorillard the business was the purchase in 1792 of a mill and the surrounding land in what is now the Bronx. *See* MAXWELL FOX, THE LORILLARD STORY 22 (1947). According to Fox, the father and sons made the decision together, despite the book including a reproduction of what Fox identifies as the earliest known advertisement for the firm dated May 27, 1789 which mentions "Tobacco & Snuff" for sale "at the Manufactory, No. 4, Chatham street [today's Park Row], near the Gaol" by Peter and George Lorillard. *Id.* at 4. The site of the mill, replaced in 1870 by a stone structure which still stands, is part of the New York City park system, the Belmont Playground, named for the Lorillard family estate that once encompassed the site. *See Belmont Playground*, *supra* note 37. Whether or not George held any interest in the mill and the surrounding real estate, the direction to sell his real estate outside of New York City would have required the sale of his interest in the mill.

[39] BURROWS & WALLACE, *supra* note 37, at 345.

[40] *Jacob Lorillard*, VIRTUAL AMERICAN BIOGRAPHIES, http://www.famousamericans.net/jacoblorillard/ (last visited July 3, 2017).

[41] *Colored American: A Good Man Gone to His Rest,* COLORED AMERICAN (Sept. 29, 1838), http://research.udmercy.edu/find/special_collections/digital/baa/item.php?record_id=493&collectionCode=baa (last visited July 3, 2017).

had already disengaged from an active role in the business. His will was made in October 1831, eleven months before his death, and it may be that he was already terminally ill and had indeed withdrawn from active life. On the other hand, in the exordium of his will George described himself as "tobacco manufacturer" and as will see very shortly, at the time he committed his estate plan to writing George Lorillard still owned an interest in the snuff mill that was an important part of the family business.

It is equally possible that George intended no slight to Peter. Peter may have been so deeply involved in running the family business that he would not have the time to deal with the real estate portfolio the trusts would hold, and Jacob appears to have been quite familiar with real estate investing. Note, too, that Jacob and George, along with the husband of their half-sister Catherine, John Coster, were the nominated executors of their mother's will.[42] The family may have relied on Peter to run the business while the other men of the elder generation, whether related by blood or marriage, were relied on to deal with the family's investments. Finally, George Lorillard may have shared at least to some degree his brother Jacob's views on slavery and abolition.

The only charitable gifts in George's will were $20,000 to the trustees of the General Theological Seminary of the Protestant Episcopal Church and $1000 to "the trustees or Vestry of St. Philips Church (fronting on Centre Street in the Sixth Ward of the City of New York)."[43] St. Philips Church was founded at the beginning of the nineteenth century and is the oldest historically black Episcopal parish in New York. According to a late nineteenth century sermon on the history of the parish, George Lorillard leased the land to the parish on which its first church building was erected in 1818-1819 and consecrated on July 3, 1819.[44] The first rector of St. Philip's, Peter Williams, Jr., the only rector during George Lorillard's lifetime, was one of the pillars of the American Anti-Slavery Society, and although he was forced to resign by the then

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[42] Coster v. Lorillard, 14 Wend. 265, 272-73 (N.Y. 1835).

[43] *Will*, Article First.

[44] B.F. De Costa, *Three Score and Ten: The Story of St. Philip's Church* (1889), http://anglicanhistory.org/usa/misc/decosta_philip1889.html (last visited July 17, 2017). That first church building burned in December 1821 and it successor was destroyed during anti-black and anti-abolitionist riots in July 1834. BURROWS & WALLACE, *supra* note 37, at 558. After several intermediate moves, the parish moved to its current location at 204 W. 134th St. in 1909. *St. Philip's Episcopal Church (Manhattan)*, WIKIPEDIA (Nov. 29, 2016, 4;50 AM), https://en.wikipedia.org/wiki/St._Philip%27s_Episcopal_Church_(Manhattan) (last visited July 17, 2017).

Bishop of New York, Benjamin Onderdonk, he never surrendered his principles.[45]

Whatever led George Lorillard to write the will he executed in October of 1831, the codicil to the will executed in December of the same year and also admitted to probate changed his estate plan in ways that more clearly benefitted his relatives, especially Peter Lorillard's son Peter, Jr. By the terms of the codicil, Uncle George gave Peter, Jr. "his heirs and assigns forever, in fee simple, all my one half part of the lands and snuff mills belonging to me and my brother Peter Lorillard" as well as George's half interest in other lands outside of New York City owned by him and Peter, Sr. as well as George's "part of the lands and mill site" in Patterson, New Jersey. The gift to Peter, Jr. also included George's house on Chatham Street (now Park Row) in Manhattan and the leasehold lot of ground on which it stood. Whatever George Lorillard expected to be the outcome of the direction in his will to sell his land outside of the City of New York, two months later the codicil made it clear that his share of the real estate involved in the family business, along with his house located on the same street as the company's store, would belong to his brother and partner's eldest son. The devises in the codicil were made conditional on Peter Jr's. paying to the executors and trustees of the will $25,000 within two years of his uncle's death.[46] That payment would then become part of the trust created by Article Second of the will and benefitting all of George's nieces and nephews ("the Article Second trust"). Peter, Jr. also had to agree to pay an annuity of $200 a year for ten years to one of George's maternal cousins. Should Peter, Jr. not agree to make the $25,000 payment and to pay the annuity, the codicil directs the executors to sell the lands involved and to add the proceeds to the Article Second trust.[47]

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45 Burrows & Wallace, *supra* note 37, at 559. Rev. Williams' father, Peter Williams, Sr., was born into slavery and was purchased by tobacco merchant James Aymar. The elder Williams, who bought his freedom after the Revolution, became an expert cigar maker and an important figure in the Methodist church in New York while maintaining a successful tobacco business. *Id.* at 398. Whether the tobacco business is part of the link between George and Jacob Lorillard, the Williamses father and son and black religious institutions in New York is a question that is worth further investigation. There is little doubt that at least some of the tobacco P&G Lorillard and Company turned into snuff and other products was raised by slave labor in the United States—Peter and George were involved in litigation over the failure to deliver to New York tobacco they had purchased in Virginia, a failure caused by the British blockade of Chesapeake Bay during the War of 1812. *See* P&G Lorillard v. Palmer*,* 15 Johns. 14 (N.Y. Sup. Ct. 1818), *rev'd,* Palmer v. Lorillard*,* 16 Johns. 348 (N.Y. 1819).

46 Using the relative share of GDP measure referred to *supra* note 32, $25,000 in 1831 is equivalent to $429 million in 2015. *See* Measuring Worth, https://www.measuringworth.com/.

47 *Codicil*, Article First.

The codicil also disposed of other real estate outside of the City of New York that the will had directed the executors to sell. A grandnephew, grandson of George's deceased brother Blaze and also named George, received a life estate in a farm in Westchester County. After the life tenant's death the land is to be sold and the proceeds added to the trust created by the will.[48] The same grandnephew was given fee simple ownership of 506 acres of land in Oswego County.[49] Another of Blaze Lorillard's grandsons, also named Blaze, received a life estate in a farm in the town of Pelham in Westchester County and fee simple ownership of another tract of land in Oswego County of 472 acres. The land subject to Blaze's life estate is to be sold after his death and the proceeds added to the trust created in the will.[50] Article Sixth gave George's niece Eleanora Spencer, Peter, Sr.'s, daughter, "all my horses, cattle, waggons [sic.], and all my farming utensils that are used upon my farm and all my household furniture, beds, bedding and books." Under Article Seventh, George's niece Maria Barstow, Blaze's daughter, received a life estate in two farms in Westchester County "at present under the care of Robert Barstow," presumably her husband, and a life estate in lands and mills in Westchester "at present leased to Robert Barstow." As with the lands in which his grandnephews were given life estates, the lands Maria was to enjoy for life were to be sold after the life tenant's death and the proceeds added to the Article Second trust.

The codicil also modified the interests in the trusts of his niece Maria Barstow and his nephew Jacob Lorillard, Jr. "[O]ne-half part of the share or proportion of the rents, income and profits of [George's] estate" that would otherwise have been paid to Maria during the seven years after George's death is to be invested by the trustees in a separate fund and the trustees are to pay or apply the property in their discretion to or for the use of Maria's children.[51] During the same seven year period, the entire share of same rents, income and profits that would have been paid to George's nephew Jacob, his brother Jacob's son, is to be set aside by the trustees as a separate fund.to be paid to Jacob or applied to the use of his children. Jacob may not have had children at the time the codicil was executed—the provision provides that if he has no children or if his children die "without such money having been applied to their use," the trustees are given authority to distribute it to Jacob or to divide it among his then surviving sisters.[52] Finally, the codicil gave annuities of $500 to the sons of his half-brother Daniel Holsman (his

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48 *Codicil*, Article Second.

49 *Codicil*, Article Third.

50 *Codicil*, Articles Fourth and Fifth.

51 *Codicil*, Article Eighth.

52 *Codicil*, Article Ninth

daughters received identical annuities in the will) to be paid out of the Article First trust.[53] The only relative completely left out was George's half-sister Catherine, married to John Coster. Whatever the motivation for the codicil, it expands the pool of those benefitting immediately from the Article First trust, the source of all of the annuities, and devises fee simple ownership of real property outside of New York City to male members of the next generation, and perhaps most importantly gives Peter Lorillard, Jr. the opportunity to purchase land critical to the functioning of the family business. In addition, some of the George's nieces receive life estates in real estate located outside of New York City, real estate that would have been sold under the provisions of the will and added to the Article Second trust. We can only speculate to what degree the changes wrought by the codicil were deigned to prevent opposition to the estate plan.

While much of the "why" is speculation, one thing is certain. When considered in the abstract, the trusts created by George Lorillard's will were not exactly the sort of trusts the Revisers intended to destroy, or rather, they did not exhibit the vices the new statutes were designed to suppress. For the Revisers, and presumably for the legislators who made the Revised Statutes the law of New York, trusts were dangerous to the polity because they created a class of rentiers who had not responsibility for the management of the property which supported them. This aspect of the new trust law is examined in the discussion of the opinions of the judges in the Court of Errors. The trusts under George Lorillard's will, however, were to be managed by the beneficiaries who were also the trustees. With the exception of the annuitants whose annuities were charges on the trust created with the real property in New York City George owned at death, the persons who would benefit from the income generated by the real estate held in the trusts were the same people who would hold title to the real estate and be responsible for the leases and other transactions that would make the property productive of income. Some of his nieces and nephews were adults. Perhaps Uncle George wanted to give them responsibility for their own financial security as well as requiring them to work together to manage his share of the

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[53] *Codicil*, Article Tenth. *See* Measuring Worth, https://www.measuringworth.com/ (last visited July 3, 2017). Using this calculator figured that a share of per capita GDP is the equivalent of $340,000 in 2015 dollars. Therefore the $500 annuity was not insubstantial.

family fortune.[54] In addition, his nieces, should they marry, would have a source of income free from the control of their husbands.[55]

Again, some qualification is necessary. It is possible, even likely, that the management of the Lorillard family real estate holdings involved agents and others whose only relationship with the owners of the real estate was that of employer and employee rather than a family relationship.[56] And, as we will see, the fact that the trustees who were also the beneficiaries were capable of managing these extensive real estate investments was seen as one more reason why the trusts violated the new statutes. Finally, there were no doubt practical reasons for placing the real estate in trust rather than parceling it out in fee simple ownership to the trust beneficiaries. Splitting up George's existing real estate would likely require dividing existing plots as well as valuing them accurately so that each beneficiary under the will received appropriate value. What was once a portfolio of real estate investments managed as a whole would become separate holdings. Instead of the intended beneficiaries sharing in a large pool of income producing property, the benefit any one beneficiary received from Uncle George's estate would depend both on which parcels they received and how well their individual property was managed. His nieces' property would also come under control of their present or future husbands unless individual trusts were created for them. Numerous relatively small trusts with a single investment each might not have appealed to George Lorillard. His desire to give annuities to some of his family members was also made much easier to accomplish by creating a large trust, income from which would fund the annuities easily. The will provision directing the sale of his personal property would still operate but the executors would have to distribute cash to the beneficiaries and it does seem that George Lorillard really did prefer long term investments to be in real estate.

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[54] *Coster*, 14 Wend. at 271. George Lorillard realized that not all of his nieces and nephews would necessarily be adults at the time of his death; the will authorized a minimum of three executors and trustees who were not minors or non-residents of New York to execute the trusts, and at his death eight of the twelve trust beneficiaries and nominated executors and trustees were of full age. *Id.* at 272.

[55] The terms of both trusts expressly provided that the interests of the nieces and grand-nieces who were current and remainder beneficiaries of the trusts would be paid to them for their separate use and benefit, free from "the control, liabilities or engagements of their husbands." *Will*, Article First. Such provisions were effective under New York law both before and after the Revised Statutes. *See* NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 76 (1982).

[56] The devises of real estate in the Codicil often include the name of a lease or the name of the person who has the "care" of the land.

Whatever the reasons George Lorillard had for making the will he did, it was all for naught. The entire arrangement was torn down by the trust provisions of the Revised Statutes.

B. The Litigation

The case began as a bill in chancery brought by Jacob as executor and trustee as well as executor of his mother's will (if the will were invalid part of George's property would pass to his mother as one of his heirs) and by seven of the nieces and nephews named as executors and trustees asking for a decree from the Chancery Court stating that the trusts in the will were valid and ordering them to be carried out. The eighth niece who was of age refused to join in the suit and she, the minors named as executors and trustees, John Coster and his wife (George's half-sister Catherine), Peter Lorillard, George's brother, George's half-brother Daniel Holsman, and George and Blaze Lorillard (George's grand-nephews, the children of a predeceased child of his predeceased brother Blaze) were named as defendants. The defendants are all persons who are George's heirs in intestacy and they may also have been beneficiaries of George's mother's will and thus would take through her will whatever she received as George's heir. In addition, George's niece Maria Barstow, the daughter of his predeceased brother Blaze and his grandnephews George and Blaze were heirs in their own right and presumably preferred to see the trusts fail. The infant trustees and executors, of course, could not join in the action to have the will construed and the trusts held valid, but they would have to be bound by any final decree and apparently under the existing procedural system they would have to be defendants, even though their interests were aligned with their adult siblings and cousins and with Jacob. Peter Lorillard was also a defendant, but again, even if he wanted his brother's will to be carried out as written he had no standing to bring an action to have it declared valid but had to be bound by any decree so holding and was therefore nominally a defendant.

The case was tried twice: once before the Vice-Chancellor[57] and again on appeal before the Chancellor who upheld the validity of part of the income interests in the twelve nieces and nephews.[58] The legal reasoning is complex, but the basic holding was that, first, the prohibition on undue suspension of the power of alienation and the voiding of future estates that caused a prohibited suspension did not apply to present interests like the income interests in the trusts under George's will and, second, that nothing in the Revised Statutes prevented the creation of a

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57 Lorillard v. Coster, 5 Paige Ch. 172, 173 (N.Y. Ch. 1835).
58 *Coster*, 14 Wend. at 272.

trust for any number of beneficiaries who have a present interest.[59] The Vice-Chancellor did express his opinion in dicta that the remainders in the trusts under the will were invalid because they would vest only after the death of the last of the twelve nieces and nephews[60] and therefore suspended the power of alienation for more than two lives.

The Vice-Chancellor's decision was appealed to the Chancellor, Reuben Walworth.[61] The Chancellor was no friend of the perpetuation of inherited fortunes. His opinion on the appeal leaves no doubt where he stands. "The present case," he wrote, "is a striking illustration of the wisdom of these restrictions upon the power of rendering real property inalienable for a long period of time."[62] George Lorillard's trusts would prevent the divisions of the real property they held for many decades

> and in the meantime to give to a few of the nephews and nieces, who may chance to live the longest, an enormous and constantly increasing income; while the descendants, not *in esse* at the death of the testator, of such of the nephews and nieces as happen to die first, will be left without a shilling out of the proceeds of this immense estate for their education and support, during the continuance of the trust, although presumptively entitled to a large share of the property after the death of the whole of the twelve nephews and nieces.[63]

Even more striking was Walworth's strong statement of the primacy of society over the individual's desire to control property after death.

> Nothing can be more repugnant to the principles of a republican government than the perpetuation of large and overgrown estates, long after those, by whose industry and prudence such estates have been acquired, have been laid in their graves. . . . The natural right, however, of disposing of, as well as enjoying all earthly possessions, necessarily terminates with our lives. And whatever power of disposition or control we are permitted, by anticipation, to exercise over our acquisitions after that time, is merely a favor conferred upon us by some positive regulation of society. No one, therefore, should be encouraged, or even allowed, to make an unnatural and capricious disposition of his property by will, without regard to the situation and probable wants of those who are the proper objects of his bounty, for the mere purpose of rendering such property indi-

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59 *Lorillard*, 5 Paige Ch. at 225-26.
60 *Id.* at 210.
61 *See id.* at 172.
62 *Id.* at 224.
63 *Id.*

> visible and inalienable for a long period after his death; because such a disposition of his property, by will, is a serious injury to the community, which has granted to him the privilege of disposing of the accumulations of his life in this manner.[64]

One might assume at this point that the Vice-Chancellor would be reversed, and indeed he was, but not in a way that destroyed the trusts and reduced George's estate to intestacy.[65] The Chancellor had a different idea. He analyzed the income beneficiaries' interests in the two trusts as tenancies in common with cross remainders. That meant that when the first niece or nephew died, the remaining eleven would enjoy one-eleventh of the decedent's share of the income of the trust.[66] When the next beneficiary died the trust must end because then the two-life permissible period of suspension of the power of alienation would be at an end. Presumably at that time the trust property would pass to George's heirs because the will made no other disposition of the property other than to the trusts.

This result, of course, made no one completely happy, and the Chancellor's decision was appealed to the Court of Errors of the State of New York.[67] The Court of Errors was the highest court of the state until the Constitution of 1846 abolished it and created instead the Court of Appeals, still the highest court of New York. The Court of Errors was unusual among the highest courts of the states in its membership. It was composed of the president of the state senate, the senators, the chancellor, and the judges of the Supreme Court.[68]

The high court decided that the new rules completely destroyed George Lorillard's estate plan. There were five opinions in the Court of Errors. All agreed that under the English common law, indeed under the law of New York as it stood before the Revised Statutes, the trusts in the will were completely valid and indeed unexceptional.[69] The classic rule against perpetuities was not violated. The remainders following the nieces' and nephews' interest in the income of the trusts are not vested during the existence of the income interest because the takers of the trust have to be living at the death of the last of the twelve to die, but when all of the twelve are dead, the trust property will be distrib-

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64 *Id.* at 225.

65 *See id.*

66 *Id*. at 230.

67 Coster v. Lorillard, 14 Wend. 265, 278 (N.Y. 1835).

68 5 American Charters, Constitutions and Organic Laws 2646 (F. Thorpe, ed. 1909). *See* Francis Bergan, History of the New York Court of Appeals 1847-1932 at 9, 12-14, 19-35 (1985).

69 *Coster*, 14 Wend. at 369.

uted to their descendants. The vesting is delayed only for the lives of the twelve and since they were all living at their uncle's death all is well.

But under the Revised Statutes all is not well. There was much discussion about the application of the provisions of sections 14 and 15 to trusts. One of the arguments made to uphold the trusts was that the language voiding every "future estate" meant that only future estates, the name the new statutes gave to future interests, the existence of which suspended the power of alienation, were void. The court held, however, that the statute subjected every interest in the trusts it permitted to the suspension rule.[70] The life income interests therefore violated the rule. Because the interests of the twelve as beneficiaries are inalienable under section 63 and because as trustees they cannot alienate so as to destroy the trusts—to do so would violate their duty as trustees to administer the trusts according to their terms and therefore be completely void under section 65 as an action in contravention of the trust—the power to alienate is suspended for all twelve lives and the statute is violated.

In addition, a majority of the court held that the trust itself was invalid because it was not one of the four varieties authorized in section 55.[71] The only authorized trust that could encompass the Lorillard trusts was the third, a trust to "to receive the rents and profits of lands and apply them to the use of any person during the life of such person."[72] As originally submitted by the revisers to the legislature, the rents and profits were to be applied "to the education and support, or support only of any persons."[73] In the course of legislative debate the section was amended and as passed allowed application of the rents and profits for "The education and support, or either" of any person.[74] Some three months after passage, in 1830, the language defining the third type of trust was amended again and the word "use" was substituted for the phrase referring to education and support.[75] The five judges of the Court of Errors who authored opinions were not of one mind on the meaning of the provision.

Chief Justice Savage clearly believed that section 45 of the Revised Statutes meant what it said: "Uses and trusts, except as authorized and modified in this Article, are abolished."[76] He cited the notes of the revisers in which they stated that the purpose of the provision in section 55

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70 *Id.* at 266.
71 *Id.* at 386.
72 *Id.* at 318.
73 *Id.* at 321.
74 *Id.*
75 *Id.* at 265.
76 R.S. § 45.

limiting express trusts of real estate to the four categories enumerated above was to allow the creation of trusts only where the trustees must necessarily have both the title to the real estate and possession of it. The revisers judged trusts in which the beneficiaries have an interest in the lands held in trust to be pernicious. Such trusts complicate title to land, create unnecessary law suits, and impair the alienability of land. The revisers concluded that only trusts in which the trustees had real, active duties to perform should be allowed and that beneficiaries should have only the right to enforce the trust; they should not have an interest in the trust property itself.[77] In the Chief Justice's view, the revisers clearly believed that trusts in the third category, "to receive the rents and profits of lands" and apply them to the education or support of any person were generally created to provide for the education of a minor, to provide a married woman with an income outside of the control of her husband, or for the support of "a lunatic or spendthrift."[78]

The Chief Justice was confident that the subsequent action of the legislature in removing the reference to education or support and replacing it with "use" did not expand the classes of persons for whom such trusts could be created.[79] Nor did replacement of "education or support" with the word "use" sanction the creation of a trust like the trusts in the Lorillard will which are supposed to collect the rents from the real property and simply pay over what is left after paying the annuities to the twelve nieces and nephews.[80] First, a trust to receive the rents and profits of real estate and to pay them over to beneficiaries was "known at common law, and was of course abolished with all other trusts."[81] Second, the Legislature's substitution of the phrase "apply to the use of"[82] must be understood in the context of the revisers' reasons for limiting the sorts of express trusts that can be created. The common law trust to receive and pay over rents and profits of real estate gave the beneficiaries of the trust an interest in the real estate. That is exactly the situation the revisers sought to eliminate from the law of New York.[83]

Senator Maison also held the Lorillard trust to be outside of the bounds erected by the Revised Statutes. He agreed with Chief Justice Savage that the Legislature intended to limit the creation of trusts of real estate to receive and pay over rents and profits to those situations in

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77 Coster v. Lorillard, 14 Wend. 265, 322-23 (N.Y. 1835).
78 *Id*. at 321.
79 *Id*. at 321-22.
80 *Id*. at 321.
81 *Id*. at 322.
82 *Id*.
83 *Id*. at 322.

which the beneficiaries are incapable of caring for themselves.[84] The provision in section 63 forbidding a beneficiary from transferring his or her beneficial interest in the trust was an integral part of the scheme designed to insure that the beneficiaries could not lose the protection given them by the creator of the trust.[85] In addition, it was abundantly clear that George Lorillard's twelve nieces and nephews were not the sort of persons for whom trusts could be created. Far from being incapable of caring for themselves, they were to be their own trustees. It would be their responsibility to manage a vast fortune. The conclusion was obvious: "This trust is not, then, in this view of it, such a trust as was designed to be authorized by the statute."[86]

Senator Young was even more adamant about the nature of the beneficiaries of the trusts authorized by the third clause of section 55:

> What class of individuals need the aid of trustees to deal out to them, from time to time, for their support for life or a shorter term, or in other words, to apply to their use the rents and profits of land? The greatest part of mankind would feel themselves degraded by being placed in such a situation; by being excluded from all control over property. . . . It is apparent, then, that it was not intended by the Legislature that trusts of this description should be create to subserve the ordinary wants of the community."[87]

The persons such trusts are to serve are those the revisers mentioned: "Persons of imbecile minds, females who have married unfortunately, dissipated sons, the aged and infirm" who cannot manage property for themselves.[88] Young admitted that the Revised Statutes do not require the creator of a trust to "specify the incapacity of the beneficiaries for whom the trust is created."[89] The law will presume that the beneficiaries fit the description. That presumption cannot be indulged in this case, however. First, as Senator Maison noted, George Lorillard's making his nieces and nephews trustees shows that as beneficiaries they "are perfectly competent to have the charge and management of property."[90] In addition, the income involved is so large that the trust "could not be designed merely for the support of the bene-

84 *Id*. at. 352.
85 *Id*. at 353.
86 *Id*. at 355.
87 *Id*. at 377-78.
88 *Id.* at 378.
89 *Id.* at 381.
90 *Id.*

ficiaries."[91] His conclusion was clear: "To give effect to the trust would be to pervert and prostrate the statute."[92]

This interpretation of the word "apply" seems to be closer to the intent of the revisers. Their report on their work was widely disseminated, and they stated quite clearly that the purpose of the third type of trust was to allow the creator of the trust to care for those who could not care for themselves—femmes covert, minors, the incapacitated and spendthrifts. The limitation of the purposes of such trusts to education and support fit with that aim. The question was whether the substitution of the word "use" changed the meaning. Senator Young certainly thought not: "The only object of the statute, as has been shown, was to authorize this trust for the benefit of those who were destitute of the will, the discretion or the power to manage property for themselves."[93]

Justice Nelson, however, believed that the Lorillard trusts were valid under section 55.[94] The substitution of "use" for "education and support" meant that the Legislature accepted that the person creating the trust could regulate how the trust was to be administered. In other words, "the mode of applying the rents and profits, as well as the amount of them" is not limited by any purpose expressed in the statute but rather "rests in the discretion of the person creating the trust."[95] The statute allows the creation of a trust to pay over rents and profits in any amount, including all of them, for the use of the beneficiary as the beneficiary decides.[96]

Although he found the trusts to be valid under section 55, Justice Nelson believed the trusts violated the rule against the undue suspension of the power of alienation and therefore were totally invalid.[97] The more important point is that he arrived at the conclusion that the trust was valid under section 55 through construing the Legislature's intention as shown by the substitution of "use" for "education or support."[98] He was as confident as his colleagues that the Revised Statutes created a completely new system. "It must be remembered," he wrote, "that no trusts now exist in the State out of this 2d article [of the Revised Statutes]. . . . They are now the creature of the statute; and to be sustained by the court, must not only be in conformity to the provisions authorizing their creation, but subject to the restrictions the statute has im-

91 *Id.*
92 *Id.*
93 *Id.*
94 *Id.* at 267.
95 *Id.* at 332.
96 *Id.*
97 *Id.* at 350.
98 *Id.* at 321.

posed."[99] There simply is no other source of the law of trusts other than the Revised Statutes.

The final member of the court to deliver an opinion was Senator Tracy. He believed that the Lorillard trusts were clearly allowed by section 55.[100] The amendment replacing "education or support" with "use" was intended to allow trusts which simply pay over the rents of profits of real estate to the beneficiaries.[101] Senator Tracy was the only one of the five members of the court writing an opinion who cast the slightest doubt on the complete supplanting of the common law by the Revised Statutes. He believed that it was possible to sustain the interests of the nieces and nephews by considering the trusts as creating an interest in one-twelfth of the income for life in each of the nieces and nephews.[102] Such was the common law and "I should be sorry to think," he wrote, "the Revised Statutes have made such unreasonable and mischievous innovation upon the common law."[103] Yet he too believed the trust violated the prohibition on suspension of the power of alienation for longer than two lives and voted to invalidate the trusts.[104]

The limitation of trusts to those purposes was again one of the radical provisions of the revised statutes. It is not surprising then that Senator Young, so certain on this subject, was the judge most direct in praising alienability. In his view, the common law has been "molded to allow the aggregation of wealth in the hands of an aristocracy, [by allowing] exclusion from alienation in perpetuity or for long periods of years, by remainders, trusts, uses and powers, to gratify the vanity of the possessor and the pride of the recipient."[105] Those provisions, in his view, "are regulations diametrically opposed to those principles of equality upon which our government is founded."[106]

The legislature did the right thing in limiting trusts to those required to protect the weak, promoting their fitness for that purpose by making the trusts destructible, and limiting their existence with the anti-suspension rule. All these changes were clearly made because the result of the adoption of the Revised Statutes is "that the common law, in reference to real property, to its tenure and transmission, with all their incidents, is wholly abolished."[107]

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99 *Id.* at 333.
100 *Id.* at 393-95.
101 *Id.* at 394.
102 *Id.* at 393-95.
103 *Id.* at 396.
104 *Id.*
105 *Id.* at 372.
106 *Id.*
107 *Id.* at 369.

As we have seen, not all the judges who gave opinions were as adamant as Senator Young, but they all found the Revised Statutes to be the only relevant source of law and all twenty-four members of the court voted to reverse the decree of the Chancellor partially upholding the life interests in the trusts because in the view of all the judges the life interests unduly suspended the power of alienation.[108] With the decision in *Coster v. Lorillard* the radical nature of the Revised Statutes at least as applied to trusts of lands was confirmed. The result was that George Lorillard's fortune passed outright to his heirs—his surviving siblings, the children of predeceased siblings, and through his mother's estate perhaps to his half-siblings as well and his dream of keeping his fortune intact for his grandnieces and nephews was frustrated, a result he could have obtained under the common law.[109]

IV. THE LEGAL SEQUEL

Within less than two decades the radicalism of the trust law embodied in the Revised Statutes was greatly lessened. Application of the suspension rule and the two life limit to present interests survived. Trusts that would have been perfectly acceptable under the classic rule against perpetuities remained void in New York, and unlike the classic rule against the remoteness of vesting the suspension rule directly limited the duration of a trust. After *Coster* a New Yorker could create a testamentary trust to endure for the lives of a child and a child's child *living at the testator's death* but the trust could not last through the lives of grandchildren born after the testator's death as it could under the classic rule which invalidates only the remainder vesting after the death of the last grandchild to die. In addition, under the classic rule the invalidity of the remainder does not affect the preceding income interests; only the remainder is invalid. That means that after the death of the last of the testator's grandchildren the trust property would most likely pass to the estates of those persons who were the testator's intestate heirs and the property might end up in the hands of the descendants in whom the testator attempted to create the invalid remainder. The trust would have endured for the lifetimes of the child and the child's children even if some of the latter were born after the trust was created. Of course

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108 *Id.* at 389. The provisions of the Codicil making outright devises of real estate and creating life estates in other parcels of real estate were also held invalid because they were so closely connected to the invalid trusts.

109 There was no disagreement, however, about the validity of the two charitable bequests which were therefore paid to the designated recipients. In addition, the lower court decrees finding valid the annuities charged on the Article First trust were not appealed as to all the annuities so some of them were indeed paid. Perhaps needless to say, the arrangements for the paying of those annuities led to litigation. *See* Lorillard v. Lorillard, 4 Abb. Pr. 210, 23 Barb. 528 (N.Y. Sup. Ct. 1857).

under the Revised Statutes a testator can create a trust for a married daughter which would keep the property out of the hands of her husband and give it directly to her children on her death. And even George Lorillard could have gotten something of what he wanted had he created separate trusts for each niece and nephew, although his fortune would not necessarily have been administered as a single entity for all of their lives.

Where change did come before the Civil War was in the meaning of the word "apply" in the definition of the third type of permitted trust of lands. The exclusion of a trust which simply pays its income to the beneficiary was litigated again and again until in 1849 the still new Court of Appeals gave a definitive answer in favor of the ability to create such trusts.[110] The interpretation given in *Coster* was the subject of much criticism. James Kent put it succinctly:

> If this construction be correct, what inconveniences have been produced by the statutory demolition of the system of trusts? Who would be a trustee, and be bound to look into, and judge of, and pay all the expenditures of a married woman, or of an absent friend, or of the aged and infirm, who stood in need of the agency of a trustee?[111]

The criticism was made more biting by another quirk of the Revised Statutes. One of the effects of the provision which gave the trustee both the legal and equitable title to the trust property and gave the beneficiary only the right to enforce the trust in the court was that the beneficiary could not be his or her own trustee.[112] If that were nevertheless to happen and the trustee were also the only income beneficiary, then the beneficiary would hold all of the interest in the trust income and the trust would merge out of existence. Consider the parent who wishes to create a trust for a married daughter in order to keep the property out of the control of her husband, or the parent or other relative who wishes to create a testamentary trust for a child simply because the inalienability of the child's interest makes it immune from creditors at least to the extent there is no "surplus" the creditors can reach under section 57, another delightful effect of the Revised Statutes. The requirement that the trustee, who must be someone other than the beneficiary, "apply" the property could be as burdensome as Kent describes it. All the creator of the trust wished to do is to create an income stream for the beneficiary that will be his or hers alone to control and that cannot be reached by creditors. Perhaps it would be more difficult to find a

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110 *See generally* Leggett v. Perkins, 2 N.Y. 297 (1849).
111 Kent, *supra* note 9, at 310.
112 *See generally id.*

willing trustee if the job required seeing to the use of money distributed from the trust. Indeed, the practical difficulty in finding a trustee willing to take on the responsibilities of trusteeship under this provision is also raised by the author of a long series of articles on codification in *The American Jurist.* [113]

Influenced or not by arguments addressed to practical effects, the then new Court of Appeals changed the law by its decision in *Leggett v. Perkins* in 1849.[114] Gerardus Post died in 1833. His will created trusts of one-fifth of his estate for each of his two daughters. At a daughter's death the trust property is to pass to her "lawful issue."[115] The trustee is to "pay over to them [the daughters] respectively . . . the rents, interests, or net income thereof . . . ."[116] In his majority opinion, Judge Gardiner held that the trusts were within the third subdivision of section 55.[117] He came to that conclusion for several reasons, including the language of the statute and practical difficulties of the sort alluded to by Kent. Perhaps more significantly, he is quite clear that the enactment of the Revised Statutes did not create the law of trusts anew:

> The statute in reference to express trusts is merely permissive. It creates nothing. We might infer from the argument addressed to us, that the legislature had in the first instance annulled all trusts, and then preceded to a new creation. It is more correct to say that they abolished all that they have not recognized as existing. The trusts preserved have their foundation in the common law, and their effect is to be determined by the application of common law principles. . . . When a trust is created of this nature [a trust to apply rents and profits to the use of any person], it is recognized as existing with all its common law incidents. The relation of the donor and trustee, the power of the former and the duty of the latter, are precisely what they were by the common law.[118]

Under the common law the donor may define the trustee's duties and that includes the ability to direct the trustee to pay over the trust income to the beneficiary. The statute, according to Gardiner, "says nothing of the discretion of the trustee; it speaks only of the power of the creator of

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113 Luther S. Cushing, *Codification and Reform of the Law,* AMER. JURIST & L., Oct. 1839 – Feb. 1840, at 368.

114 2 N.Y. 297.

115 *Id.*

116 *Id.* at 305.

117 *Id.* at 324.

118 *Id*. at 307.

the trust."[119] The statute does not compel the creator to rely on the discretion of the trustee.

Gardiner goes on to construe the words of the statute, in particular "apply," insisting that it means simply to give the income of the trust to the beneficiary and does not necessarily imply that the trustee must have discretion in deciding how much of the income is to be distributed.[120] But most significant is Judge Gardiner's answer to the argument that a trust in which the trustee must simply pay over the rents and profits of the real property held in trust is the sort of "formal" trust which the revisers were determined to destroy because it was merely a way of masking the trust ownership of real property.[121] In the *Coster* case Chief Justice Savage stated that a trust to "receive and pay over" the rents and profit of realty was exactly the sort of formal trust the revisers wished to end and supported his argument by noting that such a trust was perfectly permissible under the common law but was "abolished" with all other common law trusts.[122] According to Judge Gardiner, such a trust "is essentially active in all its particulars. It was so at the common law, and is so now."[123] In other words, it could not fall under the Statute of Uses and be "executed" out of existence. Gardiner's conclusion is all the more significant because the Revised Statutes enacted its own version of the Statute of Uses as sections 47 and 49:

> Section 47. Every person, who, by virtue of any grant, assignment or devise, now is, or hereafter shall be entitled to the actual possession of lands, and the receipt of the rents and profits thereof, in law or in equity, shall be deemed to have a legal estate therein, of the same quality and duration and subject to the same conditions, as his beneficial interest.[124]
>
> Section 49. Every disposition of lands, whether by deed or devise hereafter made, shall be directly to the person in whom the right to the possession and profits, shall be intended to be invested, and not to any other, to the use of, or in trust for, such person; and if made to one or more persons, to the use of,

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119 *Id.* at 308.

120 *Id.* at 309.

121 *Id.* at 311.

122 Coster v. Lorillard, 14 Wend. 265, 322 (N.Y. 1835).

123 Leggett v. Perkins, 2 N.Y. 297, 314 (1849).

124 Section 47 remained in the New York statutes until 1997 when its descendant, N.Y. Estates Powers & Trusts Law section 7-1.1, was repealed and a new section 7-1.1 enacted bringing the law of New York on the merger of interests held in trust into conformity with the overwhelming majority of United States jurisdictions. The principal effect of the old statute was to prevent an individual from being sole trustee of a trust created for the individual's benefit. *See* Wetmore v. Truslow, 51 N.Y. 338 (1873).

> or in trust for, another, no estate or interest, legal or equitable, shall vest in the trustee.[125]

The language of these sections seems to invalidate the sort of trust Gardiner describes, and it certainly does when read in the context of the trust law created by the Revised Statutes. If trusts are only to be created to those who cannot take care of themselves, then if someone is to have the complete enjoyment of property the property should be conveyed to him outright. Trustees exist only to take care of those who cannot help themselves.

Judge Bronson dissented vigorously. The judge held firm to the views he expressed as a member of the Court of Errors in the *Hawley* case.[126] In his view the legislature has completely abolished the common law of trusts of land, and "if the authority to make this trust cannot be found in the statute, it does not exist."[127] The trust created in Gerardus Post's will suspends the power of alienation because the beneficiaries cannot convey their interests. The Revised Statutes limit the duration of such trust to two lives and also limit the purposes for which trusts can be created to those situations in which outright ownership by the beneficiary is not possible—minors, married women whose property is controlled by their husbands, imbeciles and lunatics. In more general terms, trusts which suspend the power of alienation are to be allowed only where they are necessary to the protection of persons who cannot manage wealth for themselves. In short, "it is not the policy of our law to enable men to tie up their estates, where no valuable end is to be attained by it."[128]

Even more revealing is the description of the disasters that will come about from allowing the creation of a trust in which the trustee must pay over the income to the beneficiary. According to Judge Bronson in some case simply paying over the money to the beneficiary will not be applying it to the beneficiary's use as the statute requires:

> If [the beneficiary] is a lunatic, or is spending the money in gaming and drunkenness, while his wife and children are suffering from cold and hunger, it would be a breach of the statute

[125] The current version of this provision is N.Y. EST. POWERS & TRUSTS LAW § 7-1.2 (McKinney 2017) which applies, as its predecessor did quite soon after its adoption, to disposition of both real and personal property. The application of the Revised Statutes to all trusts was accomplished by the judiciary and is a story for another day.

[126] *See Leggett*, 2 N.Y. at 321 (Bronson, J., dissenting); Hawley v. James, 16 Wend. 61, 147-48 (N.Y. 1836) (holding that the legislature had restricted trusts to beneficiaries under disability, or at least to cases where the trustee had discretion in applying the income).

[127] *Leggett*, 2 N.Y. at 323.

[128] *Id.* at 326.

> trust to put the money in his hands. And yet under the trust we have here, the trustee could not withhold a single dollar and apply it himself to the relief of the suffering family.[129]

In addition, the Revised Statutes in section 57 allow creditors of the beneficiary to obtain an order from the appropriate court for the payment of the sums owed them from "the surplus of such rents and profits, beyond the sum that may be necessary for the education and support" of the beneficiary.[130] According to Bronson, "when the statute is followed in making the trust," that is, when the word "apply" means that the trustee must have discretion in using the rents and profits for the beneficiary, "the trustee will have the right to prefer the claims of honest tradesmen, mechanics and laborers, to the demands of harlots, gamblers, and sharpers."[131] But if the trustee must passively pay over the rents and profits "the trustee has no such power."[132] For Judge Bronson, to allow the creation of a trust which would simply pay over its income the beneficiary subverted the entire statutory scheme.

The decision in *Leggett* clearly limited the potentially radical effect of the Revised Statutes on the law of trusts.[133] If Judge Bronson is taken as exemplifying the views of those who favored limitations on the creation of trusts, then the decision in *Leggett* represents a triumph of the desires of the owner of property over social limitations on the use of property. That triumph, however, came about not through a gutting of the statutes, but of a reading of arguably ambiguous language in the statute. Clearly the amendment which substituted the word "use" for "education or support" muddied the waters considerably. The most striking aspect of Gardiner's argument, however, is the blithe assertion that the legislature did not abolish the common law of trusts in enacting the Revised Statutes.

V. Conclusion

There are many factors that can be identified as playing some part in the Court of Appeals' opinion in *Leggett*. Between the decisions in *Coster* and *Leggett* New York adopted a new constitution. Among the most important provisions of that new frame of government was a thorough reform of the state's judiciary. Not only was the Court of Errors abolished along with all the lower courts, but the judges who staffed the

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129 *Id.* at 325.

130 R.S. § 57.

131 Leggett v. Perkins, 2 N.Y. 297, 325 (1849).

132 *Id.*

133 Fowler, *supra* note 13, at 144-45 (noting that the construction of section 55 in *Leggett* and subsequent cases, "tolerates a species of naked or passive permanent trusts not originally contemplated by the revisers").

new courts were to be elected rather than appointed by the governor with the approval of the legislature. In addition, the economy suffered badly in the late 1830s and early 1840s.[134] One of the effects of the economic dislocation was a growing dissatisfaction with government expenditures on internal improvements (in modern terms, "infrastructure") which helped to bolster, if not create, a belief in a narrow role for government which might seem incompatible with restrictions on the disposition of wealth.[135] Some of these events outside of the world of legal reasoning and judging had some effect on what courts decided. Yet the language of the opinions remains and shows that it was difficult if not impossible to completely supplant in lawyers' minds common law concepts and rules by the enactment of a comprehensive statute, a code.

There is another lesson in this one small example of the fate of a radical abolition of common law rules and concepts and the substitution of a code in a fundamentally common law jurisdiction. All the opinions in both cases construe the statute; that is, the judges attempt to find the meaning of the words, in this case "apply to the use," in section 55 and "future estate" in sections 14 and 15, that the legislature intended. In addition, however, the judges were concerned with policy. The members of the Court of Errors who gave opinions in *Coster* all acknowledged the primacy of the legislature's choice of what sorts of trusts would be allowed under the Revised Statutes. Judge Gardiner's opinion in *Leggett*, however, explicitly made a policy choice. He disagreed with the limitation of trusts to those whose beneficiaries are not competent to handle their own affairs. "Every one knows," he wrote, "that there are individuals in every society, who are neither imbecile nor profligate, nor united with those who are so, who could property dispose of fixed income, and yet who ought not, from prudential reasons, to control the capital out of which it is raised."[136]

In a sense, this comment shows that the judge is substituting his judgment for that of the legislature. This willingness on the part of judges to understand their power as extending to substituting their policy choices for those of the legislature is an important factor in understanding the fate of codes in the United States. It goes hand in hand with the reluctance to accept the legislature's power to totally abolish the common law and rewrite the rules on a clean slate. In some ways

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134 *See* Charles W. McCurdy, The Anti-Rent Era in New York Law and Politics, 1839-1865 at 34-35 (2001).

135 *Id*. at 7. The difference between New York's Democrats and Whigs in this period as the difference between those who believed that society would naturally find its moral balance and those who believed that government had a duty to "shape the social condition of the people."

136 *Leggett*, 2 N.Y. at 313-14.

these two beliefs are connected. Throughout the nineteenth century the common law was seen by many lawyers and judges as embodying the total experience of society. Its rules had grown out of customary usages (although the relationship between "custom" and "law" is a complex one) and in some way embodied the very essence of a properly organized society. In the post-Civil War period in the United States the belief in the connection between the common law and the proper organization of society would become even more pronounced.[137] It was strong enough, however, to contribute to the partial undoing of perhaps the most heroic effort at codification attempted in the nineteenth century United States.

[137] *See* William P. LaPiana, *Jurisprudence of History and Truth*, 23 RUTGERS L. J. 519, 519-59 (1992).

Democracy and Trusts

*Carla Spivack**

Part I: Intro

Most of us know these stories, but they bear repeating: In 1998, Kyle Krueger sexually assaulted a four year-old boy, videotaped the act and circulated the videotape on the Internet, for which he was criminally convicted.[1] The boy's mother, Lorie Scheffel, filed a civil suit on behalf of both herself and her son seeking damages, and was awarded $551,286.25.[2] Krueger's only assets, however, were in the form of a trust created by his mother with a spendthrift clause, which barred the trust assets from attachment by creditors.[3] The trust assets were worth about $12,000,000.[4] The law of the state upheld the validity of such clauses.[5] Lorie Scheffel argued for a public policy exception to the law because it prevented tort victims, who, unlike voluntary creditors, had no choice in the matter, from being compensated for harm.[6] This, she argued, contravened the state's strong public policy of having crime victims get compensation from the perpetrator.[7] The Court refused to make this exception, however, citing a long held policy not to "question the wisdom or expediency of a statute."[8]

* Professor of Law, Oklahoma City University School of Law. My profound thanks to Paula J. Dalley, whose insight and clarity of mind brought this article back to life (speaking of ghosts!); to my colleagues at Boston College, Oklahoma City University and elsewhere whose advice and support greatly sharpened my thinking: Alfred L. Brophy, Bridget J. Crawford, Greg Eddington, Michael Grynberg, Adam Hirsch, Ray D. Madoff, John H. Langbein, William P. LaPiana, Chad J. Pomeroy, Kent D. Schenkel, Robert H. Sitkoff, Andrew C Spiropoulos, and Sjef van Erp.

1 Scheffel v. Krueger, 782 A.2d 410, 411 (N.H. 2001). For criticism of the decision in this case, see Kent Schenkel, *Exposing the Hocus Pocus of Trusts*, 45 Akron L. Rev. 63, 64 (2012) (observing that outcomes like this increase insurance costs); John K. Eason, *Developing the Asset Protection Dynamic: A Legacy of Federal Concern*, 31 Hofstra L. Rev. 23, 45 n.94 (2002) (noting the injustice of the spendthrift provisions when applied to involuntary creditors, such as tort creditors).

2 *Scheffel*, 782 A.2d at 411.

3 *Id*.

4 Memorandum for Plaintiff at 3, Scheffel v. Krueger, 782 A.2d 410 (N.H. Super. 2001) (No. 98C0308), 1998 WL 35390969 [hereinafter *Sheffel Memorandum*].

5 *Scheffel*, 782 A.2d at 411.

6 *Scheffel Memorandum,* 1998 WL 35390969, at *13.

7 *Id.* at *15.

8 Scheffel v. Krueger, 782 A.2d 410, 412 (N.H. 2001).

On January 30, 1993, Gene A. Lorance was driving drunk and collided with Will Sligh, leaving Sligh paralyzed from the waist down, and lacking sexual function or control of his urinary or bowel functions.[9] Lorance was uninsured, so Will and his wife Lucy sued Lorance for personal injury, property damage and loss of consortium.[10] Lorance's only assets were his interest as beneficiary of two spendthrift trusts established by his mother in 1984 and 1988, respectively.[11] Will and Lucy alleged that Lorance's mother knew that he was a chronic alcoholic whose mental capacity was impaired due to his drinking, that he had numerous arrests for drunk driving, and that he had been institutionalized for mental illness.[12] The Slighs argued that the court should recognize a public policy exception to spendthrift trusts in the case of intentional or gross negligence tort creditors. The court agreed, stating that in these cases, the policy of honoring the settlor's intent gave way to the policy of protecting tort victims from destitution.[13] In 2004, in response, the Mississippi legislature enacted Mississippi Code Annotated Section 91-9-503, which overruled *Sligh* by providing that an interest subject to a spendthrift clause "may not be transferred and is not subject to the enforcement of a money judgment until paid to the beneficiary."[14]

Spendthrift trusts like these which shield assets from the beneficiary's creditors - whether voluntary or involuntary - have been controversial since their advent in the nineteenth century.[15] John Chipman Gray challenged the legitimacy of a gift that is not subject to the claims of the donee's creditors and thus allows the donee to "indulge himself simultaneously in both luxury and indebtedness."[16] Objections to the spendthrift bar to recovery by voluntary creditors have subsided somewhat today, but criticism of the bar to recovery by tort creditors has persisted: theoretically, at least, voluntary creditors can investigate the

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9 Sligh v. First Nat. Bank of Holmes Cty., 704 So. 2d 1020, 1022 (Miss. 1997).

10 *Id*.

11 *Id.*

12 *Id.* at 1023.

13 *Id.* at 1025.

14 MISS. CODE ANN. § 91-9-503 (2017).

15 JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY 247 (2d. ed. 1895). *See also* Nichols v. Eaton, 91 U.S. 716, 729 (1875) (the Supreme Court sanctioned spendthrift clauses on the grounds that if the beneficiary were allowed to assign his trust interest he might become a public charge). Arguably, versions of the spendthrift trust existed earlier than the nineteenth century; for example, the married woman's separate estate in equity, which existed in the seventeenth century, was protected from her husband and his creditors. E-mail from John Langbein to Carla Spivack (June 17, 2017) (on file with author). The expansion of the spendthrift trust to broad application occurred in the nineteenth century.

16 *A Rationale for the Spendthrift Trust*, 64 COLUM. L. REV. 1323 (1964).

assets of potential debtors, the argument goes, but tort victims have no such opportunity, and thus should be able to reach trust assets to recover damages.[17]

Other, very recent, forms of the trust may be causing Gray's ghost to walk the battlements: they take the notion of "asset protection" much farther, allowing settlors to protect not only the beneficiary's assets, but the settlors' own, from creditors; these are called "self-settled asset protection trusts," or "Domestic Asset Protection Trusts" (hereafter DAPTs).[18] Moreover, more and more states have legalized so-called "dynasty trusts" which allow settlors and beneficiaries to maintain assets in trust tax free for generations, overturning long-settled principles of the common law such as the Rule Against Perpetuities.[19]

Can we pacify the old mole,[20] or does unfinished business doom him to his restless walk? Gray's objections to spendthrift trusts seem to arise from basic notions of fairness – what we would today call "public policy." A donee should not be able to enjoy all the benefits of unlimited wealth while being exempt from its burdens and obligations or, put another way, keeping the benefits while placing all the burdens on third parties (the unpaid creditors). To say that the benefit really accrues to the settlor, who has been able to extend his control over his assets beyond the grave, is to mortgage the living to the dead; it allows dead hand control to go too far. As a contemporary scholar puts it, "the trust [can be] used to skirt important obligations attached to property interests, causing negative ramifications to unrelated third parties."[21] The interests of the living third parties must outweigh those of the dead.

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17 *See* Schenkel, *supra* note 1, at 65. *See also* Carolyn L. Dessin, *Feed a Trust and Starve a Child: The Effectiveness of Trust Protective Techniques Against Claims for Support and Alimony*, 10 GA. ST. U. L. REV. 691, 715 (1994); Anne S. Emanuel, *Spendthrift Trusts: It's Time to Codify the Compromise*, 72 NEB. L. REV. 179, 182 (1993); Justin W. Stark, *Montana's Spendthrift Trust Doctrine: Analysis and Recommendations*, 57 MONT. L. REV. 211, 212-13 (1996); Laurene M. Brooks, *Comment, A Tort Creditor Exception to the Spendthrift Trust Doctrine: A Call to the Wisconsin Legislature,* 73 MARQ. L. REV. 109, 133-41 (1989).

18 JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS AND ESTATES 703-17 (9th ed. 2013). *See also* jrladmin, *Domestic Asset Protection States*, ATTORNEY-LASVEGAS.COM (Feb. 13, 2017), http://www.attorney-lasvegas.com/blog/domestic-asset-protection-trust-states/ (stating that, as of this writing, eighteen states [most recently Michigan] had adopted some form of DAPT: Alaska, Colorado, Delaware, Hawaii, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming). For a discussion of additional protections for assets in both self-settled and third-party trusts, see Al W. King, III, *The Trust Spendthrift Provision—Does It Really Protect?* TR. & EST., Dec. 2016, at 8.

19 DUKEMINIER & SITKOFF, *supra* note 18, at 902.

20 WILLIAM SHAKESPEARE, HAMLET act 1, sc. 5.

21 Schenkel, *supra* note 1, at 81 n.79.

The new forms of trust seem to fuel these concerns. Most efforts to identify and alleviate their perceived unfairness have drawn on public policy[22] - echoing Gray's idea of fairness - and sheer pragmatism (the administrative difficulty of managing trusts for centuries).[23] While the policy arguments have been exhausted, no one has yet looked to property law itself. This is a serious oversight: this article shows that property law doctrine does offer answers in the obscure but important doctrine of numerus clausus (hereafter NC).[24] NC, which means "the number is closed," is much more explicit in civil law discourse than in the common law, but it is nonetheless a foundational principle of the common law of property and one which both identifies the perceived "unfairness" of these trusts in property law terms, and also offers a solution based in property law doctrine.[25]

NC means that there is a closed list of the forms and content property rights may take in a given society, limited to those which result from the legislative – that is, democratic – process.[26] NC applies to property and not to contracts because property forms bind third parties who were not privy to the original transaction, while contracts bind only the parties to the bargain.[27] This restriction on the creation of property forms matters both for reasons of efficiency and democracy.[28] As I explain below, NC is an efficiency principle because it reduces information gathering costs, but it is a democratic principle because it makes citizens the "co-authors of the norms by which they live" – including the norms

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22 *See, e.g.*, *id.* at 88.

23 *See, e.g.*, Lawrence Waggoner, *From Here to Eternity: The Folly of Perpetual Trusts* 10 (Univ. Mich. Law Sch. Scholarship Repository, Working Paper No. 259, 2012).

24 The most thorough discussion of numerus clausus in the common law context appears in Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1604-05 (2008). *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L. J. 1, 6 (2000). *See also* Yun-chien Chang & Henry E. Smith, *The Numerus Clausus Principle: Property, Custom, and the Emergence of New Property Forms*, 100 IOWA L. REV. 2275, 2279 (2015); Anna Di Robilant, *Property and Democratic Deliberation: The Numerus Clausus Principle and Democratic Experimentalism in Property Law*, 62 AM. J. COMP. L. 367, 368 (2014). For an explanation of this principle in the civil law context, see SJEF VAN ERP & BRAM AKKERMANS, CASES, MATERIALS AND TEST ON PROPERTY LAW 65-73 (2012).

25 For a discussion of trust law's failure to apply numerus clausus, see Kent D. Schenkel, *Trust Law and the Title Split: A Beneficial Perspective,* 78 UMKC L. REV. 181, 191 (2009).

26 Di Robilant, *supra* note 24, at 397.

27 Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 793-94 (2001).

28 Avihay Dorfman, *Property and Collective Undertaking: The Principle of Numerus Clausus*, 61 U. TORONTO L. J. 467, 509 (2011). *See also* Robert C. Post*, Democracy and Equality*, 25, 33 (Yale Law School Legal Scholarship Repository, Paper No. 177, 2005).

embodied in property law.[29] This co-authorship legitimizes society's property rules and the human interactions they determine.

Historically, trusts have evaded the NC filter for highly formalistic reasons: the trust form separates legal from equitable title, and, traditionally, NC has applied only to forms of legal title, ignoring all of the myriad equitable interests trusts create.[30] As I explain below, this distinction makes little sense. I argue that the NC should apply to the beneficial interests of trusts just as it applies to other property forms. Bringing equitable interests into the NC analysis would change the legal landscape of trust law and force a much more rational discussion of the role that trusts play in our society and our estate planning.

This article proceeds in four parts. Part II presents the history of numerus clausus and explains the two main justifications for it: efficiency and democratic governance. Part III explains why NC should apply to trusts and shows how recent trust forms violate both its principles of efficiency and of democracy. Part IV explains how NC applies to trusts. Ultimately, I argue that recent trust proliferation represents the failure of democratic decision-making about property, a failure we ignore at our peril.

PART II: NUMERUS CLAUSUS: HISTORY AND JUSTIFICATIONS

A. History

Numerus clausus literally means "the number is closed."[31] It limits the types of property rights in a given legal system to those the legislature authorizes.[32] NC has two components: one limits the number of property rights – i.e., fee simple, defeasible fee, and lease – and the second limits the content of those forms – that is, an easement is limited to certain common and predictable content.[33] Thus, for example, a lease satisfies the first component by being one of the allowed forms of property rights, but it still may violate the second component by having content which is not allowed – a famous example being a lease "until the

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[29] Post, *supra* note 28, at 25.

[30] *See* Schenkel, *supra* note 25, at 210.

[31] For a general explanation of numerus clausus, see VAN ERP & AKKERMANS, *supra* note 24, at 65-73; Dorfman, *supra* note 28, at 467; Henry Hansmann & Reinier Kraakman*, Property, Contract, And Verification: The Numerus Clausus Problem and The Divisibility of Right*s, 31 J. LEGAL STUD. S373, S373-74 (2002); Davidson, *supra* note 24, at 1598; Merrill & Smith, *supra* note 24, at 4.

[32] VAN ERP & AKKERMANS, *supra* note 24, at 65-73; Dorfman, *supra* note 28, at 468; Davidson, *supra* note 24, at 1616; Hansmann & Kraakman*, supra* note 31, at S374; Merrill & Smith, *supra* note 24, at 10-11.

[33] Chang & Smith, *supra* note 24, at 2279.

war ends."[34] Or, an easement – a nonpossessory right to use the land of another – appears on NC but the content of the right must also be allowed (a right of way, yes; a right to charge a fee to transport goods across the land, no).[35]

The NC receives explicit mention in civil law cases; American courts apply it without referring to it specifically.[36] An oft-cited American case applying NC is *Johnson v. Whiton*, in which a will devised land "to my granddaughter Sarah A. Whiton and her heirs on her father's side."[37] Finding that "[a] man cannot create a new kind of inheritance," Justice Holmes, writing for the Supreme Judicial Court of Massachusetts, ruled that the devise created a fee simple in the devisee.[38] American statutory law also expresses NC by implication, as in Uniform Commercial Code Section 1-203 (distinguishing between security interests and leases).[39] American property law applies NC implicitly by limiting property rights to an enumerated list of five: the fee simple absolute, the defeasible fee simple, the fee tail, the life estate, and the lease – and, more recently, the condominium, the timeshare.[40]

The NC does not freeze property interests in time. The legislature may authorize new forms of property rights as changing times and circumstances require.[41] The underlying idea of the principle is not to prevent the evolution of property rights, but rather to prevent them from proliferating at the whim of private parties.[42] For example, the timeshare and the condominium are two new forms of property ownership which satisfy numerus clausus because they emerged from legislatures – i.e., democratic deliberation – rather than the design of private parties.[43] NC does not work perfectly as an efficiency principle: American property law tolerates many information inefficiencies – discrepancies among different recording systems, for example[44] – but NC remains

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[34] *See, e.g.*, Lace v. Chantler, [1944] 368 K.B.D. 305 (C.A.) 307 (appeal taken from C.C.).

[35] Keppel v. Bailey, [1834] 39 Eng. Rep. 1042, 1042.

[36] Merrill & Smith, *supra* note 24, at 4.

[37] Johnson v. Whiton, 159 Mass. 424, 425 (1893).

[38] *Id.* at 426.

[39] U.C.C. § 1-203 (Am. Law Inst. & Unif. Law Comm'n 2012). *See* Juliet M. Moringiello, *What Virtual Worlds Can Do for Property Law*, 62 Fla. L. Rev. 159, 181 n.173 (2010).

[40] Merrill & Smith, *supra* note 24, at 13. Although, as Merrill and Smith note, "Defeasible fees and leases can be further subdivided into subtypes, and the fee tail has been abolished in nearly all jurisdictions and is for practical purposes defunct." *Id.*

[41] *Id.* at 15.

[42] *Id.*

[43] *Id.*

[44] Chad J. Pomeroy, *A Theoretical Case for Standardized Vesting Documents*, 38 Ohio N.U. L. Rev. 957, 976 (2012).

a system for minimizing the costs of these discrepancies, if an imperfect one.

The rationale for limiting the forms property rights can take – i.e., applying NC – to property and not contracts is that property laws bind parties not in privity with the contracting parties – in fact, everyone else in society – while contracts do not.[45] Parties to a contract are free to devise whatever contract terms they wish - within the limits of legality and public policy - because they are the only ones affected by those terms.[46] By contrast, forms of property limit the rights of everyone in society; they travel with the asset, binding future buyers and sellers, and potentially, everyone else – without these parties' consent or even knowledge.[47] In Blackstone's words, property is "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[48] Thus, the rationale goes, there should be a limit to how many such forms exist to prevent the rights of third parties from being undermined in unforeseeable, inefficient and unfair ways.[49] This is not to say that the distinction between contracts and property is always clear. Some legal relations can be hybrids of contract and property.[50] The trust itself is best explained as such a hybrid: it can contain an almost infinite variety of customized terms in the contract between the trustee and the settlor which control the beneficiary's interest, but it also limits the legal interests of third parties not privy to the bargain.[51]

The early cases explaining the NC base it, at least in part, on efficiency. In the 1834 English case of *Keppel v. Bailey*, an owner of land tried to enforce an agreement on subsequent buyers to pay a certain

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45 *See, e.g.*, Dorfman, *supra* note 28, at 490 (observing that property forms allow owners to impose norms on non-owners); Hansmann & Kraakman, *supra* note 31, at 374 (noting that "[P]roperty rights differ from contract rights by being 'good against all the world'").

46 Daniel Kelly, *The Right to Include*, 63 EMORY L.J. 857, 918 (2014) (noting that, "property forms not only bind third parties in ways that contracts cannot").

47 *Id.* at 918-19.

48 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

49 Merrill & Smith, *supra* note 24, at 4, 7.

50 *See, e.g.,* Julie E. Cohen, *Property as Institutions for Resources: Lessons from, and for IP*, 94 TEX. L. Rev. 1, 5 (2015) (observing that "some emerging IP arrangements occupy a hybrid space between property and contract"); Michael A. de Gennaro, *The "Public Trust" Servitude: Creating A Policy-Based Paradigm for Copyright Dispute Resolution and Enforcement*, 37 TEX. TECH L. REV. 1131, 1151 (2005) (noting that Servitudes—like copyright term limits—are actually contract-property hybrids); Robert H. Kelley, *Any Reports of the Death of the Property Law Paradigm for Leases Have Been Greatly Exaggerated,* 41 WAYNE L. REV. 1563, 1579 (1999) (stating that tenancies for a term "today are construed under a hybrid of contract and property law").

51 Schenkel, *supra* note 25, at 183.

price for transporting coal across it.[52] The issue in the case was whether the owner of land could create a burden which would obligate future buyers of the burdened land with what the court called "novel rights" – that is, rights which were unprecedented in such transactions and which no purchaser would likely anticipate attaching to land.[53] The Court declined to uphold such burdens, saying

> [i]t must not be supposed that incidents of a novel kind can be devised and attached to property at the fancy and caprice of any owner. It is clearly inconvenient both to the science of the law and the public weal that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves . . . to answer in damages for breach of their obligations . . . but great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property.[54]

The Court's objection to these "incidents of a novel kind" is that they would cause much "confusion of rights," that is, no subsequent buyers would be sure what burdens they were taking on with the purchase of the land.[55] For this reason, the Court explained the parameters of permissible burdens: a burden that could run with the land – i.e., pass through the filter of property rights and bind future owners – had to be "of such a nature as 'to inhere in the land' and 'concern the demised premises, and the mode of occupying them.'"[56] This is the origin of the "touch and concern doctrine," which means that a burden which runs with the land must affect how the land is used or occupied.[57] This is because such a burden is both more likely to be visible to inspection, and because, in a related vein, it is more likely to fit with expectations of the kind of burden that would likely attach to land.[58] Nineteenth century courts in England and the United States invalidated such easements as walking for pleasure,[59] boating for pleasure,[60] withdrawing subjacent support,[61] opening sluices of a reservoir when its

52 Keppel v. Bailey, [1834] 39 Eng. Rep. 1042, 1045.

53 *Id.*

54 *Id.* at 1049.

55 *Id.*

56 *Id.*

57 For discussion of the touch and concern doctrine, see generally Ursula Tracy Doyle, *Evidence of Things Not Seen: Divining Balancing Factors from Kiobel's Touch and Concern Test*, 66 HASTINGS L.J. 443, 445 (2015).

58 Keppel v. Bailey, [1834] 39 Eng. Rep. 1042, 1049.

59 Dyce v. Hay, [1852] 1 Macq. H. L. Cas. 299, 303-04.

60 Hill v. Tupper, [1863] 159 Eng. Rep. 51, 53.

61 Richards v. Harper, [1866] L. R. 1 Ex. 199, 204.

level rises dangerously,[62] and maintaining bathhouses,[63] because, as one of the opinions observed, "[n]one of the cases cited are at all analogous [to] this, and some authority must be produced before we can hold that such a right can be created."[64]

The burden in the *Keppel* case – an agreement to pay a specified price for transporting material over the land – did not meet this "analogous" requirement; nor was it tied closely enough to the actual use of the land.[65] A burden not closely tied to the use of the land would be a "novel fancy" and enforcing it would wreak havoc on both "the science of law and the public weal."[66] Because the rights sought to be enforced were "novel" there was a notice problem: no subsequent buyer who was not privy to the contract would have had any reason to suspect such an agreement.[67] Second, the Court seemed to fear that allowing such agreements to run with the land would choke off commerce in land: potential buyers would be discouraged by the possibility that any land they bought might be encumbered by a vast array of unpredictable obligations, making it unattractive as an investment.[68] These factors speak to information-gathering costs and notice: potential buyers should be able to discern what burdens they were taking on with the land, and those that were too "novel" would be too hard to discover – if they were discovered at all.

NC governs leases as well.[69] American leases fall into four recognized types: the term of years, the periodic tenancy, the tenancy at will, and the tenancy at sufferance.[70] A lease "for the duration of the war," for instance, would almost certainly not be enforced according to its terms.[71] Seeking to place such a lease within one of the four recognized "boxes" of ownership, a court would probably shoehorn the lease into the category of periodic tenancy or a tenancy at will.[72] There is no such thing as a lifetime lease at common law, so such an interest would fall

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62 Simpson v. Mayor of Godmanchester [1896] 1 Ch. 214, 220.

63 Eckert v. Peters, 36 A. 491, 492 (N.J. Ch. 1897).

64 *Hill*, 159 Eng. Rep. at 53.

65 Keppel v. Bailey, [1834] 39 Eng. Rep. 1042, 1053.

66 *Id.* at 1049.

67 *Id.* at 1048.

68 *Id.* at 1049.

69 Pomeroy, *supra* note 44, at 976.

70 Robert S. Schoshinski, American Law of Landlord and Tenant §§ 2:1-2:26, pp. 30-83 (1980); David A. Thomas, 4 Thompson on Real Property § 39.02(c), at 492 (1994).

71 Schoshinski, *supra* note 70, §§ 2:1-2:26; Thomas, *supra* note 70, § 39.02(c).

72 *But cf.* Garner v. Gerrish, 473 N.E.2d 223, 225 (N.Y. Ct. App. 1984) (characterizing an interest as a "life tenancy terminable at the will of the tenant").

outside the recognized categories and so constitute a departure from the NC.[73]

Changing times require changing property forms, and the NC does not hinder this evolution: as industrialization in the United States continued apace, American courts steadily expanded the list of permissible easements to include, among other things, conservation easements, newly necessitated by encroachments on the land.[74] The basic principle, however, remained: limiting the burdens that can be passed on to third parties to those already in existence or codified by the legislature through a democratic process.

B. Justifications

Contemporary scholarship falls into two schools of thought about the justifications for numerus clausus: the efficiency rationale and the democratic decision-making rationale.

1. *Efficiency*

The most notable spokespeople for the efficiency school are Merrill and Smith, who argue that limiting property forms reduces information gathering costs – i.e., the cost of finding out what burdens attach to a particular asset thus enabling efficient - i.e., low-cost - market transactions.[75] If property forms were infinitely variable, the list of burdens could be endless, and the costs of ascertaining them for any given form of ownership would be prohibitive and thus reduce efficiency.[76] Merrill and Smith give an example of a watch whose use is limited to Mondays (an example to which I shall return).[77] A potential buyer of such a watch would have to spend considerable resources to discover this odd (novel?) limitation on the watch's use; this is why idiosyncratic forms of property ownership make market transactions prohibitively costly.[78]

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73 Nat'l Bellas Hess, Inc. v. Kalis, 191 F.2d 739, 740 (8th Cir. 1951); Stanmeyer v. Davis, 53 N.E.2d 22, 23 (Ill. App. Ct. 1944); Lace v. Chantler, [1944] 368 K.B.D. 305 (C.A.) 306 (appeal taken from C.C.). *But cf.* Smith's Transfer & Storage Co. v. Hawkins, 50 A.2d 267, 268 (D.C. 1946) (concluding that a term of years requires only that the lease be certain to end, not that it have a definite calendar ending, and thus that a tenancy until the termination of "the present war" was a term of years).

74 For the history of conservation easements, see generally Connie Kertz, *Conservation Easements at the Crossroads*, 34 REAL EST. L.J. 139, 141 (2005).

75 The most prominent statement of this thesis is Merrill & Smith, *supra* note 24, at 33.

76 *Id.* at 40.

77 *Id.* at 27.

78 *Id.*

Limiting the list of property forms to a small number of known possibilities lowers the buyer's cost.[79]

In a related vein, the cost of providing notice in such a complex system would be equally prohibitive, with the same result.[80] Hansmann and Kraakman argue that NC aids the potential purchaser of property rights to verify the content of those rights as part of a market transaction.[81] Moreover, the duty to understand property rights is not personal, that is, it is not limited to those involved in the transaction.[82] Rather, it is the duty of everyone in the society to understand property rights and to arrange their economic plans accordingly, so efficiency concerns are relevant society at large[83]

2. *Democratic Decision-Making About Property*

Several writers have pointed to another, compatible rationale for NC – namely, democratic decision-making about property rights. Joseph Singer, Avihay Dorfman and Anna Di Robilant all connect NC to democratic decision-making and property's role in ensuring individual freedom. Dorfman in particular focusses on the rationale of democratic decision-making about property:[84] He argues that it goes to the heart of the legitimacy of political authority[85] and uses it to explain the how laws exert authority and engender obedience.[86] According to Dorfman, there are two models to explain this effect, the liberal model and the republican model.[87] The liberal model bases the legitimacy of authority on the appeal to reason: "[l]iberals demand that social order should in principle be capable of explaining itself at the tribunal of each person's understanding."[88] The republican model rests authority on the democratic process: because the members of society have faith in the fairness

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79 *Id.* at 33.

80 *See, e.g.*, *id.* at 69 (arguing that, "by permitting a significant number of different forms of property but forbidding courts to recognize new ones, the numerus clausus strikes a balance between the proliferation of property forms, on the one hand, and excessive rigidity on the other").

81 Hansmann & Kraakman, *supra* note 31, at 374.

82 *See* Merrill & Smith, *supra* note 24, at 26-27.

83 Pomeroy, *supra* note 44, at 983; Merrill & Smith, *supra* note 24, at 25-26.

84 *See generally* Dorfman, *supra* note 28, at 468.

85 Avihay Dorfman, *Freedom of Religion,* 21 CAN. J. L. & JURIS. 279, 290 (2008).

86 There is, of course, a vast literature on this subject. *See, e.g.*, *id.*

87 *Id.* at 290-95.

88 Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127, 149 (1987); *see also* JÜRGEN HABERMAS, THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY 100 (Ciaran Cronin & Pablo De Greif ed. 1998) ("Moral commands [extending, in Habermasian terminology, to principles of political-moral conduct] must be *internally* related to the life-plans and lifestyles of affected persons in a way they can grasp for themselves.").

and transparency of the political process, even the dissenter whose views do not prevail in a given set of circumstances respects and obeys the law.[89]

Under either of these models, decision-making about property rights must carry legitimacy. Because property rights, unlike contract rights, affect everyone in society, the only forum that should be able to create new ones is a democratically elected legislature, in a process which must be able to "explain itself at the tribunal of each person's reason," and/or receive the input of the whole spectrum of social interests and groups.[90] Thus, NC legitimates government by guaranteeing that forms of ownership which affect everyone will be created only through the process of democratic decision-making.[91] As Dorfman explains, it is "a categorical restriction on private legislation"[92] in the area of property rights; it is an affirmation that, for government to have legitimacy, forms of property must be the products of collective decision-making which reflects the input of all whom they obligate.[93]

Joseph Singer broadens the purpose of NC by arguing that the system of estates not only fosters efficiency, but also "shape[s] social life in a manner consistent with the normative commitments of a democratic society composed of free and equal individuals who treat each other respectfully."[94] He explains that "[p]roperty law therefore both reflects and puts into practice value judgments about the appropriate contours of social, economic, and political life."[95] I would include in this the idea that the doctrine of NC limits the burdens which can be imposed on third parties to those that comport with social expectations and fairness. In other words, NC – what Singer calls the system of estates – controls the proliferation of property rights in accordance with the principles and expectations of a democratic society whose market actors are expected to treat one another with decency and respect.[96] Singer illustrates this notion with the examples of Fair Housing laws, consumer protection laws, and the Economic Recovery Act of 2008, which allowed homeowners to renegotiate their mortgages.[97] The basic idea the estate system embodies, in Singer's view, is that property ownership comes with

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[89] For an account of this theme in the American context, see ROBERT POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 185-86 (1995).

[90] Dorfman, *supra* note 28, at 483.

[91] *Id.*

[92] *Id*.

[93] *Id*.

[94] Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1052 (2009).

[95] *Id.*

[96] *Id.*

[97] *Id.*

responsibility toward others in society, and property use must conform the basic expectations about market interactions.[98]

Anna Di Robilant similarly justifies the NC by referring to democratic decision-making.[99] Affirming that property rights have an "inherent public quality," because they impose duties on non-owners, she asserts, like Singer and Dorfman, that they must be the product of democratic deliberation.[100] But she goes on to credit the principle with allowing for significant experimentation in property, in a process by which citizens develop new property forms to respond to emerging social concerns and then submit them to legislative approval.[101] As examples of ownership forms which this process has produced, Robilant cites Common Interest Communities, Community Land Trusts, and the public trust doctrine in the United States, as well as several emergent property forms in the E.U.[102]

Part III: Applying NC to Trusts

A. Rationale for Applying NC to the Equitable Interests of Trusts

As noted, trusts have traditionally evaded the NC filter. This has been the result of overly formalistic thinking: traditionally, NC paid attention only to legal title.[103] The trust, as a formal matter, functions by separating legal title, which vests in the trustee, from beneficial title, which vests in the beneficiary.[104] The trustee exercises legal title by managing and distributing the trust assets, and the beneficiary exercise beneficial title by enjoying, using or disposing of the assets.[105] Merrill and Smith do not see limiting NC to the legal title part of the trust as presenting information cost problems because, they assert, third parties "deal only with the underlying trust assets which are held by the trustee in fee simple."[106]

This analysis, however, allows formalism to obscure reality. As Professor Schenkel points out, "trust beneficiaries also engage in market transactions."[107] Schenkel goes on to build on Merrill and Smith's watch analogy to illustrate this point: suppose A transferred the Monday watch to a trust which gave B the right to use the watch only on Mon-

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98 *Id.*
99 Di Robilant, *supra* note 24, at 369.
100 *Id*. at 370.
101 *Id.* at 369-70.
102 *Id.* at 373-87.
103 Schenkel, *supra* note 25, at 190-91.
104 Dukeminier & Sitkoff, *supra* note 18, at 393-96.
105 *Id.*
106 Merrill & Smith, *supra* note 24, at 34.
107 Schenkel, *supra* note 25, at 210.

days, and suppose the beneficiary sought to offer the watch as collateral for a loan.[108] Wouldn't third parties doing business with B face information costs in ascertaining what B's interest in the watch actually was?[109] Because equitable interests affect third parties as much as legal interests, if the rationale of NC is to reduce information gathering costs, NC should apply to them as well.

The concepts of developed by Wesley Newcomb Hohfeld in his article *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* illustrate how trust interests affect the property rights of others.[110] Hohfeld grouped legal relations into what he called "jural correlatives" and "jural opposites."[111] Hohfeld's system of correlatives establishes that any time a person has a right, there is a person with a duty which corresponds to that right.[112] In other words, if person A has a right to a payment of X dollars from person B, B has a duty to pay those X dollars to A.[113] Likewise, the fact that one person has a privilege means that another has what Hohfeld referred to as "no-right;" power in one corresponds to a liability in another, and so on.[114] Thus, each legal interest, or right, also has an opposite burden, or "no-right."[115] That B in the above example has a duty to pay A means that B does not have the privilege to avoid that payment. Or: Y has a privilege to enter Y's own land, and therefore D, for example, has the corresponding "no-right" to prevent Y from doing so. That Y has a privilege means that Y could not have a duty (privilege's jural opposite) to refrain from entering Y's land.

Hohfeld's analysis makes clear how the equitable interests of trusts burden third-party property rights. Every right of the beneficiary – say, to withhold her interest from creditors – creates of corresponding "no-right" in the creditor to collect. DAPTs do this more egregiously: the settlor's right to withhold his assets from creditors (as in a DAPT) creates the creditor's "no right;" the settlor's right to keep his assets free of spousal claims – whether arising from divorce or death – creates a no-right in the spouse to what would otherwise be marital property. More broadly, the settlor's right to keep her assets tax-free in a dynasty trust imposes a "no-right" on everyone else – in this case, "no right" to keep similar assets tax free. Rather, the DAPT settlor's right burdens every-

[108] *Id.* at 212.
[109] *Id.*
[110] This section is indebted to Kent D. Schenkel's insightful analysis in *Trust Law and the Title Split: A Beneficial* Perspective, *supra* note 25, at 183.
[111] Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1914).
[112] *Id.* at 32.
[113] *See id*.
[114] *See id.* at 32-33, 44.
[115] *See id.* at 30-38.

one else with the "no right" of either paying higher taxes or living with unsafe roads and contaminated water.

Perhaps voluntary creditors - banks, credit card companies, etc. – who also do business with trust beneficiaries – are able to protect themselves through due diligence: surely, they can investigate the resources of potential borrowers to ascertain the nature of their assets and can ascertain the existence of trusts which might bar recovery. This is not always the case in reality, however: some states' statutes of limitations for raising fraudulent transfer claims are so short (i.e. 120 days for transfers to DAPTs in Utah[116]) that a debtor could quickly become judgment proof four months after sending notice to creditors.[117]

These Hohfeldian "no-rights" are very real. For example, while many states have traditionally made exceptions to spendthrift trusts for certain so-called "super creditors," like ex-spouses and children with support orders, the new generation of DAPTs shrinks these exceptions considerably. Utah, for example, bars all claims against the assets of a DAPT including those for court-ordered child and spousal support,[118] as does Nevada.[119] Similarly, Alaska law bars challenges to transfers made to a DAPT to avoid support claims,[120] and it only allows a child support creditor to reach trust assets if the payment is 30 days overdue at the time the trust is created.[121] This is also the case with Hawaii DAPT law.[122] Indeed, avoidance of child support and other forms of family obligations are one of the selling points of DAPTs: a Nevada Trust Company, for example, touts that state as "the only state that includes ex-spouse and child support creditors in those who may not gain access to protected assets in an Asset Protection Trust," which it advertises as "an incredibly significant benefit."[123]

These trust forms impair the property rights of spouses and children arising from marriage: the marital relation gives them certain rights to marital property (whether in the form of support or asset division) which these trusts limit or obliterate. The effect on spousal and child support creates, in effect, a servitude which impairs these property interests – without the holders' knowledge or consent.

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117 115 UTAH CODE ANN. § 25-6-502(9)(b) (2017). *Id.*

118 § 25-6-502(3).

119 NEV. REV. STAT. § 166.120 (2017).

120 ALASKA STAT. § 34.40.110 (2017) (listing exception creditors).

121 § 34.40.110(b)(4).

122 HAW. REV. STAT. § 554G-9(1) (2017).

123 Provident Tr. Grp., *What is an Asset Protection Trust?*, TRUSTPROVIDENT.COM, https://trustprovident.com/trust-escrow-services/asset-protection-trust (last visited June 21, 2017).

Surviving spouses to whom state succession law guarantees a portion of the decedent's estate at death similarly may have their property rights turned into "no-rights" when a trust is involved. In *Bongaards v. Millen*, for example, a mother established a trust for her own benefit and then upon her death, for that of her daughter.[124] After the mother's death, the daughter also had a power of appointment over the trust assets, as well as the power to terminate the trust and distribute the assets to herself.[125] The daughter died, leaving nothing to her husband in her will.[126] The husband exercised his right under state law to elect against the will, and argued that the trust assets should be subject to the elective share.[127] The court disagreed, and refused to include the trust assets in the estate because the trust had been created by the wife's mother and not by the wife herself.[128]

This result makes little sense, since the wife had had the power at all times to distribute the trust assets to herself, either by using the power of appointment or by simply terminating the trust.[129] The legal-equitable title split distracted the court from the reality that the wife's interest in the trust impacted the husband's property rights as guaranteed by state law. The result in this case clearly contradicts settled trust law, which states that a general power of appointment is an ownership interest in the donee.[130] But this is not the point. Courts are prone to making this mistake when they elevate the interests of the dead settlor (here, the mother) over that of the living. Moreover, the problem is more acute with DAPTs, which estate planners advertise as a mechanism to avoid the elective share, even when the domicile state's law would count the assets of a more traditional trust in the decedent's estate.[131]

Other benefits attached to trust assets impact the property rights of society at large. Many dynasty trusts exempt their assets from taxation,

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[124] Bongaards v. Millen, 793 N.E.2d. 335, 337 (Mass. 2003).

[125] *Id*. at 337-38.

[126] *Id*. at 338.

[127] *Id.* at 340-41.

[128] *Id*. at 341.

[129] For a detailed critique of *Bongaards* and similar cases, see Schenkel, *supra* note 25, at 199-203.

[130] Restatement (Third) of Prop.: Wills and Donative Transfers, Introductory Note to Chapter 25 (Powers of Appointment), pp. 1812-13 (Am. Law Inst. 2011).

[131] Thomas D. Begley, Jr., *Protecting your Assets from Creditors: Are you Bullet-Proof? Part 3*, Begley Law Group, http://www.begleylawyer.com/2015/01/protecting-your-assets-from-creditors-are-you-bullet-proof-part-3/ (last visited June 21, 2017) ("Delaware law does not defer to the decedent's domicile to determine the surviving spouse's elective share rights, so it is likely that the Delaware DAPT would offer protection against elective share rights even if the grantor of the trust was a resident of New Jersey or Pennsylvania.").

thus burdening all other members of society with the additional obligation – "no-right" - of either increased tax burden or reduced public goods and services.[132] As a state citizen, my only choice is between the burden of paying higher taxes to make up the shortfall or driving on unpaved roads.

The shift of tax burden is substantial. A 2003 study estimated that the amount of capital these trusts shelter from taxes was around one hundred billion (then),[133] and, because of the invisibility of private trust companies, this may drastically undervalue the true amount.[134] What this means is that settlors and beneficiaries of these trusts avoid their obligations to participate in a progressive tax system, leaving others to foot the bill, or do without. Dynasty trust beneficiaries' "right" to avoid taxes triggers an obligation on the part of everyone else to make up the difference.

So at the new millennium we have one old and two new forms of trust which burden the rights of third parties by protecting their beneficiaries – and now settlors – from the claims of individuals and of society at large. Whether one justifies NC on efficiency or democracy grounds, there is no basis for leaving the equitable interests of trusts out of the calculation. Trust create benefits which in turn burden third parties, and it is time property law acknowledged this reality.

Defenders of these trusts do not deny that they affect the rights of third parties, in essence binding them in ways they never agreed to.[135] Rather, they claim that these externalities are not significantly harmful, and/or that settlors of the trusts can achieve the same effects through other property forms. For example, Adam Hirsch lists such devices as tenancies by the entirety, voluntary contributions to an ERISA pension fund, re-titling non-exempt property as exempt, forming a family limited

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132 For a discussion of the tax avoidance strategies of dynasty and other kind of trusts, see generally Iris J. Goodwin, *How the Rich Stay Rich: Using a Family Trust Company to Secure a Family Fortune*, 40 SETON HALL L. REV. 467, 468 (2010) (exposing "the role of the family trust company as the masterstroke in a series of aggressing planning techniques . . . that are used by the very wealthy to secure and grow a fortune for untold generations to come").

133 JOINT COMM. ON TAXATION, 112TH CONG., DESCRIPTION OF REVENUE PROVISIONS CONTAINED IN THE PRESIDENT'S FISCAL YEAR 2012 BUDGET PROPOSAL 522, 528 (2011).

134 RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 76-84 (2010) (describing dynasty trusts and the evolving treatment of them).

135 For examples of criticism in this vein, see Adam S. Hofri-Winogradow, *The Stripping of the Trust: From Evolutionary Scripts to Distributive Results*, 75 OHIO ST. L.J. 529, 531 (2014); Schenkel, *supra* note 1, at 69 (observing that trusts can increase insurance costs); Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P*, 24 CARDOZO L. REV. 2097, 2115 (2003).

partnership, using an offshore asset protection trust, or making "gifts" to "trusted family members" as devices people can use to avoid future creditors.[136] This is all true (although the gift to the "trusted family member" has backfired more than once, when the relative has turned out to be more avaricious than trustworthy).[137]

None of these possible mechanisms, however, undermines my point with respect to NC: these are all forms of property ownership which have gained legal acceptance, thus (theoretically at least) passing the NC test. They are all forms of ownership which at least have the imprimatur of democratic decision-making: tenancies by the entirety emerged from the impulse to protect marital property;[138] ERISA rules serve to shelter retirement savings, a public good;[139] exempt property is intended to prevent destitution in cases of bankruptcy or other financial catastrophe;[140] and the initial impulse for the corporation, at least, was a democratic one: to enable small investors to buy shares in companies without risking devastating liability for their debts.[141] This is not to paint an overly rosy picture of any of these entities and the various interest groups which had a hand in their formation. But these forms achieved broad-based benefits – protection of retirement savings for millions of workers, the possibility of investing and earning interest to the middle class, because they arose from a clash of interest groups re-

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136 Adam J. Hirsch, *Fear Not the Asset Protection Trust*, 27 CARDOZO L. REV. 2685, 2695 (2006).

137 *Id.* at 2696, 2701. As Dukeminier and Sitkoff put it, "as any lawyer knows, these transferors are asking for trouble, and, human nature being what it is, they usually get it." DUKEMINIER & SITKOFF, *supra* note 18, at 434. They go on to cite the case of *Pappas v. Pappas,* 320 A.2d 809 (Conn. 1973), in which a 67-year-old man married a 23-year-old woman while on a visit to Greece. After they returned, trouble ensued, and, shortly before the wife filed for divorce, Mr. Pappas transferred certain assets to his son, who agreed to return everything once the divorce was final. At that point, however, the son refused to return the assets, and the court refused to impose a constructive trust because it held that the father, in perpetrating a fraud on the court, had unclean hands.

138 *See generally* John D. Johnston, Jr., *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality,* 47 N.Y.U. L. REV. 1033, 1083 (1972) (discussing history of tenancies by the entirety).

139 Donald T. Bogan, *ERISA: The Savings Clause, § 502 Implied Preemption, Complete Preemption, And State Law Remedies*, 42 SANTA CLARA L. REV. 105, 181 (2001) (discussing Congressional policy purpose for ERISA).

140 Michael Denham, Comment, *A Call for Bankruptcy Reform: The Fifth Circuit Limits the Texas Homestead Exemption and Further Complicates the Exemption Controversy*, 30 TEX. TECH L. REV. 269, 272 (1999) (noting that "[e]xemptions allow a debtor to maintain "property necessary for his physical survival).

141 *See, e.g.,* Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. REV. 22, 24-25 n. 8 (1983) (describing the history of property exemptions under federal bankruptcy laws).

sulting in compromise.[142] By contrast, the rise of DAPTs has not resulted from any such clash. Rather, it has been the result of one-sided lobbying by a small segment of society without input from the large group of citizens affected by it. This cannot pass democratic muster.

If we apply the NC to trusts, do they fulfil its mandate, either by enhancing efficiency or by embodying democratic decision-making?

B. Efficiency

So far, those promoting the efficiency rationale for NC have largely ignored or brushed aside the problem of trusts.[143] This may be because of confinement to the real property paradigm: real property in trust presents less of a problem in terms of notice and transaction costs. The transfer of real property requires a deed, and the deed indicates the existence of the trust (although not necessarily the terms of the trust.)[144] So, the efficiency rationale of NC (that it reduces information-gathering costs) makes some sense with respect to real property (although the great variance among the three thousand U.S. counties in terminology and property forms undermines its effectiveness).[145]

The majority of private trusts today, however, consist of assets other than real property – money, stocks and bonds, etc.[146] Unlike deeds to real property and wills, which are publicly recorded, trusts are completely private instruments. This is one of the advantages they offer to those seeking to avoid the public disclosure of probate. If one leaves property to a trust in a will, then the existence of the trust is in a public record, but if a settlor transfers her estate to a trust during life – a "living trust" – the instrument will likely remain private. There is no public registry of trusts in the United States.[147] Federal law requires banks

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[142] Donald T. Bogan, *ERISA: The Savings Clause, § 502 Implied Preemption, Complete Preemption and State Law Remedies*, 42 SANTA CLARA L. REV. 105, 117 (2002) ("As might be expected with such an ample piece of legislation affecting the rights and obligations of both big business and labor, ERISA also reflects the reality of political compromise.").

[143] *See, e.g.*, Merrill & Smith, *supra* note 24, at 54.

[144] DUKEMINIER & SITKOFF, *supra* note 18, at 440-41.

[145] For a discussion of the differences among counties in terminology, see generally Pomeroy, *supra* note 44, at 961.

[146] Goodwin, *supra* note 132, at 471-72.

[147] There is one in the European Union; it lists settlors, trustees and beneficial interest holders of EU trusts, and is open to national officials responsible for anti-money laundering and tax evasion efforts. *See* Directive (EU) 2015/849, of the European Parliament and of the Council of 20 May 2015 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, Amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC(1), *available at* THE OFFICIAL JOURNAL OF THE EUROPEAN UNION,

which manage trusts to make reports about the assets they control, but private trust companies, which represent a growing trend among the wealthy, are under no such obligations.[148] According to Hoover's Online, there are as of this writing, 22,000 private trust companies in the United States.[149] Uncovering the interest holders and determining the terms of the trust under private management – important information for putative creditors – can be daunting, or impossible. Indeed, one of the main reasons the wealthy create these companies in the first place is to keep their assets and affairs confidential.[150] This undermines the efficiency rationale by making information about the assets – or even their very existence – costly to uncover.

One might argue that it should be obvious that any trust in question has a spendthrift clause, which is boilerplate in most trusts today,[151] thus avoiding the cost of analyzing a particular instrument. But this assumption would offer limited help: trust instruments can contain almost infinite variations on the theme of which creditors may receive payment out of trust assets. For example, states have differing rules about what creditors constitute an exception to spendthrift prohibitions: some states allow for ex-spouses,[152] some for suppliers of necessaries;[153] some allow for attachment of assets if the distribution exceeds what the beneficiary needs to maintain her "station in life."[154] This wide variety of trusts, each with different sets of creditor rights, makes it difficult for third parties to assess whether to extend credit to trust beneficiaries, and also makes it difficult for creditors to decide whether to seek enforcement. This could add considerably to the information costs associated with these decisions.

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§ 4, ch. III, art. 31.1(a)-(e), eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2015_141_R.

148 Alan V. Ytterberg & James P. Weller, *Managing Family Wealth Through a Private Trust Company*, 36 ACTEC L.J. 623, 625 (2010).

149 D&B HOOVERS, http://www.hoovers.com/ (last visited June 21, 2017); e-mail from Ryan Splenda, Bus. & Econ. Librarian, Carnegie Mellon U., to Timothy Gatton, Head of Ref. Servs. & Law Library Prof., Chickasaw Nation Law Library (Jul. 13, 2016, 10:54 EST) (on file with author).

150 Todd Ganos, *Wealthy Families Create Private Trust Companies for Privacy, Protection, Tax Savings, and Control,* FORBES (Oct. 28, 2013), https://www.forbes.com/sites/toddganos/2015/10/28/wealthy-families-create-private-trust-companies-for-privacy-protection-tax-savings-and-control/#3a476363713e.

151 Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 IOWA L. REV. 215, 228 (2011) (noting that "most *modern trusts* contain a boilerplate spendthrift clause") (emphasis added).

152 UNIF. TRUST CODE § 503 (b)(1) (UNIF. LAW COMM'N 2010).

153 § 503 (b)(2).

154 *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 7-3.4 (McKinney 2017).

C. The Failure of the Democratic Process

Sadly, the ideal of property forms emerging from democratic decision-making presents an overly rosy picture of the legislative process in the United States. The increasing influence of money in elections and of the power of lobbyists and special interest groups raises concerns that new forms of property ownership voted in by a legislature might be more responsive to the interests of those members of society with assets, connections and influence than to those of society at large.[155] The proliferation of new forms of trusts passed by state legislatures in the past decade implicates some of the concerns underlying the NC in the first place, despite their appearance of democratic legitimacy by virtue of having passed through a democratically elected body.[156]

The legislative process for making determinations about dynasty and asset protection trusts does not embody the ideals put forth by the proponents of deliberative democratic decision-making. Despite being passed by legislatures, these new forms of property ownership often are not the products of democratic decision-making. To the contrary, the rush by state legislatures to repeal the rule against perpetuities and pass dynasty trusts has been the result of lobbying by the wealthy, their lawyers, bankers, and trust managers,[157] at times in the face of popular rejection of these innovations.[158]

Typically, the special interests who stand to benefit from these new trusts control the drafting, introduction and debate about them. For example, the Maine dynasty trust bill passed "after a lopsided debate whose key contributors were members of the banking lobby and attorneys in private practice who stood to gain the most from its passage."[159]

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[155] For investigations of the role of lobbying and money on legislatures, see, for example, Lynda Powell, *How Money Talks in State Legislatures*, WASHINGTON POST, Nov. 5, 2013, https://www.washingtonpost.com/news/monkey-cage/wp/2013/11/05/the-influence-of-money-in-u-s-politics/?utm_term=.d54c1f9c5cbe (analyzing the mechanics of donor influence on the drafting and progress of legislation). *See also* DUKEMINIER & SITKOFF, *supra* note 18, at 705 (asserting that "[l]ocal bankers and lawyers, who stand to gain from an influx of trust assets, have lobbied for [APTs and dynasty trusts"]).

[156] The leading analysis of interjurisdictional competition for trust business is Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 356 (2005).

[157] *See, e.g.,* Grayson M. P. McCouch, *Who Killed the Rule against Perpetuities?* 40 PEPP. L. REV. 1291, 1292 (2013) (noting in 2013 that, "in the space of less than twenty years, at least half the states, responding to intense lobbying by lawyers, bankers, and financial planners, have enacted statutes authorizing perpetual trusts, with the express goal of attracting trust business from other states").

[158] Steven J. Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts,* 67 VAND. L. REV. 1769, 1773 (2014).

[159] Chris Stevenson, *Maine's Dynasty Trust Statute: The Product of an Informed Judgment*, 23 ME. B. J. 224, 230 (2008).

Nevada offers another example of this lack of democratic process: when proponents of perpetual trusts in that state held a state-wide referendum to repeal the state constitution's anti-perpetuity provision, voters rejected it by a margin of sixty percent.[160] Nonetheless, the state legislature passed a law – drafted by a committee which included members of a Nevada trusts and estates law firm[161] - allowing trusts to endure for 365 years.[162] In Michigan, the Greenleaf Trust Company, represented by a local law firm, seems to have "spearheaded" the passage of perpetual trusts in that state.[163] According to the webpage of Dykema, a Michigan law firm, one of its partners was the "primary draftsperson" of the domestic asset protection trust legislation passed by the Michigan legislature in December 2016.[164] In Connecticut, local banks and lawyers argued that "people who want to set up dynastic trusts for their grandchildren, great-grandchildren and down the line of generations, are doing them in other states."[165] Indeed, the lawyer who headed the lobbying efforts in the Connecticut Legislature reported that at the hearing on the perpetual trusts bill "a kind of bidding war ensued as legislators extended the time period from 90 to 100 to 360 years, finally ending at a 2000 year period limitations."[166] The New Jersey legislature passed the Trust Modernization Bill overturning the ban on perpetuities which was sponsored by the New Jersey Bankers Association.[167] There have also been efforts, so far unsuccessful, to repeal state constitutional bans on perpetuities in North Carolina and Texas.[168] As Sitkoff and Horowitz note, "lawyers and bankers have lobbied for perpetual trusts to attract, or at least retain, trust business."[169]

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[160] *Election 2002,* RENO GAZETTE, Nov. 8, 2002, at 3C.

[161] Steven J. Oshins, *The New Nevada 365-Year Dynasty Trust: Nevada Becomes a Leading Dynasty Trust State*, COMMUNIQUE, Mar. 2006, at 32, https://docs.wixstatic.com/ugd/b211fb_9e5f37d4ba8e4c9cb359ea66155a7d61.pdf.

[162] NEV. REV. STAT. § 111.1031(1)(b) (2017).

[163] Warner Norcross & Judd, LLP, *Building A Dynasty: Michigan Law Now Allows Perpetual Trusts*, WNJ.COM (Nov. 26, 2008), http://www.wnj.com/Publications/Building-A-Dynasty-Michigan-Law-Now-Allows-PerpetualTrusts (last visited June 21, 2017).

[164] *Michigan's New Asset Protection Trusts*, DYKEMA (Dec. 14, 2016), http://www.dykema.com/resources-alerts-michigans-new-asset-protection-trusts_12-13-2016.html (last visited June 21, 2017).

[165] Thomas Scheffey, *Is Immortality Just Around the Corner? "Dead Hand" Trust Law Relaxes Its Grip*, CONN. L. TRIB., Feb. 28, 2002, at 10 (quoting "veteran estate tax specialist" Frank S. Berall).

[166] *Id.*

[167] Rachel Wolcott, *New Jersey Poised to Allow Dynasty Trusts*, PRIV. ASSET MGMT., May 17, 1999, at 6, 10.

[168] *See* S.B. 398, 2011 Gen. Assemb. (N.C. 2011) (North Carolina); Ashley Vaughan, *You Can't Take It with You: Property Rights After Death and Rethinking the Rule Against Perpetuities*, 47 S. TEX. L. REV. 615, 637-39 (2006) (Texas).

[169] Horowitz & Sitkoff, *supra* note 158, at 1786.

The problem of interest group capture is, of course, not unique to this area of law.[170] As long as politicians need vast sums of money to win elections, and as long as soft money flowing into campaigns is unlimited, the undemocratic influence of interest groups on legislatures is almost a given. The legislation of trusts and estates, however, is especially vulnerable to closed door dealmaking: it isn't an area of law which garners much media attention and hardly ever makes headlines; most people are unaware of it and uninterested in it.[171] This allows the new trust forms to emerge hidden from public scrutiny. Ray Madoff calls this "the stealth nature"[172] of changes to trust law: "The larger picture has gone unnoticed because change has occurred within [discrete] areas of the law, and often at the state level."[173] As Mark Ascher elaborates,

> [w]hen the relevant committee of the local bar association recommends a package of proposed changes to the probate code, no bells begin to ring and no warning lights begin to flash. The committee states truthfully that it has vetted the proposed changes with all of the 'relevant' groups, like the local bankers' and accountants' groups, and the legislature rubber-stamps the changes, probably without hearings.[174]

Madoff sums up the process this way:

> Finally, the story of the American law of the dead would not be complete without recognition of the effect of money on legislation. It is significant that the areas in which American law has grown most dramatically . . . not only appeal to individuals' desire to exert posthumous control but also appreciably benefit corporate interests. By using interests of the dead as a decoy, these entities have succeeded in enriching their own property interests. Although financial gain may be the driving force behind these changes, corporations are not the ultimate villains. Businesses are amoral, simply doing what our society tells them to do: maximize profit. The blame lies with legislators, who have responded to corporate demands even when they have not best served the needs of American society at large.[175]

As Sitkoff and Schanzenbach suggest, local interest groups such as banks, members of the estate planning bar, and trustees, "benefit from,

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170 Powell, *supra* note 155, at 1-2.

171 MADOFF, *supra* note 134, at 155.

172 *Id.*

173 *Id.*

174 Mark L. Ascher, Book Review, 89 TEX. L. REV. 1149, 1174 (2011).

175 MADOFF, *supra* note 134, at 155-56.

and hence lobby for" laws that increase the state's trust business.[176] Indeed, "abolition of the [Rule against Perpetuities] has been 'pushed by banking associations . . . [that] wish to remain competitive with banks where perpetual trusts are permitted.'"[177] The annual trustees' commissions alone are worth about one billion dollars.[178] In short, Sitkoff and Schanzenbach's empirical study concluded that "[t]he story of jurisdictional competition in trust law is a story of successful lobbying by local banks and trust lawyers, the principal beneficiaries of attracting new trust business to the state."[179] The story of the genesis of the Alaska dynasty trust illustrates Sterk's point that "[j]urisdictions seeking to become trust havens . . . appear content to draw business to local financial institutions and lawyers, even without direct benefit to the public fisc."[180]

The proliferation of these instruments underlines both American law's drift away from the NC principle – and thus from democratic decision-making in property law - as well as the principle's importance. These new trust instruments serve the needs of wealthy families by allowing for the multi-generational accumulation of wealth and the interests of banks, fund managers and trusts and estates attorneys who profit from their creation and management. They offer a prime example of how legislative capture can negate the NC principle, and, ironically, why it and the democratic decision-making about property it seeks to preserve are important for social welfare.

Nor do these new forms of trust benefit society at large by increasing state tax revenue or employment, although it is a common assumption that states compete for business to bolster the tax base.[181] Rather, these trusts are situated in states which have no income tax: Sitkoff and

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176 Sitkoff & Schanzenbach, *supra* note 156, at 363. The Congressional GST exemption was the result of the lobbying efforts of the Gallos, the California winemaking family, who donated $324,000 to ensure that the GST exemption was part of the 1986 tax reform bill. FRED S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 2 (1997).

177 Sitkoff & Schanzenbach, *supra* note 156, at 374 (quoting JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 854 (6th ed. 2000)).

178 *Id*. at 411.

179 *Id.* at 417.

180 Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1060 (2000).

181 *See, e.g.*, ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 6-16 (1993); William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201, 235-39 (1997); Dennis Epple & Allan Zelenitz, *The Implications of Competition Among Jurisdictions: Does Tiebout Need Politics?*, 89 J. POL. ECON. 1197, 1204-10 (1981); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 945-49 (2005).

Schanzenbach found that "the only states that experienced an increase in trust business after abolishing the Rule [against Perpetuities] were those that did not levy an income tax on trust funds attracted from out of state."[182] Moreover, employment statistics for the financial industries in states which have adopted DAPTs fail to show a significant "bump" in the years post-adoption. For example, Alaska saw a small rise in financial industry jobs between 1997, the year the legislature DAPTs were first passed, and the following year – and it saw the same increase in every year before that and every year after, until 2008, which saw, unsurprisingly, a drop.[183]

Some people try to justify the creation of these trusts by arguing that an overly litigious society justifies professionals in protecting their assets from frivolous suits and exorbitant damage awards[184] – and that they will find ways to do this anyway — so American jurisdictions might as well benefit from their business.[185] The reality is, however, that most unjustified or egregiously large damages awards are reduced on appeal, and the filing of frivolous lawsuits is greatly exaggerated.[186] Even if over-litigation were the case – and there is much dispute[187]– it's a far cry from agreeing as a society that we will allow people to hold their assets in such a way that their creditors cannot reach them.

Part IV: The NC Solution

One way to check the proliferation of these undemocratic forms of the trust is for courts to step into the breach. While it's certainly possible for a democratic polity to opt out of NC altogether, ours has not

[182] Sitkoff & Schanzenbach, *supra* note 156, at 362.

[183] Historical data can be viewed and calculated at the U.S. Bureau of Labor Statistics website for Alaska's Economy at a Glance, https://www.bls.gov/eag/eag.ak.htm (last visited June 21, 2017).

[184] *See, e.g.*, Jonathan L. Mezrich, *It's Better in the Bahamas: Asset Protection Trusts for the Pennsylvania Lawyer*, 98 Dick. L. Rev. 657, 675 (1994) (arguing that "asset protection is simply a reasonable reaction to today's 'court-happy' society, and should be allowed until the U.S. judiciary or legal community finds a way to reign-in damaging, frivolous lawsuits and litigiousness.").

[185] Randall G. Gingiss, *Putting a Stop to Asset Protection* Trusts, 51 Baylor L. Rev. 987, 991 (1999).

[186] *See generally* Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 Md. L. Rev. 1093, 1132 (1996) (showing that claims of litigiousness and outsize damage awards are greatly exaggerated).

[187] *See, e.g.*, Carl T. Bogus, Why Lawsuits Are Good for America: Disciplined Democracy, Big Business, and the Common Law (2001); Stephen Daniels & Joanne Martin, Civil Juries and the Politics of Reform (1995); Jay M. Feinman, Un-Making Law: The Conservative Campaign to Roll Back the Common Law (2004); Thomas H. Koenig & Michael L. Rustad, In Defense of Tort Law (2001).

done so: NC remains a principle of American property law. The expansion of the trust I have been describing is in effect an opt-out by stealth, bypassing the democratic process which would be able to achieve such a result. This is a place where courts have a role: they can – and do – police the boundaries of the universe of property forms.[188]

Traditionally, the doctrine of "property exceptionalism" has relegated decisions about property forms to legislatures and kept them out of the hands of judges.[189] This is because, for property forms to enjoy legitimacy, they must be the products of democratic "co-authorship" – that is, legislation by elected representatives from all interest groups in society – and judicial decisions are not "co-authored" in this way.[190] It's not clear that this rationale always holds up, however. First, even proponents of legislative decision-making about property acknowledge the possibility of a role for courts when "the legislative process underperforms due to interest groups" or when it is "incapable of performing at all."[191] As discussed above, the problem of legislative underperformance of its democratic role due to interest group capture is a particular one in property law, due to the arcane nature of the subject and the attendant lack of popular interest or awareness of the issues it raises.

These peculiarities make the creation and modification of trust forms especially prone to rent-seeking and capture by interest groups seeking narrow, self-interested goals,[192] and thus fail to embody the ideal of collective co-authorship. In such circumstances, courts may legitimately enter the fray. Indeed, judges necessarily hear from "both sides," which as we have seen, legislators often do not.[193] Property forms are about "expressing normative ideals with respect to core types of human relationships regarding resources,"[194] then judges seem well-positioned to take part in the process of regulating property forms.

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188 Merrill & Smith, *supra* note 24, at 4. *See generally* Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES L. 5, 34-36 (2009) (discussing the willingness of U.S. courts to incorporate custom and its tensions with *numerous clausus*); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics,* 111 YALE L.J. 357, 385-88 (2001) (discussing limitations on forms of ownership in civil law and common law systems).

189 Hanoch Dagan, *Judges and Property*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW 17, 18 (Balganesh Shyamkrishna ed., 2013).

190 Dorfman, *supra* note 28, at 510-13. This discussion ignores the fact that several states provide for the election of state court judges, a reality which seems to eliminate the distinction for these purposes between legislative and judicial decision-making about property, even under the tradition of exceptionalism.

191 *Id*.

192 Dagan, *supra* note 189, at 38.

193 *Id*. at 39.

194 *Id*. at 34.

To the extent American courts have engaged in policing property forms, their role has generally been to create new forms of property through the expansive understanding of existing forms, such as the public trust doctrine,[195] and the right of publicity.[196] There is no reason, however, that courts cannot police property form creation as well.

To some extent, courts are beginning to respond the new trust forms at both the Federal and state level – although not by invoking NC. The Federal Bankruptcy Code, and courts applying the Code, have viewed DAPTs with skepticism.[197] In *Battley v. Mortensen*,[198] a case which, according to one estate planning attorney, "reverberated throughout the trust and estate planning world,"[199] a Bankruptcy Court voided Mortensen's transfer of property to an Alaska DAPT under Section 548(e), the Code's fraudulent transfer provision.[200] In doing so, the Court noted that this section "was enacted to close this 'self-settled trust loophole.'"[201] This is a significant development: fear of bankruptcy is one of the main reasons people seek APT protection.[202] At the state level, significant precedent indicates that states hostile to APTs will decline to enforce spendthrift provisions in foreign APTs.[203]

These trends are encouraging, but courts must go further: they must, as I have done here, subject the equitable interests of trusts to NC analysis. This means that when courts face a creditor seeking to attach assets of a spendthrift trust, for example, the question is not whether to create a "policy" based exception to the spendthrift provision for a particular type of creditor, but rather whether the property interest created – a grant of property subject to the condition that it not be used to pay the beneficiary's creditors – appears on the NC list, and whether it should. As this example shows, such analysis implicates centuries-old forms of the trust, as well as more recent iterations like DAPTs. Does the NC "closed list" allow for a type of property ownership which denies

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[195] Di Robilant, *supra* note 24, at 402.

[196] Merrill & Smith, *supra* note 24, at 3, 4, 10-11.

[197] *See generally* Richie W. Taylor, *Domestic Asset Protection Trusts: The "Estate Planning Tool of the Decade" Or A Charlatan?* 13 BYU J. PUB. L. 163, 175 (1998) (discussing how bankruptcy is perhaps the most controversial area of asset protection).

[198] No. A09–00565–DMD, 2011 WL 5025249 (Bankr. Alaska May 26, 2011).

[199] Neil Schoenblum, *On* Mortensen *and Other Asset Protection Developments:* Ten Questions for Barry S. Engel and John R. Garland, 26 PROB. & PROP., Nov./Dec. 2012, at 30, 31.

[200] *Mortensen,* 2011 WL 5025249, at *8.

[201] *Id.* at *6.

[202] Taylor, *supra* note 197, at 175.

[203] Sterk, *supra* note 180, at 1051 (listing cases which indicate that courts in states that are hostile to self-settled spendthrift trusts are unlikely to enforce the spendthrift provisions in self-settled asset protection trusts, regardless of the effect that those provisions might have under the law of the trust situs).

the owner's creditors access to that property? Do we as a society want it to?

Discarding the red herring of title split this way requires – or allows – us to re-evaluate what we as participants in a democratic property regime want from the trust. It forces us to face squarely the question of what types of property ownership we want to allow. For example, one of the original purposes of trusts was to protect the financially vulnerable such as minors, the disabled and the mentally ill. We might agree that a property form which allowed such people to enjoy assets but which keeps them out of reach of their creditors offered enough social benefits to outweigh its cost, and that we were willing, as a society, to absorb those costs. Asking such questions would force a much more realistic evaluation of trust forms, one which would make their costs and benefits clear by internalizing and thus making visible their externalities. A model for a public conversation on the topic of trusts is the nonpartisan Boston College Forum on Philanthropy and the Public Good, which gathers the nation's leading experts in charitable giving to assess the current state of philanthropy and tax law to raise and explore questions about how philanthropy can best achieve its goals and what we as a society want it to achieve.[204] We need much the same effort for trust law to publicize the issue of trust proliferation and publicly raise questions about what we as a society want this form of property ownership to achieve – and what limits on it would be beneficial. Such a forum would bring the issue out into the open, as the Philanthropy Forum has done for charity and tax matters in a way which would allow a nonpartisan assessment of the role trusts should play.

CONCLUSION

The creation and modification of property forms have a major impact on interpersonal interaction and our expectations about the rules which govern it. In the words of Hanoch Dagan, "they shape and reshape our social order, adjusting it to new circumstances, challenges and opportunities."[205] Whether one supports efficiency or democratic decision-making – or both – as rationales for NC, all these factors urge its application to trusts. The formalistic focus on the title split has distracted the law from what is in plain sight: the purloined property interests of third parties who deal with trust beneficiaries. Ultimately, as trusts become ever more popular with the wealthy, this includes most of the rest of us.[206]

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[204] *Philanthropy Forum*, BOSTON COLLEGE LAW, https://www.bc.edu/bc-web/schools/law/centers/philanthropy-forum.html (last visited July 19, 2017).

[205] Dagan, *supra* note 189, at 40.

[206] Schenkel, *supra* note 25, at 183.

The modifications of the trust I discuss here threaten to eviscerate property's role in a democratic society: the role of allowing some degree of equal access to material self-expression, opportunity, remedies and input into ownership norms, as well as bearing out peoples' expectations about interpersonal interactions. All of the trusts I present here work against these aims by increasing inequality in access to resources, depriving creditors, both voluntary and involuntary, of their right to a remedy, and avoiding the proportional payment of taxes. Unsurprisingly, and unlike other forms of liability "trade-offs" like the limited general liability company and conservation servitudes, these trusts did not emerge from decision-making in which the full range of social interests had voice and in which the overall interests of society were a factor. Rather, they emerged from behind closed doors where legislators signed off on already-drafted laws designed solely to protect the wealth of a few from the obligations society imposes on all of us. In the world of the trust, the time is truly out of joint. If Gray's ghost is to rest, we must put it right.

Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family

Danaya C. Wright & Beth Sterner***

Abstract

This article provides preliminary analysis of an empirical study of nearly 500 wills probated in Alachua and Escambia Counties in the State of Florida in 2013. The particular focus of the study is to determine if there are noticeable patterns of property distribution preferences among decedents based on their diverse family relationships. Earlier empirical studies of distribution preferences indicated that a majority of married decedents wanted to give all or most of their estates to their surviving spouses. As a result of these studies, most states amended their probate codes to give surviving spouses a sizable percentage of a decedent spouse's estate under their intestacy provisions. But with the explosive growth of nontraditional families, particularly blended families with stepchildren, the standard estate plan for these nontraditional decedents is actually a revocable trust with a QTIP provision to provide for the surviving second or third spouse, thus protecting a significant portion of the property for the children by a prior marriage. As family patterns have changed and the blended family has become more ubiquitous, there is a

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** J.D., University of Florida Levin College of Law, Articles Editor for the Florida Law Review, and Teaching Assistant for Legal Writing and Appellate Advocacy. I would like to thank Professor Danaya Wright for bringing this issue to my attention and allowing me to co-author this important work with her. It is my desire that reformation of intestacy laws will bring more equity to all individuals, especially those in nontraditional families. Most importantly, I want to thank the love of my life, Erik, who has supported me through all the long hours spent on this project and for his wiz-kid mastery of spreadsheets and help with pulling hundreds of court records. Finally, I want to thank my two children, Peter and Joel, to whom I am supremely grateful for their love and support as their mother goes through law school. To them, I hope to exemplify that they too can follow their dreams, no matter how late in life that may be.

growing divergence between the estate plans of those who can afford to make them, and the default rules of intestacy.

In this article, we report our initial findings in a comprehensive study of testate estates through the lens of family relationship patterns. Focusing on distributions to second or subsequent spouses, and bequests to stepchildren, we show that intestacy laws still tend to fit most decedents' preferences regarding bequests to surviving spouses, though certainly the fit is less close than with first spouses, but that there is a significant gap in the intestacy law's treatment of step-children. Moreover, there are definite gender-based differences in treatment of surviving second-spouses that suggest our intestacy laws are not providing as close a fit as they could.

INTRODUCTION 342
I. HISTORY OF EMPIRICAL STUDIES 346
A. Empirical Studies to Date 347
B. Key Findings of Recent Empirical Studies 350
II. CURRENT EMPIRICAL STUDY 355
A. Demographics of Dataset 355
B. Method of Empirical Study 357
C. Results 358
i. Demographics 359
ii. Testamentary Dispositions 361
iii. Second and Third Marriages 363
iv. Race as a Factor 366
v. Dispositions Involving Children and Stepchildren 368
III. THE TENUOUS FIT OF INTESTACY LAWS 370
A. Spousal Shares in Intestacy 371
B. Shares to Children and Others 373
CONCLUSION 378

INTRODUCTION

Under the law, individuals have nearly unlimited testamentary freedom to direct the disposition of their property by executing a valid will.[1]

[1] Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 884–85 (2012).

Nevertheless, many Americans do not have a will[2] and die intestate.[3] At death, when a decedent has not prepared a will, intestacy statutes will direct the disposition of his or her property to the people most closely related by blood or marriage to the decedent.[4] Thus, intestacy statutes are default rules that operate to channel property owned by a decedent at death to the people lawmakers assume would be the decedents' preferred beneficiaries. However, despite the seeming logic of benefitting children and spouses, do current intestacy statutes truly reflect a dispositive scheme in line with what most individuals would choose if they had executed a will? Scholars have long criticized intestacy statutes for prioritizing blood descendants over adopted or functional children, and legal spouses over unmarried cohabitants. In light of the fact that marriage is a waning institution[5] and a majority of chil-

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2 *See id.* at 887–88 ("[D]ecades of empirical studies have repeatedly confirmed that most Americans do not have a will. Although no nationwide study has ever quantified the number of intestate decedents, scholars agree that a high rate of intestacy has persisted throughout most of American history.") (footnotes omitted); Alyssa A. DiRusso, Testacy and Intestacy: The Dynamics of Wills and Demographic Status, 23 QUINNIPIAC PROB. L.J. 36, 41 (2009) (finding that in a 2006 nationwide survey, sixty-eight percent of respondents lacked a will). Scholars have suggested that the primary reason many Americans do not have a will is likely due to procrastination or laziness. *See* Weisbord, *supra* note 1, at 885; Wendy S. Goffe & Rochelle L. Haller, From Zoom to Doom? Risks of Do-It-Yourself Estate Planning, 38 EST. PLAN. 27, 27 (2011) (estimating that sixty-five percent of Americans do not have a will); Contemporary Studies Project, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1077 (1978). In a 1978 survey of Iowa residents, 57% of respondents stated that the reason they did not have a will was that they had "not gotten around to making a will." *Id. See also* Mary Louise Fellows, Rita J. Simon & William Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 AM. B. FOUND. RES. J. 321, 339 (1978). In an empirical study performed in 1977, 63.6% of respondents who did not have a will cited laziness as the reason. *Id.*

3 *See* Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 244 (1963) (reporting that of the estates that were probated in a 1957 sample group of Chicago decedents, 45% were intestate); Joel R. Glucksman, *Intestate Succession in New Jersey: Does it Conform to Popular Expectations?*, 12 COLUM. J.L. & SOC. PROBS. 253, 285 (1976) (reporting that in Morris County, New Jersey, in 1971, of the 2,556 decedents, 12% had a probate estate administered under the intestacy laws and 41% utilized an intestate affidavit or the estate was unprobated); Contemporary Studies Project, *supra* note 2, at 1059, 1070 (reporting that of the 3,122 probate files reviewed from six Iowa counties in 1973 and 1974, 28% of the decedents died intestate).

4 *See* Weisbord, *supra* note 1, at 891.

5 Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married: As Values, Economics and Gender Patterns Change*, PEW RES. CTR. SOC. & DEMOGRAPHIC TRENDS PROJECT (Sept. 24, 2014), http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/ ("After decades of declining marriage rates and changes in family structure, the share of American adults who have never been married is

dren are currently being raised in nontraditional families[6] – defined as blended, single-parent, or same-sex – the norms represented by intestacy statutes may not accurately reflect the preferences of not only those living in nontraditional families, but even those in many traditional nuclear families.

Despite many people's aspirations to marry and have children, the traditional nuclear family no longer prevails in the United States.[7] Instead, divorce and multiple marriages abound, with single parents, nonmarital, and blended families being the new normal.[8] Additionally, more and more adults are cohabitating together in intimate partnerships, but remaining unmarried.[9] Fewer and fewer children reach adulthood by residing in the home with their married parents, as a growing number of people choose to parent unmarried, single, in same-sex relationships, or with new partners. With the smorgasbord of family options that people are choosing, how can intestacy statutes, with their cookie-cutter distribution schemes based in large part on the traditional single-marriage nuclear family, be adapted to the changes in the modern family? To answer that question we need to know three things: 1) how intestacy laws currently distribute property upon death, 2) how people would prefer to have their property distributed if they do not make a will, and 3) whether any patterns or clear preferences exist based on certain family structures. If these patterns exist, we might be able to recalibrate our intestacy laws to better reflect the actual wishes of those who die intestate.

To determine how well the intestacy laws reflect the presumed wishes of twenty-first century decedents, we conducted an empirical

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at an historic high. In 2012, one-in-five adults ages 25 and older (about 42 million people) had never been married . . . in 1960, only about one-in-ten adults (9%) in that age range had never been married . . . . Adults are marrying later in life, and the shares of adults cohabiting and raising children outside of marriage have increased significantly.").

[6] *See* Pew Res. Ctr., *Parenting in America: Outlook, Worries, Aspirations are Strongly Linked to Financial Situation* 15–26 (Dec. 17, 2015), http://www.pewsocialtrends.org/files/2015/12/2015-12-17_parenting-in-america_FINAL.pdf; *America's Families and Living Arrangements: 2016 Family Groups*, U.S. CENSUS BUREAU (Nov. 2016), https://www.census.gov/data/tables/2016/demo/families/cps-2016.html (select tbl. FG10) (last visited May 23, 2017) [hereinafter *America's Families*].

[7] *See* Pew Res. Ctr., *supra* note 6, at 15, 21; *America's Families*, *supra* note 6.

[8] *See* Pew Res. Ctr., *supra* note 6, at 15, 19; *America's Families*, *supra* note 6.

[9] Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?*, 41 ACTEC L.J. 49, 53 (2016) ("As the marriage rate has declined, the cohabitation rate has risen. According to the [2010] Census Bureau report, 'the unmarried partner population numbered 7.7 million in 2010 and grew 41% between 2000 and 2010.'") (quoting Daphne Lofquist, et al., *Households and Families: 2010*, U.S. CENSUS BUREAU 3 (Apr. 2012), http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf).

study of hundreds of wills of decedents domiciled in Florida. Our goal was to see if what people actually did in their wills can tell us anything about what dispositions intestate decedents would likely prefer given certain relationship patterns. Of course, there is always the argument that people who die intestate do so with an understanding of the intestacy rules, and that intestacy defaults accurately reflect their wishes with regard to disposition of their property. But the fact that the likelihood of having a will is more closely correlated to wealth and race than family structure and intimate relationships[10] suggests that people don't choose intestacy in quite the same way they choose testacy.

The predominant goal of intestacy statutes is to carry out the probable intent of most decedents in the disposition of their property.[11] This is rooted in the principle that succession law "places donative freedom at the apex of its hierarchy of values."[12] As a result, "succession law should reflect the desires of the 'typical person,' both with regard to protecting expressions of desire and anticipating situations where those expressions are inadequately presented."[13] But as the typical person becomes less and less typical, the disjuncture between the cookie-cutter intestacy model and the atypical decedent becomes wider. We would

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[10] *See* Weisbord, *supra* note 1, at 897 ("Demographic analyses reveal that individuals are more likely to have a will if they are white, male, married or formerly married, educated, older, and wealthy; this demographic pattern has endured over time."); DiRusso, *supra* note 2, at 42–51; Fellows, Simon & Rau, *supra* note 2, at 324–25; Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 Or. L. Rev. 453, 492 (2010).

[11] *See, e.g.*, Unif. Probate Code, art. II, pt. 1, general cmt. (Unif. Law Comm'n 2010) ("The pre-1990 Code's basic pattern of intestate succession, contained in Part 1, was designed to provide suitable rules for the person of modest means who relies on the estate plan provided by law. The 1990 and 2008 revisions were intended to further that purpose, by fine tuning the various sections and bringing them into line with developing public policy and family relationships."); Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 Law & Ineq. 1, 8-9 (2000) ("Although many sources cite the decedent's intent as the primary goal of intestacy laws, commentators have also identified goals that benefit society more broadly."); John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 Univ. of Miami L. Rev. 497, 501 (1977) (noting that it is generally agreed that the purpose of succession laws is "to give effect, subject to the constraints of other public policies, to the wishes of the decedent while providing for the well-being of his family."); Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 Iowa L. Rev. 223, 230 (1991) ("Various considerations drive the formulation of intestate-succession laws. The most obvious and perhaps predominant consideration is the decedent's intention."); Contemporary Studies Project, *supra* note 2, at 1043 (noting that furthering the perceived intent of the decedent has become the primary goal of intestacy statutes).

[12] E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 Ariz. L. Rev. 1063, 1068 (1999).

[13] Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 Alb. L. Rev. 891, 912 (1992); Spitko, *supra* note 12, at 1068.

like to explore whether there are sufficient patterns in testamentary dispositions to justify restructuring intestacy statutes to better reflect the diversity and nuances of individualized preferences and if there are ways to restructure a default rule to be more reflective of diverse preferences.

In this article we provide preliminary results of our study to help determine the *probable intent* or *range of intent* of those dying without a will, and thereby offer possible reforms to intestacy statutes to better reflect the changes in the modern "family" unit. The theory behind the study is that by analyzing the will dispositions of recently passed decedents, patterns will emerge that demonstrate the probable intent of decedents sharing similar relationships to potential beneficiaries of their estate. Indeed, this is not the first empirical study related to testate or intestate distributions. But, this is the first such study of actual wills that focuses on the distributions in relation to the decedents' family relationships.

Part I of this article summarizes the history and findings of earlier empirical studies that shaped intestacy laws in the United States. Part II details the method and findings of our empirical study. Lastly, Part III examines the gaps between presumed intent of testators and state intestacy laws and proposes a variety of reforms to intestacy statutes with an order of succession that more accurately reflects the succession patterns of modern decedents.

I. HISTORY OF EMPIRICAL STUDIES

Various inquiries have been made into individuals' preferences for the distribution of their assets with and without a will. Two types of empirical studies have been primarily performed: phone surveys of living persons and an analysis of probate records in specific geographical regions. Both have their benefits and their disadvantages. While this information has been relied on in the past to shape intestacy laws, more needs to be done to better calibrate our intestacy statutes to reflect the nontraditional family structures of today.

A number of phone surveys have been done, gathering useful information from living people about their property distribution preferences. Phone surveys of individuals can gather useful information that a study of probate records may be unable to glean. For instance, studies have shown that most people do not prepare a will until they are much older,[14] so analyzing probate records may not demonstrate how a

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[14] *See, e.g.*, Edward H. Ward & J. H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393, 412–15 (1950) ("Once a person is retired he has more time to think about the disposition of his property after his death."); Dunham, *supra* note 3, at 245 n.9 (discussing that in 1949, "of the total voting age population, 3 out of 4 men and 6 out of 7 women had no wills."); MARVIN B. SUSSMAN, JUDITH N. CATES, & DAVID T.

younger intestate decedent would have distributed her property had she prepared a will. As a result, surveys of younger individuals may yield distribution patterns that are more reflective of the modern family. However, phone interviews may only reflect the respondent's aspirational ideals at that moment, which are subject to change as the respondent grows older or as his or her family unit changes.[15]

Empirical studies of probate records have generally examined probated wills and death certificates from a particular locality. Among these studies, which have focused on both testate and intestate probate records, four issues are commonly researched: (1) the percentage of people dying intestate; (2) what factors make it more likely that someone will die intestate; (3) the demographics of those who die with a will; and (4) to whom decedents have chosen to leave their property.[16] By examining probated wills, researchers are able to compile a record of testamentary beneficiaries based on the decedent's express intent. To be fair however, those dying with a will are generally older, wealthier, whiter,[17] and held occupations with a higher status and annual income than those dying intestate, so this type of study may not be fully reflective of the probable intent of all individuals.[18] However, the distributive preferences of respondents in phone surveys have shown few differences attributable to age, education, income, wealth, or occupation.[19] Therefore, by studying probated wills, patterns of actual succession preferences can provide valuable clues to the hypothetical preferences of the intestate decedent that can assist lawmakers in modifying intestacy statutes to reflect probable intent where there is none expressed.

A. Empirical Studies to Date

The first empirical studies tended to review probate records, including death certificates and probated wills. The first important study, conducted in 1930 by Richard Powell and Charles Looker, analyzed probate records and inheritance tax records from multiple counties in New

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SMITH, THE FAMILY AND INHERITANCE 62–82 (1970); Fellows, Simon & Rau, *supra* note 2, at 324–25 ("People who die with wills tend to be older . . .").

[15] *See* Gary, *supra* note 11, at 15.

[16] *Id.* at 14.

[17] *See* Dunham, *supra* note 3, at 250 (analyzing probate estates in Illinois initiated in 1953 and 1957 and finding that frequency of testacy increased correspondingly with the size of the decedent's estate; decedents with probate estates of less than $5,000 had wills 25% of the time, whereas decedents with probate estates of more than $100,000 had wills 96% of the time).

[18] Fellows, Simon & Rau, *supra* note 2, at 324-25.

[19] *See, e.g.*, *id.* at 321 ("The distributive preferences of the respondents reveled few significant differences that could be attributed to age, education, income, wealth or occupational status.").

York.[20] From 1937-1969, five other studies were performed where, in some, the analysis included both testate and intestate files.[21]

The 1970s was the genesis of several influential empirical studies that also brought the first phone surveys of living individuals.[22] One of the most prolific scholars in the area of intestacy is Mary Louise Fellows, whose empirical studies have primarily focused on telephone interviews with individuals.[23] Her empirical study in 1978, along with other studies

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[20] Richard R. Powell & Charles Looker, *Decedents' Estates*, 30 COLUM. L. REV. 919, 920–21 (1930).

[21] Steuart Henderson Britt, *The Significance of the Last Will and Testament*, 8 J. OF SOC. PSYCHOL. 347 (1937) (studying 49 wills from New York between 1880 and 1885); Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1304 (1969) (examining 223 testate estates in Washtenaw County, Michigan from 1963 plus 100 English wills, also from 1963, selected at random); Dunham, *supra* note 3, at 241 (studying 170 probate proceedings initiated in Illinois in 1953 and 1957); Lawrence M. Friedman, *Patterns of Testation in the 19th Century: A Study of Essex County (New Jersey) Wills*, 8 AM. J. OF LEGAL HIST. 34, 34 (1964) (studying 150 New Jersey wills from 1850, 1875, and 1900); Ward & Beuscher, *supra* note 14, at 393 (reviewing death certificates from Dane County, Wisconsin, from the years 1929, 1934, 1939, 1941 and 1944, and a sample of 415 testate and intestate probate files from those years).

[22] *See, e.g.*, SUSSMAN, CATES, & SMITH, *supra* note 14, at 11–15 (performing three types of studies: (1) reviewing 659 probate cases, which represented a 5% random sample of all closed estates in Cuyahoga County, Ohio, between November 1964 and August 1965, (2) interviewing approximately 55% of the legal next of kin or testate successors of these decedents, and (3) interviewing 70 attorneys-of-record selected from the 659 probate cases in the dataset); Fellows, Simon & Rau, *supra* note 2, at 321, 326, 331, 335, 339–40 (performing 750 telephone interviews of individuals residing in five states—Alabama, California, Massachusetts, Ohio and Texas—to determine the respondent's distributive preferences, whether they had a will and if not, the reason why, their knowledge of their state's intestacy law, and their attitudes about property distribution at death); Mary Louise Fellows et al., *An Empirical Study of the Illinois Statutory Estate Plan*, 1976 U. ILL. L. F. 717, 720 (1976) (analyzing data obtained from 182 telephone interviews of Illinois residents); Glucksman, *supra* note 3, at 255, 261–62, 267, 278 (conducting three studies: (1) a review of death certificates and probate records of 100 Morris County, New Jersey residents dying in 1971, (2) a 1975 telephone survey of 50 Morris County residents to determine their knowledge of New Jersey intestacy law, and (3) a telephone survey of 50 Morris County residents as to their dispositive preferences, along with collecting the distribution patterns of 53 randomly drawn wills filed in Morris County Surrogate's Court); John R. Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction*, 50 WAS H. L. REV. 277, 285 (1975) (examining death certificates, probate records and inheritance tax records for a random sample of 211 decedents dying in King County, Washington in 1969); Contemporary Studies Project, *supra* note 2, at 1052–53 (gathering data from three sources: (1) reviewing probate files from 150 testate estates and 150 intestate estates from six Iowa counties in 1973 and 1974, (2) interviewing 74 survivors who received some distribution of one of the 150 intestate estates, and (3) interviewing 600 randomly selected Iowa citizens).

[23] *E.g.*, Fellows et al., *supra* note 22; Fellows, Simon & Rau, *supra* note 2 (explaining a telephone survey conducted providing insights in public attitudes concerning property distribution at death); Mary Louise Fellows et al., *Committed Partners and Inheritance:*

largely from the 1970s, heavily influenced the 1990 revisions of the Uniform Probate Code's intestacy distribution scheme, particularly by increasing the share allocated to a surviving spouse.[24]

From 1980-1998 only four empirical studies were published in the United States.[25] One of these studies was the first of its kind—interviewing unmarried couples, including same-sex couples, as to their dispositive preferences.[26] The primary purpose of this study was to determine whether a decedent's surviving committed partner should take a share of the estate under intestacy, as well as how to define a committed partner for these purposes.[27]

An Empirical Study, 16 LAW & INEQ. 1 (1998) [hereinafter *Committed Partners and Inheritance*] (describing "an empirical study designed to assess public attitudes about the inclusion of surviving committed partners as heirs"); Mary Louise Fellows, E. Gary Spitko, & Charles Q. Strohm, *An Empirical Assessment of the Potential for Will Substitutes to Improve State Intestacy Statutes*, 85 IN. L. J. 409 (2010) (investigating public attitudes about will substitutes and determine if the public prefers current law).

24 *See* UNIF. PROBATE CODE § 2-102 cmt. (UNIF. LAW COMM'N 2010) ("Empirical studies support the increase in the surviving spouse's intestate share, reflected in the revisions of this section. The studies have shown that testators in smaller estates . . . tend to devise their *entire* estates to their surviving spouses, even when the couple has children."); Lawrence W. Waggoner & J.H. Langbein, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871, 874 (1992) (stating that the share of the surviving spouse in the 1990 revision of the UPC was greatly increased due to the changes in family and gender relations and the prevalence of multiple marriages); Waggoner, *supra* note 11, at 230-31 n.25 (citing the following empirical studies as being influential in the 1990 revisions of the UPC's spousal shares in intestacy: CAROLE SHAMMAS, MARYLYNN SALMON & MICHAEL DAHLIN, INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT 184–85 (1987); SUSSMAN, CATES, & SMITH, *supra* note 14, at 86, 89–90, 143–45; Browder, *supra* note 21, at 1307–08; Dunham, *supra* note 3, at 252; William W. Gibson, Jr., *Inheritance of Community Property in Texas—A Need for Reform*, 47 TEX. L. REV. 359, 364–66 (1969); Price, *supra* note 22, at 283, 311–17; Fellows, Simon & Rau, *supra* note 2, at 351–54, 358–64, 366–68; Contemporary Studies Project, *supra* note 2, at 1089; U.K. LAW COMM'N, *Report on Family Law: Distribution on Intestacy*, 1989, No. 187, at 28). Of note, Lawrence Waggoner served as Reporter for the 1990 and 2008 revisions of the Uniform Probate Code. Lawrence W. Waggoner, *Why I Do Law Reform*, 45 U. MICH. J.L. REFORM 727, 727 (2012).

25 SHAMMAS, SALMON & DAHLIN, *supra* note 24, at 184–85 (comprehensive treatment of the history of U.S. inheritance law); Gerry W. Beyer, *Statutory Fill-in Will Forms—The First Decade: Theoretical Constructs and Empirical Findings*, 72 OR. L. REV. 769, 797 (1993) (interviewing 51 persons regarding their opinions of statutory wills and whether they currently had a will); *Committed Partners and Inheritance*, *supra* note 23, at 31–32 (conducting a 1996 telephone survey of 256 Minnesota residents, administered to four different groups, assessing their attitudes about the inheritance rights of couples who are not married, but living together); Frederick R. Schneider, *A Kentucky Study of Will Provisions: Implications for Intestate Succession Law*, 13 N. KY. L. REV. 409, 412 (1987) (reviewing 449 wills from nine different counties in Kentucky filed in 1981 and 1982).

26 *Committed Partners and Inheritance*, *supra* note 23, at 31–32.

27 *Id.* at 9.

Since 1998, only two empirical studies have been published. One is a phone survey by Mary Louise Fellows and Gary Spitko, conducted in 2006 and 2007, interviewing individuals regarding their attitudes towards will substitutes, which in turn is useful in evaluating whether beneficiary designations of such substitutes may approximate donative intent in intestacy.[28] Lastly, the most recently published study is by David Horton, which analyzed 668 probate estates, both testate and intestate, of individuals who died in 2007 in Alameda County, California.[29]

B. Key Findings of Recent Empirical Studies

It is useful to analyze the results of prior studies, and build on this empirical evidence with the results from the current study, so that intestacy laws can be revised in a way that more accurately reflects probable intent. As noted earlier, the findings from several empirical studies discussed above were utilized to revise the intestacy provisions in Article II of the Uniform Probate Code (UPC) in 1990.[30] Accordingly, only the key findings from the most recent studies, those published from 1987 through the present, are summarized.

The first study, conducted by Frederick Schneider, reviewed 449 wills from nine different counties in Kentucky filed in 1981 and 1982.[31] The study found that 4 out of 5 testators (80%) gave all of the estate to their surviving spouse.[32] Of the 241 who were survived by a spouse, 144 decedents (60%) provided that if his or her spouse was predeceased, all or substantially all of the estate would pass to the children equally.[33] Where the testator was widowed and did not include a provision for a spouse, but had surviving children, 53 out of 101 testators gave all or substantially all of their property to their children equally and 21 out of 101 testators gave their estate to their children, but in unequal shares.[34] Only one testator among 449 provided for a parent, leaving the entire estate to the mother.[35] In this case, the testator died survived by both parents, but had no spouse or children.[36] Of the 43 testators who died

[28] Fellows, Spitko, & Strohm, *supra* note 23, at 412, 421–22 (using phone interviews to test whether beneficiary designations in will substitutes are reliable evidence, in the absence of a will, to approximate donative intent in intestacy).

[29] David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L. J. 605, 611, 627 (2015).

[30] *See supra* note 24 and accompanying text; UNIF. PROBATE CODE § 2-102 cmt. (UNIF. LAW COMM'N 2010).

[31] Schneider, *supra* note 25, at 412.

[32] *Id.* at 437.

[33] *Id.* at 424.

[34] *Id.* at 425.

[35] *Id.* at 430–31.

[36] *Id.* at 430.

survived by siblings, but no surviving spouse, children or parents, 37% gave their property to their siblings in equal shares and 65% gave their property to other named persons, with little or nothing to siblings.[37] While this study revealed other statistical findings,[38] the primary conclusion was that the Kentucky intestacy statute should be amended to increase the surviving spouse's share.[39]

In 1993, Professor Beyer set out to critique the legal and non-legal ramifications of statutory fill-in-the-blank wills, available at that time in California, Maine, Michigan and Wisconsin.[40] This type of will was designed to increase the number of individuals executing a will.[41] As part of his analysis, Beyer conducted two studies.[42] He first tested the ability of individuals to satisfactorily complete the fill-in-the-blank wills, thereafter interviewing them to determine their reactions to the form.[43] Secondly, he interviewed practicing estate planners and probate judges as to their opinions of these statutory form wills.[44] Based on the theories underlying form wills and his empirical findings, Beyer made three recommendations.[45] First, these statutory wills should be improved, evaluated, and expanded to include a comprehensive set of forms, like trusts, powers of attorney, declarations of guardians, burial instructions, and living wills.[46] Second, modern technology should be used to improve the delivery method of fill-in-the-blank wills to reduce the likelihood that they are filled out improperly or misunderstood.[47] Third, states should increase education to its citizens regarding basic estate planning and the use of form wills.[48]

In a novel study published in 1998, Professor Mary Louise Fellows and other scholars set out to assess public attitudes towards the inheri-

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37 *Id.* at 432.

38 In ten cases where the decedent was survived only by nieces or nephews, only two gave their property to the nieces and nephews in equal shares, whereas eight gave all or substantially all of their property to other named persons. *Id.* at 433-34. No cases were found where the decedent was survived by grandparents, aunts, or uncles, and only two decedents were survived by first cousins, who were not given any of the estate; instead, all passed to named persons. *Id.* at 434. Lastly, no decedent gave his or her estate to "laughing heirs." *Id.* at 435. Although six decedents died not survived by a spouse, children, parent, siblings, nieces, nephews, grandparents, aunts, uncles, or first cousins, these decedents gave their estate to named persons or charity. *Id.* at 435.

39 *Id.* at 437.

40 Beyer, *supra* note 25, at 772–73.

41 *Id.* at 772, 841.

42 *Id.* at 773.

43 *Id.* at 773, 799.

44 *Id.* at 773.

45 *Id.* at 835–41.

46 *Id.* at 836–38.

47 *Id.* at 838–40.

48 *Id.* at 840–41.

tance rights of couples who are not married, but are living together.[49] Four different groups of Minnesota residents were surveyed by telephone: 87 were persons from the general public (i.e. married or single persons who were not in nonmarital intimate relationships), 33 were persons with opposite-sex committed partners, 51 were men with same-sex committed partners and 85 were women with same-sex committed partners.[50] Significantly, this study collected the first empirical data regarding the distribution preferences of a decedent with surviving children who were unrelated to the decedent by blood or adoption, such as stepchildren and children of same-sex couples.[51] The four major findings of this study were: (i) a substantial majority of the respondents in each sample group consistently preferred that the partner take a share of the decedent's estate; furthermore, the respondents with same-sex partners were consistently more generous to partners than those from the general public or with opposite-sex partners; (ii) the respondents in each sample group consistently preferred that same-sex and opposite-sex couples be treated the same under inheritance laws; (iii) for purposes of inheritance laws, committed relationships can be identified through readily observable attributes that demonstrate a preference for having a partner share in a decedent's estate; and (iv) respondents consistently recognized the social ties between the decedent and the partner's child.[52]

In yet another study by Professors Mary Louise Fellows, E. Gary Spitko and Charles Q. Strohm, published in 2010, it was tested whether beneficiary designations in will substitutes provide reliable evidence to approximate donative intent in the absence of a will.[53] To that end, 190 randomly selected individuals from 48 states were surveyed by phone.[54] The goal was to investigate public attitudes about will substitutes, whether the public prefers current intestacy law (which ignores will substitutes in determining succession) or an intestacy law that takes into account the beneficiary designations of will substitutes.[55] The results of the study suggested that beneficiary designations in will substitutes should not be used as evidence for the supposition that the decedent prefers the will substitute beneficiary over other heirs.[56] However, the results provided some support for the idea that will substitute benefici-

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[49] *Committed Partners and Inheritance*, *supra* note 23, at 9, 31.

[50] *Id.* at 31–32.

[51] *See id.* at 72–84.

[52] *Id.* at 89. For a summary of the results of this empirical study, see Table 14 in the Appendix, *id.* at 94–95.

[53] Fellows, Spitko, & Strohm, *supra* note 23, at 412.

[54] *Id.* at 421–22.

[55] *Id.* at 412.

[56] *Id.* at 446.

ary designations in favor of nonheirs should be used to create new heirs, particularly where the takers under the intestacy statute are more distantly related to the decedent.[57] It was concluded that, as a general rule, will substitutes should only affect the intestacy distribution scheme for those decedents dying without a surviving spouse or descendants, since these are the individuals whose likely donative intent is most unknown.[58]

In 2015, David Horton published a study that analyzed 668 probate estates, both testate and intestate, of individuals who died in 2007 in Alameda County, California.[59] The purpose of his study was to analyze the contemporary probate process in light of the "nonprobate revolution," i.e., using trusts and other techniques to avoid probate.[60] His conclusions about the probate process were that probate court oversight adds more value and costs less than one might assume, that eliminating traditional probate functions can cause serious harm to creditors, and that the probate process itself is slow.[61] Horton recommended reforming the probate process by scaling back judicial involvement and adding the options of informal probate and unsupervised administration, but cautioning that a majority of estates would need court involvement at some point.[62] Lastly, the bond requirement for personal representatives could be eliminated and, by privatizing appraisals when valuing a decedent's assets, the valuation process could take less time and be less costly.[63]

All of these studies have made important contributions to our understanding of how the probate process works and support recent statutory changes to benefit spouses or domestic partners. The partnership theory of marriage, which holds that couples work together to amass wealth and intend to jointly benefit from that wealth, supports the current practice of giving the surviving spouse most if not all of a decedent spouse's wealth. Compared to the stingy historical dower share of a life estate in one-third of a decedent's real property that prevailed until the mid-twentieth century, the new partnership model of shared wealth is definite progress. But intestacy changes to benefit spouses occurred simultaneously with the explosion in no-fault divorce in the 1970s and merely brought the law of succession up to the 1950s, rather than the

[57] *Id.* at 446–47.

[58] *Id.* at 447.

[59] Horton, *supra* note 29, at 611, 627.

[60] *Id.* at 613, 620–24.

[61] *Id.* at 664.

[62] *Id.* at 662–63. Of the 668 probate cases analyzed, 31% did not include a contingent event, such as litigation or real property sales, which would require the parties to seek judicial assistance. *Id.* at 663.

[63] *Id.* at 663–64.

twenty-first century. Today, some statistics show the divorce rate is over 50%[64] and many people will pass through their life with multiple spouses or partners. Ironically, the rise of the QTIP trust as the mainstay of estate planners for decedents with independent wealth in blended families reflects a move back to the support theory of marriage, especially for the second wife, in order to protect property for the children by the first wife. This occurred just as intestacy law began entrenching the marital model of the monogamous, heterosexual, traditional, nuclear family that is best protected by the partnership theory.

What we teach in our estates and trusts classes is that blended families need a trust to protect the children from the first marriage and provide adequately for the second spouse, but ultimately to give the decedent spouse final control over most of the property. QTIP trusts, powers to consume, and a variety of elective share trusts are all being used to diminish the surviving spouse's power and control over any property beyond what is needed for support and maintenance. Thus, while working and middle class couples are more likely to have succession plans (either intentional or by default) that reflect the partnership theory of marriage,[65] the wealthy are turning to modern mechanisms that, ironically, recreate the old common law form of dower based on the support model of marriage.[66] This is especially true in blended families where the parents worry that the generous intestacy laws giving all to a surviving spouse could result in complete disinheritance of the first-to-die's children.[67]

The empirical studies to date have not focused on how blended families, second marriages, and the presence of step-children may alter preferred succession schemes, leaving a significant disconnect between the default rules and the estate planning advice we are teaching the next generation of trusts and estates practitioners. But trying to discover what people would want in their estate plans, just as more and more of

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64 However, there are many ways to measure divorce rates. *See, e.g.*, Glenn Stanton, *What is the Actual US Divorce Rate and Risk?,* THE WITHERSPOON INSTITUTE: PUBLIC DISCOURSE, http://www.thepublicdiscourse.com/2015/12/15983/ (Dec. 16, 2015) (last visited May 23, 2017).

65 *See* DiRusso, *supra* note 2, at 50-51; *see also* Waggoner, *supra* note 11, at 230-32 (discussing how amendments to the uniform probate code are consistent with the modern trend to favor spousal inheritance).

66 *See* Robert Frank, *How the Rich are Paying less in Estate Tax*es, CNBC, Sept. 23, 2016, http://www.cnbc.com/2016/09/23/how-the-rich-are-paying-less-in-estate-taxes.html ("Another reason the estate tax is quietly dying is that the rich have become better at avoiding it."); *see also*, *e.g*., Joseph M. Dodge, *A Feminist Perspective on the QTIP Trust and the Unlimited Marital Deduction*, 76 N.C. L. REV. 1729, 1734-37 (1998).

67 *See* Horton, *supra* note 29, at 624; Waggoner, *supra* note 11, at 230-31.

those who can get what they want are using private non-probate mechanisms, is a very tricky endeavor.

II. CURRENT EMPIRICAL STUDY

We now turn to the current empirical study, the focus of this article. The probate cases reviewed in our study are from two counties in Florida and were obtained by pulling all wills that were recorded in the county's official public records from January 1, 2013 to December 31, 2013. Among other types of data gathered, we analyzed to whom a testator gave his property and the relationship status of that beneficiary to the decedent. To the best of our knowledge, we attempted to gather information on multiple marriages, the presence of stepchildren or adopted children in the family, and the extent to which testators left their property in ways that deviated from intestate norms. We also gathered information on whether testators were routinely using wills that poured over their probate property into a revocable trust, the holy grail of estate planners. To account for changing demographics, we noted the time between execution of the will and death to see if more recent wills reflected different patterns than older wills executed many years prior to death. We chose the year 2013 because that was recent enough to capture more blended and nontraditional family structures, yet was far enough in the past to ensure that the probate process was mostly completed.

Some of the data we are collecting has not yet been analyzed, or carefully calibrated to reflect changing norms with more modern family relationship patterns. At this point our dataset is still too small, despite our having examined nearly 500 wills, to see if there are notable differences between wills executed in the year of death, as against those executed many years before death, for instance. But as we collect more data, we hope to be able to further refine our results to provide better guidance to lawmakers and estate planners.

A. Demographics of Dataset

One of our strategies was to obtain a broad pool of wills from decedents residing in areas of Florida that vary culturally, demographically and economically. Accordingly, the study was performed in Alachua and Escambia counties. We plan to add Palm Beach County in the future, as well as counties in other parts of the country.

Alachua County, located in the north central region of Florida, is the home of the University of Florida in the college town of Gainesville. Much of the economy in the county revolves around the University of Florida; indeed, the university employs over 14,000 people and is the

largest employer in the county.[68] More than 40% of Alachua County residents have a bachelor's degree or higher level of education.[69] As of the 2010 U.S. Census, the total population was 247,336, with a racial composition of 63.7% White (not Hispanic or Latino), 20.3% Black or African American, 8.4% Hispanic or Latino, 5.4% Asian, 0.3% American Indian or Alaska Native, and 0.1% Native Hawaiian or Pacific Islander, with 2.6% listed as two or more races.[70] The median household income from 2011-2015 was $43,073.[71] Of registered voters in Alachua County, 48% are registered Democrat, 28% are registered Republican, and 24% are registered Independent or with no affiliation.[72]

Neighboring the state of Alabama is Escambia County, the westernmost county in the Florida Panhandle, boasting sugar-white sand beaches and one of the largest military training operations in the Navy.[73] The Naval Air Station in Pensacola employs over 23,000 people and its impact on the local economy is over one billion dollars annually.[74] In 2010, the total population of Escambia County was 297,619, with a racial makeup of 66.2% White (not Hispanic or Latino), 22.9% Black or African American, 4.7% Hispanic or Latino, 2.7% Asian, 0.9% American Indian or Alaska Native, and 0.1% Native Hawaiian or Pacific Islander, with 3.2% listed as two or more races.[75] The median household income from 2011-2015 was $45,390.[76] Of registered voters in Escambia County, 35% are registered Democrat, 45% are registered Republican, and 20% are registered Independent or with no affiliation.[77]

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[68] Alachua Cty., Fla., *Alachua County's Economic, Demographic & Fiscal Trends* 25 (Dec. 3, 2013), http://www.alachuacounty.us/Businesses/InformationCenter/Graphs/Economic.Demographic.Fiscal.Trends Dec 3.pdf.

[69] *Quick Facts: Alachua County, Florida*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/table/EDU635215/12001,00 (last visited May 24, 2017).

[70] *Id.*

[71] *Id.*

[72] Fla. Div. of Elections, *Voter Registration - Current by County*, FLA. DEP'T OF STATE, http://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-monthly-reports/voter-registration-current-by-county/ (last updated Dec. 31, 2016) (last visited May 23, 2017).

[73] *Florida Beach Vacation*, VISIT PENSACOLA, https://www.visitpensacola.com/things-to-do/beaches/ (last visited May 24, 2017); *Naval Air Station Pensacola: History*, COMMANDER, NAVY INSTALLATIONS COMMAND, https://www.cnic.navy.mil/regions/cnrse/installations/nas_pensacola/about/history.html (last visited May 24, 2017).

[74] *Naval Air Station Pensacola*, *supra* note 73.

[75] *Quick Facts: Escambia County, Florida*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/table/PST045215/12033,00 (last accessed May 24, 2016).

[76] *Id.*

[77] Fla. Div. of Elections, *Voter Registration - Current by County*, FLA. DEP'T OF STATE, http://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/

Although Florida may not be entirely representative of the country as a whole, it is remarkably diverse, is the third most populous state, and is home to a significant retired and transient population. Yet despite Florida's reputation as a state full of snow-birds and retirees, there were remarkably few wills executed in states outside of Florida. Of course, the less time that elapsed between will execution and death, the more likely the will was executed in Florida with a presumed understanding of the operation of Florida probate law, particularly Florida's generous homestead and elective share rules.[78]

B. Method of Empirical Study

Once a will has been admitted to probate in Florida, it is usually recorded in the official public records of the county where the decedent was domiciled. Thus, the first step in the study was to gather a dataset of all decedents whose wills or codicils were recorded in the official public records from January 1, 2013 to December 31, 2013 in each of the two Florida counties: Alachua and Escambia. After compiling the list of testate decedents, duplicates were removed from the dataset (e.g., decedents with multiple last names because of a name change were sometimes listed in the dataset twice). Once the dataset was complete, the probate records totaled 293 in Alachua County and 378 in Escambia County. Because only a statistically significant sample is required to provide sufficient evidence of distributive patterns among decedents, and due to the time required to review each probate record, our empirical study compiles data from a total of 493 probate records: 293 from Alachua County and 200 from Escambia County. A random, blind selection of 200 probate records was used to gather records from Escambia County.

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voter-registration-monthly-reports/voter-registration-current-by-county/ (last updated Dec. 31, 2016) (last visited May 23, 2017).

78 *See* FLA. CONST. art. X, § 4; FLA. STAT. § 732.401 (2017). Under Florida law, a surviving spouse is entitled to a life estate in the real property used as a homestead by the decedent, with a vested remainder interest belonging to the decedent's descendants. If a surviving spouse is left a life estate, he or she has six months from the decedent's date of death to make an election to take a one-half interest in the homestead property as a tenant in common. *See also* FLA STAT. § 732.2065 (a surviving spouse has a right to an elective share of the decedent's estate equal to 30% of the elective estate); FLA. STAT. § 732.2035 (the elective estate to which the surviving spouse is entitled to 30% is comprised of probate estate assets and other nonprobate assets, such as transfer on death or pay on death accounts, interest in property held by the decedent with another in joint tenancy or tenancy by the entirety, certain revocable transfers, pension funds, retirement funds, deferred compensation plans, the net cash surrender value of a life insurance policy immediately before the decedent's death, and property transferred during the one year preceding the decedent's death).

The second more tedious step was to go to the website of the Clerk of Court for each county and pull the probate case of each decedent in the dataset. At least three documents were reviewed in every probate case: (1) Petition for Administration,[79] (2) Death Certificate, and the (3) Last Will and Testament, plus any codicils.

We gathered the following data from the documents: date of death, gender, race, marital status, date the will was executed, number of decedent's children, size of the probate estate, court costs, the relationship status of the primary and contingent personal representatives to the decedent, testamentary dispositions, whether a trust existed, and the relationship status of the trustee to the decedent. As to the testamentary dispositions of the decedent, they were separated into two categories, specific dispositions and residuary dispositions. Each category was coded as one of the following: (1) all to spouse, but if predeceased, then to children; (2) some to spouse and some to children; (3) all to children; (4) split between children and others; (5) all to others; and (6) pour over to trust. When it was apparent that the spouse was from a second or subsequent marriage of the decedent, this was noted. Also documented were any dispositions that were given to stepchildren or foster children, if so designated in the will or Petition for Administration. Harder to decipher were dispositions to committed partners of single or divorced decedents, whether same-sex or opposite-sex, as the relationship status of the beneficiary was generally termed as "friend," with a few exceptions where the decedent named a distinct relationship of the beneficiary in his or her will. Speculation could be made that in some instances, a "friend" was actually a committed partner of the decedent. But, in the absence of a specific designation by the decedent, no presumptions were made in the results of this study.

C. Results

The cumulative and county-specific results of the empirical study are documented in Tables 1 through 7 below. Briefly, the cumulative results are summarized according to topic, beginning with the

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[79] The Petition for Administration was especially helpful to determine the relationship status of beneficiaries named in the will. This petition is the document that initiates a probate proceeding, usually filed by the personal representative or executor of the decedent's estate. The Petition for Administration lists basic information about the decedent and summarizes the probate estate to be administered, including the following: the beneficiaries of the probate estate (based on the will), the relationship status of the beneficiaries to the decedent (spouse, daughter, friend, charity, etc.), the percentage of the estate bequeathed to each beneficiary (or the particular bequeathed asset), the size of the probate estate (e.g., less than $50,000), the decedent's real property in Florida subject to probate, and the name of the personal representative as nominated by the decedent in his or her will.

demographics of the 493 decedents who are the focus of this study, and then by testamentary disposition and family relationship, with a particular focus on nontraditional family relationships. All of the decedents in this study executed wills that were admitted to probate and recorded in the official public records of the county where they were domiciled.

i. *Demographics*

More women than men had their estates probated (43% male and 57% female) and 60% of the wills were executed five or more years prior to death. As to race, 91% of the decedents were White, 5.8% Black, 1% Hispanic, 0% Asian and 1.6% Other. At the time of their death, 83% were 70 years or older, 10% were in their 60s, 5% were in their 50s, and 1.6% were 49 years or younger.

Most of the decedents were widowed on the date of their death (57%). But, 21% were married, 15% were divorced, and 5% had never been married. Most of the decedents had surviving children, 84%, while 15% did not have any children.

The size of most of these probate estates was relatively small, with nearly 60% being under $100,000. Another 21% had estates between $100,000 and $500,000, and only 4.6% had estates over $500,000. A large percentage, 14%, was of unknown size. The wealth of these decedents is particularly unreliable for numerous reasons. First, the inventories of these estates are not public records and so the actual total wealth of these decedents was unattainable. The Petitions for Administration, however, ask for the size of the estate and some people put what appeared to be the actual total size of the decedent's estate. Others only listed the probate property that was being probated, leaving out personal property or nonprobate property. In other cases, the only important property being probated was the homestead, which is protected under Florida law up to any value.[80] Thus, many personal representatives simply listed "homestead" as the property and only sometimes its value to be probated. Florida also allows for summary administration of estates that are valued at under $75,000.[81] Consequently, many petitions simply stated that the personal property of the decedent was a value under $75,000 and then listed homestead as additional property. Because Florida homestead is treated separately from the rest of the estate, the value of the homestead often was not listed in the Petitions. Nonetheless, we were able to obtain approximate indications of wealth for many decedents, less any nonprobate property that passed via a will substitute.

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80 FLA. CONST. art. X, § 4.
81 FLA. STAT. § 735.201.

TABLE 1. CUMULATIVE RESULTS OF DECEDENT DEMOGRAPHICS

	Alachua Co. 293 Decedents		**Escambia Co.** 200 Decedents		**Cumulative Average of Both Counties** 493 Decedents	
Gender of Decedent	Male	43% (127)	Male	44% (88)	Male	43% (215)
	Female	57% (166)	Female	56% (112)	Female	57% (288)
Race of Decedent	White	92% (269)	White	91% (181)	White	91% (450)
	Black	4% (13)	Black	8% (16)	Black	5.8% (29)
	Hispanic	2% (5)	Hispanic	00% (0)	Hispanic	1% (5)
	Asian	00% (1)	Asian	00% (0)	Asian	0% (1)
	Other	2% (5)	Other	2% (3)	Other	1.6% (8)
Age at Death	90+	28% (82)	90+	23% (46)	90+	26% (128)
	80-89	35% (102)	80-89	38% (75)	80-89	36% (177)
	70-79	19% (57)	70-79	24% (47)	70-79	21% (104)
	60-69	10% (30)	60-69	10% (20)	60-69	10% (50)
	50-59	6% (18)	50-59	4% (7)	50-59	5% (25)
	40-49	1% (3)	40-49	2% (3)	40-49	1% (6)
	30-39	0% (1)	30-39	1% (2)	30-39	.6% (3)
	18-29	0% (0)	18-29	00% (0)	18-29	0% (0)
Length of Time Between Will Execution and Death	< 6 wks	6% (16)	< 6 wks	4% (8)	< 6 wks	5% (24)
	6 wks–3 mos	3% (8)	6 wks–3 mos	1% (2)	6 wks–3 mos	2% (10)
	3–12 mos	9% (25)	3–12 mos	8% (16)	3–12 mos	8% (41)
	1–2 yrs	7% (21)	1–2 yrs	10% (19)	1–2 yrs	8% (40)
	2–5 yrs	16% (47)	2–5 yrs	15% (29)	2–5 yrs	15% (76)
	5–10 yrs	22% (63)	5–10 yrs	25% (50)	5–10 yrs	23% (113)
	> 10 yrs	37% (107)	> 10 yrs	38% (75)	> 10 yrs	37% (182)
Marital Status of Decedent	Married	21% (61)	Married	22% (44)	Married	21% (105)
	Divorced	13% (38)	Divorced	19% (38)	Divorced	15% (76)
	Widowed	59% (173)	Widowed	55% (110)	Widowed	57% (283)
	Never Married	7% (19)	Never Married	4% (7)	Never Married	5% (26)
	Unknown	0% (1)	Unknown	1% (1)	Unknown	00% (1)
Decedents with Children	Yes	85% (250)	Yes	82% (164)	Yes	84% (414)
	No	14% (40)	No	18% (36)	No	15% (76)
	Unknown	1% (3)	Unknown	0% (000)	Unknown	1% (3)
Size of Estate (generally excludes homestead)	<$50,000	37% (109)	<$50,000	30% (60)	<$50,000	34% (169)
	50-100K	23% (68)	50-100K	29% (58)	50-100K	26% (126)
	100-500K	23% (68)	100-500K	18% (36)	100-500K	21% (104)
	500K-1M	4% (12)	500K-1M	1% (2)	500K-1M	2.8% (14)
	>1M	2% (7)	>1M	1% (2)	>1M	1.8% (9)
	Unknown	9% (27)	Unknown	21% (42)	Unknown	14% (69)

Florida has a somewhat unique homestead law. Enshrined in the constitution of the state, it provides that the primary residence is protected from creditors up to any value.[82] Most importantly for our purposes, it also limits testamentary disposition of the homestead if a homeowner decedent left a spouse or minor children.[83] The homestead can be devised freely if a decedent leaves only adult children. But, if

[82] FLA. CONST. art. X, § 4(a).
[83] *Id.* § 4(c); FLA. STAT. § 732.401(1) (2017).

there are minor children, the homestead cannot be devised at all, and must pass to the children and surviving spouse, if any, by intestacy. If there is only a surviving spouse and no minor children, which was the more common situation, the testator could devise the homestead to the surviving spouse entirely. But, if it was not devised outright to the spouse, then the spouse was entitled to a minimum of a life estate or, at the spouse's election, a one-half interest in the homestead property.[84] Because of the testamentary limitations on devising homestead property, many of the probated estates involved primarily a declaration of homestead or excluded the value of the homestead from the value of the estate because homestead passes independently from the rest of the decedent's estate in many cases.

Real estate organizations put the median home values in Alachua County for the past few years in the neighborhood of $150,000 and in Escambia between $125,000 and $135,000.[85] With the exclusion of the value of most homesteads from the estate inventories and calculations, most of the estate values in the database are low. These also, of course, do not reflect the value of wealth passing through will substitutes, such as joint accounts, beneficiary designations, or revocable trusts, and therefore underestimate the value of these estates significantly. The one reliable piece of information was the indication required on the Petition for Administration as to whether federal estate taxes would be due on the estate, for which only two estates qualified.

ii. *Testamentary Dispositions*[86]

The testamentary dispositions in the decedents' wills were separated into different categories: specific bequests and residuary dispositions, and then further broken down if the estate involved stepchildren or dispositions to second or third spouses. The single most common dis-

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[84] FLA. CONST. art. X, § 4(c); FLA. STAT. § 732.401(2).

[85] *See Alachua County Home Prices & Values*, ZILLOW, http://www.zillow.com/alachua-county-fl/home-values/ (last visited May 24, 2017); *Escambia County Home Prices & Values*, ZILLOW, http://www.zillow.com/escambia-county-fl/home-values/ (last visited May 24, 2017). *See also Pensacola Home Prices & Values*, ZILLOW, http://www.zillow.com/pensacola-fl/home-values/ (last visited May 24, 2017).

[86] Testamentary dispositions are difficult to code precisely. In some wills, a decedent left some or all property to an individual, and then the residue or lapsed bequests into trust. Other wills directed all of the property into trust, but if the trust failed the residue to the children outright. Whether to code these as bequests into a trust or not took some judgment and discretion. Discretion was also used in coding bequests that did not use trusts, and it wasn't clear if a specific bequest to an individual was of a small memento, or was actually a significant percentage of the estate. For this reason we tried to be as precise as possible in coding bequests involving married individuals and those decedents with step-children, but we recognize that some small range of error is inevitable.

position was to leave everything to the children equally (or nearly equally), which was the disposition in 35% of cases. The next most common disposition was to leave everything to a surviving spouse, but if the spouse predeceased then everything was to pass equally to the children, which was the disposition 29% of the time. In many of these latter cases, the spouse had indeed predeceased and thus everything passed to the children after all. But in a large number of the wills where the disposition was to leave everything to the children, it appeared that the surviving spouse had made a new will after the death of a spouse. It is likely that many of these decedents originally had wills that left everything to a spouse as a primary beneficiary, and then to the children as alternate beneficiaries, but they changed the will upon the death of the spouse. Many others who had such wills did not execute new ones after the death of the first spouse, so their property did not actually pass to their spouse; instead it went to the children.

For the vast majority of wills with these two dispositions, the wills very closely approximate the results that would have occurred under intestacy. In many states, including Florida, if the children are the children of both spouses, the surviving spouse takes the entire intestate estate, but if there are children of a different spouse than the surviving spouse, the latter takes only half the estate or a portion of the estate and the children or their issue take the remainder.[87] Although many wills fell in line with the intestacy outcome for the single marriage family, almost none expressly fell in line with the intestacy outcome for the decedent with children by a prior marriage and a surviving spouse. We explore the details of that below.

The rest of the decedents mostly left their property either entirely to others (not a child or a spouse) in most cases because they didn't have a surviving spouse or children, or they poured their property into a trust which we could not examine to determine the eventual disposition of the decedent's property.

[87] Fla. Stat. § 732.102(2)-(3).

TABLE 2. CUMULATIVE RESULTS OF TESTAMENTARY DISPOSITIONS

	Alachua Co. 293 Decedents		**Escambia Co.** 200 Decedents		**Cumulative Average of Both Counties** 493 Decedents	
Testamentary Dispositions	All to spouse, if predeceased, then children	25% (73)	All to spouse, if predeceased, then children	29% (57)	All to spouse, if predeceased, then children	26% (130)
	Some to spouse & some to children	1.7% (5)	Some to spouse & some to children	1% (1)	Some to spouse & some to children	1% (6)
	All to children	30% (89)	All to children	24% (70)	All to children	32% (159)
	All to children & others	1% (3)	All to children & others	5% (10)	All to children & others	2.6% (13)
	All to others	15% (45)	All to others	11% (31)	All to others	15% (76)
	All to trust (unknown beneficiaries)	27% (79)	All to trust (unknown beneficiaries)	15% (30)	All to trust (unknown beneficiaries)	22% (109)

iii. *Second and Third Marriages*

Although it was not always possible to identify if the decedent was in a second or a subsequent marriage, there were certain wills that clearly indicated that a surviving spouse was not the parent of the children, or that a decedent was providing for a previously divorced spouse or a second spouse. This was easy if the Petition or the will stated as such. It could also be gleaned from the wills of certain female decedents whose male children had a different last name. We tried to confirm this through a study of the Petitions for Administration that listed the beneficiaries and their relationships to the decedent. Where it was unclear, we erred on the side of assuming a surviving spouse was the first spouse. Despite that, there were some striking differences in the wills between those in a first marriage and those in a second or subsequent marriage.

In Alachua County, 60 of the decedents were married and at least 23 appeared to be in a second or subsequent marriage. Twenty of all married decedents (33%) left their property in trust, which is marginally higher than the entire population of decedents which was only 30%, but lower than the decedents in second marriages who left their property in trust in 39% of the cases. In Escambia County, 44 of the decedents were married and 11 poured their property into a trust (25%), which is noticeably higher than the entire population of decedents using a trust, which was only 15%. But this was the same percentage as those in second marriages, in which 3 decedents out of 12 used a trust. So being married was likely to lead to the use of a trust in between one-quarter and one-third of decedents' estates. The likelihood of using a trust in a second or third marriage went up in Alachua County but stayed the same in Escambia County, although the numbers are sufficiently small

that it would be difficult to speak of a trend or pattern. This is precisely the kind of statistic we should try to tease out better through further research because the trust, and of course the ability to tailor the specific trust terms, are at the heart of most estate planning involving couples in second or third marriages.

TABLE 3. DISPOSITIONS TO ALL SPOUSES SURVIVING THE DECEDENT

	Alachua Co. 61 Decedents		**Escambia Co.** 44 Decedents		**Cumulative Average of Both Counties** 105 Decedents	
Dispositions to All Spouses Surviving the Decedent	All to spouse, if predeceased, then children	52% (32)	All to spouse, if predeceased, then children	67% (29)	All to spouse, if predeceased, then children	58% (61)
	Some to spouse & some to children/others	7% (4)	Some to spouse & some to children/others	4.5% (2)	Some to spouse & some to children/others	6% (6)
	Life estate only to spouse	(0)	Life estate only to spouse	2% (1)	Life estate only to spouse	1% (1)
	Nothing to spouse	5% (3)	Nothing to spouse	2% (1)	Nothing to spouse	4% (4)
	All to trust (unknown beneficiaries)	36% (22)	All to trust (unknown beneficiaries)	25% (11)	All to trust (unknown beneficiaries)	31% (33)
	Pretermitted Spouse	1.6% (1)	Pretermitted Spouse		Pretermitted Spouse	1% (1)

TABLE 4. DISPOSITIONS TO SECOND OR THIRD SPOUSES

	Alachua Co. 23 Decedents		**Escambia Co.** 12 Decedents		**Cumulative Average of Both Counties** 35 Decedents	
Dispositions to Second or Third Spouses	All to spouse, if predeceased, then children	30% (7)	All to spouse, if predeceased, then children	58% (7)	All to spouse, if predeceased, then children	40% (14)
	Some to spouse & some to children/ others	17% (4)	Some to spouse & some to children/ others	8% (1)	Some to spouse & some to children/ others	14% (5)
	Nothing to spouse	9% (2)	Nothing to spouse	8% (1)	Nothing to spouse	9% (3)
	All to trust (unknown beneficiaries)	39% (9)	All to trust (unknown beneficiaries)	25% (3)	All to trust (unknown beneficiaries)	34% (12)
	Pretermitted Spouse	4% (1)	Pretermitted Spouse		Pretermitted Spouse	3% (1)

Other interesting factors appear when we try to figure out what dispositions people in second or subsequent marriages preferred to

make. After removing the trust estates, for which we have little dispositive information, the next clear preference by these decedents was to leave everything to their surviving spouse. Roughly 40% of decedents in multiple marriages chose to leave everything to their surviving spouse, which was lower than in the married dataset, in which 58% left their entire estates to their surviving spouses. So a second marriage led to a general decline in dispositions entirely to the surviving spouse and a marginal increase in the use of trusts.

In many of these multiple marriages, dispositions spreading the estate between a surviving spouse and children or other relatives increased. Thus, in the married population generally, only 6% of decedents split their estates, while 14% did so in the multiple marriage population of decedents. Similarly, in the married population generally only 4% entirely disinherited their surviving spouse, while that number rose to 9% in the multiple marriage population. Again, these numbers are relatively small, but they do show that most of the diversity of spousal dispositions arose in cases involving multiple marriages, which is to be expected. The question now, of course, is whether intestacy laws do or can be reformed to properly account for that discrepancy. But we take that issue up in the next section.

What is quite noticeable, however, was the significant deviation from the general pattern when we looked at dispositions to second or third spouses by the sex of the decedent.

TABLE 5. DISPOSITIONS TO SECOND OR THIRD SPOUSES BY SEX

	Alachua Co. 23 Decedents	**Sex**	**Escambia Co.** 12 Decedents	**Sex**	**Cumulative Average of Both Counties** 35 Decedents	**Sex**
Dispositions to Second or Third Spouses	All to spouse, if predeceased, then children 30% (7)	M=6 F=1	All to spouse, if predeceased, then children 58% (7)	M=4 F=3	All to spouse, if predeceased, then children 40% (14)	M=10 F=4
	Some to spouse & some to children 17% (4)	M=3 F=1	Some to spouse & some to children 8% (1)	M=1	Some to spouse & some to children 14% (5)	M=4 F=1
	Nothing to spouse 9% (2)	M=1 F=1	Nothing to spouse 8% (1)	F=1	Nothing to spouse 9% (3)	M=1 F=2
	All to trust (unknown beneficiaries) 39% (9)	M=8 F=1	All to trust (unknown beneficiaries) 25% (3)	M=3 F=0	All to trust (unknown beneficiaries) 34% (12)	M=11 F=1
	Pretermitted Spouse 4%(1)	M=1	Pretermitted Spouse		Pretermitted Spouse 3% (1)	M=1

These numbers are quite astounding. For instance, of the 12 married decedents in a multiple marriage that used a pour over will to a trust, 11 were men. Also, of the 14 married decedents who left everything to their surviving spouse, 10 were men and 4 were women. Women left nothing to their surviving spouses in 2 out of 3 instances, while

men split the estate between their surviving spouse and their children in 3 out of 4 instances. It is also notable that of the total of 35 decedents in multiple marriages, 27 (77%) were men, and only 8 (23%) were women. This contrasts sharply with the fact that women were the significant majority of decedents in the entire sample. So while the percentage of men and women who were in first marriages was roughly similar in percentage to the number of men and women who were in second marriages, their dispositions were dramatically different by gender if they were in a second marriage rather than a first marriage.

This deviation confirms earlier studies that show women historically tended to devise property to a variety of children, nieces and nephews, and grandchildren while men tended to devise property just to their children, more in conformity with intestate priorities.[88] Certainly many women devised all of their property directly to their children in equal shares, and many men devised property to children in unequal shares. However, this data show that more research needs to be done to determine if women in subsequent marriages devised property differently from women who were only married once, and if they devised property to a wider variety of recipients than women who only married once. It would make sense that people in multiple marriages would be more likely to spread their property among a wider group of beneficiaries, but why women would be more likely to disinherit their second spouses than men may relate more to wealth than to gender.

iv. *Race as a Factor*

Not surprisingly, race is a factor in the use of a will. And it also correlated to different dispositions regarding spouses and the use of a trust.

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[88] *See, e.g.*, R.J. Morris, Men, Women, and Property in England, 1780-1870: A Social and Economic History 260 (2005); Amy Louise Erickson, Women and Property in Early Modern England 211-21 (2002).

TABLE 6. DISPOSITIONS OF DECEDENTS BY RACE AND MARITAL STATUS

	Alachua Co.		**Escambia Co.**		**Cumulative Average of Both Counties**	
Race of General Population	White	63.7%	White	66.2%	White	65%
	Black	20.3%	Black	22.9%	Black	22%
	Hispanic	5.4%	Hispanic	4.7%	Hispanic	5%
	Asian	.3%	Asian	.9%	Asian	.6%
	Other	2.3%	Other	3.3%	Other	2.8%
Race of Decedents in Study	White	92% (269)	White	91% (181)	White	91% (450)
	Black	4% (13)	Black	8% (16)	Black	5.8% (29)
	Hispanic	2% (5)	Hispanic	00% (0)	Hispanic	1% (5)
	Asian	00% (1)	Asian	00% (0)	Asian	0% (1)
	Other	2% (5)	Other	2% (3)	Other	1.6% (8)
Race of Married Decedents	White	97% (59)	White	93% (41)	White	95% (100)
	Black	(0)	Black	7% (3)	Black	3% (3)
	Hispanic	1.6% (1)	Hispanic	(0)	Hispanic	1% (1)
	Asian	1.6% (1)	Asian	(0)	Asian	1% (1)
	Other	(0)	Other	(0)	Other	0% (0)
Dispositions of Decedents by Race (both counties)	All to spouse, if predeceased, then children	Some to spouse & some to children	All to children	All to children & others	All to others	All to trust (unknown beneficiaries)
White	26% (120)	1% (5)	31% (142)	2% (10)	15% (70)	23% (106)
Black	17% (5)	13% (1)	62% (18)	10% (3)	7% (2)	00% (0)
Hispanic	00% (0)	00% (0)	50% (3)	00% (0)	00% (0)	50% (3)
Asian	100% (1)	00% (0)	00% (0)	00% (0)	00% (0)	00% (0)
Other	25% (1)	00% (0)	25% (1)	00% (0)	50% (2)	00% (0)

A number of striking results emerge when we break down the testamentary dispositions by race. Not surprisingly, decedents of color were far less likely to die testate or have their estates probated than White decedents. Although the White population of the combined counties is only 65%, White decedents comprised 91% of the testate estates. And although the Black population of the combined counties is 22%, only 5.8% of the testate estates were of Black decedents. Similarly, no Black, Asian, or Other decedent had a will that poured over into a trust. Only White and Hispanic decedents had trusts, and the latter had a higher rate of trust use than even Whites. Fifty percent of Hispanic decedents had a trust, while only 24% of White decedents used a trust, although the total number of Hispanic decedents was quite low (6).

In examining patterns between the two largest groups of decedents, Whites and Blacks, the former had relatively equal dispositions between spouses, children, others, and trusts. This was not the case with Black decedents who left their property to their children twice as often as White decedents. Black decedents left their estates to their spouses in only 17% of cases, compared with 26% of White estates. There were no

Black decedents in Alachua county who had been married more than once or who included bequests to step-children and only one in Escambia County who had been married more than once, and that decedent was estranged from her second spouse and had executed a postmarital agreement waiving inheritance rights. These numbers are not surprising since significantly fewer Black decedents were married compared to White decedents. But the number is disturbing in many ways. It further supports studies showing that the Black family is under more stress and more likely to forego marriage, which provides significant social and economic benefits.[89] For estates and trusts policy makers, this is particularly disturbing because it suggests that our inheritance and family laws do not adequately meet the needs of Black or other decedents of color. This gap between the needs of the population and the law becomes even more apparent when we look more carefully at dispositions for children.

v. *Dispositions Involving Children and Stepchildren*

As noted above, children were the primary beneficiaries of the majority of wills, which is not surprising since the majority of decedents were widowed with surviving children. Where there were surviving spouses, the vast majority of decedents benefitted their spouses with all or a lion's share of their estates. And where the decedent was widowed leaving children, the children took all or the lion's share of those estates. But, two important patterns jump out. The first is that a significant number of decedents used a will to disinherit a child or make significantly unequal distributions to children. The unequal distributions appeared to be for many reasons, sometimes punitive and sometimes because a particular child appeared to have had a greater or lesser need than other children. And second, the majority of decedents with stepchildren left at least some property to their stepchildren. Some did this because they had no children of their own, which makes sense. But many others distributed their property quite unevenly, sometimes benefitting stepchildren above their own children. Thus, unlike the dispositions to spouses, which generally prevailed regardless of whether the

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89 *See Marital Status: 2011-2015 American Community Survey 5-Year Estimates*, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_5YR_S1201&prodType=table (last visited May 24, 2017). In 2015, it was estimated that only 29.1% of Blacks were married compared to 48.2% of all Americans over age 15. Additionally, 49.2% of Blacks are estimated to never have been married, compared to 32.8% of all Americans over age 15. *See also* Elizabeth Davenport Pollock, Josh B. Kazman, & Patricia Deuster, *Family Functioning and Stress in African American Families: A Strength-Based Approach*, 41(2) J. BLACK PSYCHOL. 144, 145 (2015).

spouse was a first or a subsequent spouse, the dispositions to children significantly deviate from the default rules of intestacy.

TABLE 7. DISPOSITIONS INVOLVING STEPCHILDREN

	Alachua Co. 24 Decedents		**Escambia Co.** 8 Decedents		**Cumulative Average of Both Counties** 32 Decedents	
Dispositions Involving Stepchildren	All to children & nothing to stepchildren	13% (3)	All to children & nothing to stepchildren	13% (1)	All to children & nothing to stepchildren	13% (4)
	All to stepchildren & nothing to children	13% (3)	All to stepchildren & nothing to children	13% (1)	All to stepchildren & nothing to children	13% (4)
	Small bequests to stepchildren with primary bequests to children	13% (3)	Small bequests to stepchildren with primary bequests to children	13% (1)	Small bequests to stepchildren with primary bequests to children	13% (4)
	Equal treatment of children and stepchildren	38% (9)	Equal treatment of children and stepchildren	13% (1)	Equal treatment of children and stepchildren	31% (10)
	All to stepchildren because no children	17% (4)	All to stepchildren because no children	50% (4)	All to stepchildren because no children	25% (8)
	All to trust (unknown beneficiaries)	8% (2)	All to trust (unknown beneficiaries)	0% (0)	All to trust (unknown beneficiaries)	6% (2)

Table 7 shows that, of the 32 estates where stepchildren were clearly identified, 82% of the cases involved a decedent giving the stepchild at least a small bequest, and more often than not a more substantial bequest. Of course, there may have been many other estates in which stepchildren were simply not mentioned and no bequest was given to them. But since stepchildren often become relevant in cases of second marriages, it makes sense that decedents who are quite generous to their second spouse would also be generous to their stepchildren. But this is one area in which the law of intestacy simply has not caught up with practice.

Moreover, of these 32 estates involving stepchildren, none of the decedents were of any race other than White. To the extent this data reflect larger patterns in the population, families of color are particularly subject to inheritance inequities. The more people in non-traditional family structures must rely on intestacy for passing wealth to their loved ones, the less likely the fit will be equitable, as the intestacy laws rely heavily on marriage and biological relationship for inheritance rights.

III. THE TENUOUS FIT OF INTESTACY LAWS

Much more needs to be done to amass a larger sample of wills from nontraditional families and examine more closely their dispositions by race, gender, class, and marital status than we have been able to do here. Nonetheless, the results of our initial inquiry suggest important avenues for further research and suggest some specific weaknesses in our current intestacy laws as they deal with marriage and parental status. They also suggest that the default intestacy laws may not be working as well for certain populations, particularly those who cannot afford to do estate planning that involves a trust or even a basic will.

Every state in the U.S. has enacted an intestacy statute governing the distribution of assets when a decedent does not have a will, but there are many variations among the states. Seventeen states[90] and the U.S. Virgin Islands have enacted the UPC, originally promulgated in 1969, but most recently amended in 2010.[91] Article II of the UPC, which includes the rules for intestate succession, was significantly revised in 1990 and again in 2008,[92] in order to bring the succession rules in line "with developing public policy and family relationships."[93] The 1990 revisions increased the surviving spouse's share in intestacy and the 2008 revisions added stepchildren as last-resort takers, prior to the estate escheating to the state.[94] Yet our data suggest that these UPC revisions are actually fifty years behind the times. The UPC revisions are based on the dominance of single marriage families, which is waning in today's society, and they do not adequately account for stepchildren, which clearly contravenes the testamentary intentions of the decedents in this study.

The definition of "family" in intestacy is generally based on legal status, such as blood, marriage, or adoption.[95] While two of the goals for

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[90] The seventeen states enacting the UPC are Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, South Carolina, South Dakota and Utah. *Legislative Fact Sheet—Probate Code*, UNIF. LAW COMM'N, http://uniformlaws.org/LegislativeFactSheet.aspx?title=probate%20Code (last visited May 24, 2017).

[91] *Probate Code Summary*, UNIF. LAW COMM'N, http://uniformlaws.org/ActSummary.aspx?title=probate%20Code (last visited May 24, 2017). The 1991 revision of the original 1969 UPC was the result of a systematic study conducted by the Joint Editorial Board for the Uniform Probate Code, which is an organization representing the National Conference of Commissioners on Uniform State Laws, the Real Property, Probate and Trust Law Section of the American Bar Association, and the American College of Trust and Estate Lawyers. *Id.* Additionally, the revised version has been accepted in part by many of the remaining states. *Id.*

[92] UNIF. PROBATE CODE art. II, prefatory note (UNIF. LAW COMM'N 2010).

[93] UNIF. PROBATE CODE art. II, pt. 1, general cmt.

[94] *Id.*

[95] Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 U. MICH. J.L. REFORM 787, 792 (2012).

the UPC revisions to Article II were to favor the imputed intent of more decedents and reflect the "advent of the multiple-marriage society,"[96] sizeable gaps still exist for those in non-traditional family relationships with the decedent.[97] For example, the UPC does not provide an intestate share for unmarried, committed partners of the decedent or for non-genetic children who have not been adopted by the decedent, beyond the last-resort share for stepchildren.[98]

A. Spousal Shares in Intestacy

Table 8 below shows the spousal share in intestacy under the UPC,[99] Florida,[100] Kentucky[101] and Arkansas[102] statutes to demonstrate some of the dramatic variations in spousal shares. Some states have particularly restrictive provisions for surviving spouses.[103] In Kentucky, for example, other than $15,000 in exempt personal property that passes to the surviving spouse, the spouse takes an intestate share only if there are no surviving children, grandchildren, parents, siblings, or nieces and nephews of the decedent.[104] Additionally, the surviving spouse will be barred from taking a share if the spouse "leaves the other and lives in adultery," unless the spouses "afterward become reconciled and live together as husband and wife."[105]

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[96] Unif. Probate Code art. II, prefatory note.

[97] Gary, *supra* note 95, at 793.

[98] *Id.*

[99] Unif. Prob. Code § 2-102 (Unif. Law Comm'n 2010).

[100] Fla. Stat. § 732.102 (2017).

[101] Ky. Rev. Stat. Ann. §§ 391.010, 391.030(1)(c) (West 2017).

[102] Ark. Code Ann. § 28-9-214(2) (2017).

[103] *See, e.g.*, *id*. (if there are no surviving children or descendants of the children, then 100% of the estate goes to the surviving spouse, but only if married continuously for 3 years prior to the decedent's death and 50% to the surviving spouse if married less than 3 years prior to death); Ind. Code § 29-1-2-1(c) (2017) ("if the surviving spouse is a second or other subsequent spouse who did not at any time have children by the decedent, and the decedent left surviving the decedent a child or children or the descendants of a child or children by a previous spouse, the surviving second or subsequent childless spouse shall take only an amount equal to twenty-five percent (25%) of the remainder of: (1) the fair market value as of the date of death of the real property of the deceased spouse; minus (2) the value of the liens and encumbrances on the real property of the deceased spouse. The fee shall, at the decedent's death, vest at once in the decedent's surviving child or children, or the descendants of the decedent's child or children who may be dead. A second or subsequent childless spouse . . . shall, however, receive the same share of the personal property of the decedent as is provided . . . to surviving spouses generally.").

[104] Ky. Rev. Stat. Ann. §§ 391.010, 391.030(1)(c).

[105] Ky. Rev. Stat. Ann. § 392.090. Kentucky is not the only state barring the surviving spouse from taking an intestate share if desertion or adultery is involved. *See, e.g.*, N.H. Rev. Stat. Ann. § 560:19 (2017) ("If, at the time of the death of either husband or wife, the decedent was justifiably living apart from the surviving husband or wife because

TABLE 8. SPOUSAL SHARES IN INTESTACY

UPC	Florida	Kentucky	Arkansas
Surviving spouse (SS) receives: **(1)** the entire estate if: **(a)** no descendant or parent of the decedent survives the decedent; or **(b)** all of the descendants of the decedent are also descendants of the SS and there is no other descendant of the SS; **(2)** the first 300K, plus ¾ of any balance of the estate if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent; **(3)** the first 225K plus ½ of any balance of the estate if all of the decedent's surviving descendants are also descendants of the SS and the SS has one or more surviving descendants who are not descendants of the decedent; or **(4)** the first 150K, plus ½ of any balance of the estate, if one or more of the decedent's surviving descendants are not descendants of the SS.	**Surviving spouse (SS) receives:** **(1)** the entire estate if: **(a)** there is no surviving descendant of the decedent, or **(b)** there are surviving descendants of the decedent, all of whom are also lineal descendants of the SS. **(2)** 50% of the estate if: **(a)** there are surviving descendants, one or more of whom are not lineal descendants of the SS; or **(b)** there are surviving descendants, all of whom are descendants of the SS, and the SS has one or more descendants who are not descendants of the decedent.	**$15,000 in personal property is exempt** from distribution and upon application, passes either to the surviving spouse or surviving children. **As to the rest of the estate**: (1) 100% to surviving children of the decedent or descendants of the children. If none, then: (2) 100% to surviving parents of the decedent. If none, then: (3) 100% to surviving siblings of the decedent or descendants of the siblings. If none, then: **(4) 100% to surviving spouse of decedent.**	(1) 100% to surviving children or descendants of a deceased child. If none, then: **(2) 100% to surviving spouse, if married continuously for at least 3 years prior to death,** but if married less than 3 years prior to death, only 50%.

Multiple scholars have proposed model statutory language to correct the inequitable treatment for committed partners falling outside the

such survivor was or had been guilty of conduct which constitutes cause for divorce, such guilty survivor shall not be entitled to any interest or portion in the real or personal estate of said decedent, except such as may be given to such survivor by the will of the deceased"); N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(5)–(6) (McKinney 2017) ("The spouse abandoned the deceased spouse, and such abandonment continued until the time of death. A spouse who, having the duty to support the other spouse, failed or refused to provide for such spouse though he or she had the means or ability to do so"); 20 PA. CONS. STAT. § 2106(a)(1) (2017) ("A spouse who, for one year or upwards previous to the death of the other spouse, has willfully neglected or refused to perform the duty to support the other spouse, or who for one year or upwards has willfully and maliciously deserted the other spouse, shall have no right or interest . . . in the real or personal estate of the other spouse"); VA. CODE ANN. § 64.2-308(A) (2017) ("If a spouse willfully deserts or abandons the other spouse and such desertion or abandonment continues until the death of the other spouse, the party who deserted the deceased spouse shall be barred of all interest in the decedent's estate by intestate succession, elective share, exempt property, family allowance, and homestead allowance.").

definition of "spouse" under typical probate codes[106] and others have suggested changes to better calibrate the shares taken by second or subsequent spouses when there are children by a prior marriage.[107] Our research suggests that most decedents want their surviving spouse to take most of their estates, even when the spouse is a second or third spouse and there are children and stepchildren. But a significant minority of decedents clearly used prenuptial agreements, trusts, and shared dispositions to reduce the share of a second spouse. The greater use of trusts among second spouses indicates that people tend to recognize that estate planning is more important when the family situation gets complicated. The obvious problem with simply relying on testators intentionally executing estate documents, however, is that access to lawyers and use of these devices, particularly trusts, differs by race and to some extent by gender. The clear message here is that we have two laws: the law of testamentary freedom for the White and the wealthy, and the default rules of intestacy for persons of color and the poor. Yet if any statistic jumps out, it is that nontraditional family structures do not occur only in the White and wealthy population, but actually occur more frequently as one moves down the economic ladder and across different racial divides.

B. Shares to Children and Others

Although the law of intestacy that privileges spouses conforms generally to the data we found, the same is not true of the intestacy rules involving children. The general order of priority under intestacy, with variations among the states, proceeds as follows: spouse, children, par-

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106 *See, e.g.*, E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255, 325–26, 340 (2002) (proposing an intestate share for a committed partner who either has registered as a domestic partner with the decedent under state law or proves by clear and convincing evidence that the partner and decedent had lived together "as a couple in an emotionally and physically intimate partnership such that the intestacy scheme should protect the decedent's interest in donative freedom, or the surviving committed partner's reciprocity or reliance interests." For unmarried couples not registered with the state as domestic partners, the court would use a multi-factor test to determine whether the claimant has met his or her burden of proof. If entitled to an intestate share, the size of the share increases based on the length of time the decedent and committed partner had cohabitated before the decedent's death); T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55, 86–90 (2004) (proposing a statute in response to a request from the Joint Editorial Board for Uniform Trust and Estate Acts that created an intestate share for unmarried partnerships in a "qualified relationship" and that also removed the duration of the relationship as a factor).

107 *See, e.g.*, Danaya C. Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Nontraditional Families,* 25 CORNELL J.L. & PUB. POL'Y 1, 57–65 (2015).

ents, siblings, grandparents, aunts and uncles, cousins, sometimes descendants of cousins ("laughing heirs"), sometimes stepchildren, then the state.[108] In 2008, Section 2-103 of the UPC was revised to include shares to stepchildren, but they are last in the order of takers prior to escheating to the state.[109] Other states similarly followed the UPC by adding stepchildren as last resort takers.[110] As a result, a stepchild is a potential heir in intestacy only if the decedent has no other living next-of-kin. Furthermore, the UPC does not provide an intestate share for non-genetic children who have not been adopted by the decedent, beyond the last resort share for stepchildren.[111] Thus, a same-sex partner's child who is parented by the decedent would have no inheritance rights under intestacy in any state, even if the parents are married, without a formal adoption. And foster or other functional children would have no inheritance rights whatsoever, despite what appears to be evidence by many of our decedents of an intent to benefit children who are not related to the testator by blood or adoption.

Table 9 below reflects similar variation among intestacy statutes for the shares to a decedent's children and other family members.

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108 *See infra* Table 9 for examples of state variations in the distribution of intestate shares to children and others.

109 UNIF. PROBATE CODE art. II, pt. 1, general cmt. (UNIF. LAW COMM'N 2010).

110 *See, e.g.*, CAL. PROB. CODE § 6402.5 (West 2017) (passing to the "issue of [a] predeceased spouse" if there is no surviving issue of a decedent, parent, issue of a parent, grandparent or issue of a grandparent); CONN. GEN. STAT. § 45a-439(a)(4) (2017) (passing to stepchildren if there are no descendants, parents, brothers, sisters or next of kin, limited to collaterals); FLA. STAT. § 732.103(5) (2017) (passing to "the kindred of the last deceased spouse of the decedent"); MD. CODE ANN., EST. & TRUSTS § 3-104(e) (LexisNexis 2017) (passing to stepchildren, if no surviving blood relative); N.J. STAT. ANN. § 3B:5-4(f) (West 2017) (passing to "decedent's step-children or their descendants" if no surviving descendants of grandparents); OHIO REV. CODE ANN. § 2105.06(J) (LexisNexis 2017) (passing to stepchildren or their lineal descendants, if there is no next of kin of the decedent, with no cut-off for laughing heirs).

111 Gary, *supra* note 94, at 793. See also the UPC's treatment of "family" relationships for purposes of inheritance laws. UNIF. PROBATE CODE § 1-201(5) (defining "child" to expressly exclude stepchildren, foster children and grandchild. This definition is also in conflict with sections 2-115 and 2-116 which allow functional child-parent relationships for purposes of inheritance); UNIF. PROBATE CODE § 2-114 (barring parents from inheriting in certain circumstances); § 2-115 (defining a child and parent in a functional parent-child relationship); § 2-116 (detailing the effect of a functional parent-child relationship for purposes of inheritance); § 2-117 (establishing that a parent-child relationship exists between a child and the child's genetic parents regardless of the parents' marital status); § 2-118 (treatment of adoptee and adoptee's adoptive parents); § 2-119 (treatment of adoptee and adoptee's genetic parents); § 2-120 (treatment of children conceived by assisted reproduction other than a child born to a gestational carrier); § 2-121 (treatment of children born to a gestational carrier); § 2-122 (equitable adoption).

TABLE 9. CHILDREN AND OTHERS' SHARES IN INTESTACY

UPC[112]	**Florida**[113]	**Wyoming**[114]
Any part of the intestate estate not passing to a decedent's surviving spouse passes in the following order: **(1)** to the decedent's descendants. If none: **(2)** to the decedent's parents equally if both survive, or to the surviving parent if only one survives. If none: **(3)** to the descendants of the decedent's parents. If none, then: **(4)** if the decedent is survived on both the paternal and maternal sides by one or more grandparents or descendants of grandparents: **(A)** ½ to the decedent's paternal grandparents equally if both survive, or to the survivor of them, or to the descendants of the decedent's paternal grandparents taking by representation; and **(B)** ½ to the decedent's maternal grandparents equally if both survive, or to the survivor of them, or to the descendants of the decedent's maternal grandparents taking by representation; **(5)(a)** if the decedent is survived by one or more grandparents or descendants of grandparents on either the paternal or maternal side, but not on the other, to the decedent's relatives on the side with one or more survivors. If none, then: **(b)** If the decedent has: **(1)** one deceased spouse who has one or more descendants who survive the decedent, the estate passes to that spouse's descendants; or **(2)** more than one deceased spouse who has one or more descendants who survive the decedent, an equal share of the estate passes to each set of descendants. **(6)** if none, then the estate reverts to the state.	The part of the intestate estate not passing to the surviving spouse descends as follows: **(1)** to the descendants of the decedent. If none: **(2)** to the decedent's father and mother equally, or to the survivor of them. If none: **(3)** to the decedent's brothers and sisters and the descendants of deceased brothers and sisters. If none: **(4)** the estate shall be divided, ½ of which shall go to the decedent's paternal, and the other half to the decedent's maternal, kindred in the following order: **(a)** to the grandfather and grandmother equally, or to the survivor of them. If none: **(b)** to uncles and aunts and descendants of deceased uncles and aunts of the decedent. If none: **(c)** If there is either no paternal kindred or no maternal kindred, the estate shall go to the other kindred who survive. If none: **(5)** the whole of the property shall go to the kindred of the last deceased spouse of the decedent. **(6)** if none, then the estate reverts to the state.	If there is no surviving husband or wife, the estate of any intestate shall descend and be distributed as follows: **(i)** To his children surviving, and the descendants of his children who are dead, the descendants collectively taking the share which their parents would have taken if living. If none, then: **(ii)** to his father, mother, brothers and sisters, and to the descendants of brothers and sisters who are dead, the descendants collectively taking the share which their parents would have taken if living, in equal parts. If none, then: **(iii)** to the grandfather, grandmother, uncles, aunts and their descendants, the descendants taking collectively, the share of their immediate ancestors, in equal parts. If none, then: **(iv)** the estate reverts to the state.

Many scholars have critiqued the problems plaguing inheritance laws that affect children in nontraditional families.[115] An article pub-

112 UNIF. PROBATE CODE §§ 2-103, 2-105.

113 FLA. STAT. § 732.103 (2017).

114 WYO. STAT. ANN. §§ 2-4-101(c), 9-5-202(b) (2017).

115 *See, e.g.*, Wright, *supra* note 106, at 1; Gary, *supra* note 11, at 31–34 (proposing a model intestacy statute to replace UPC § 2-114, adding an additional means for a person to meet the definition of parent or child for purposes of intestacy and providing that a child can qualify for a share as the decedent's biological child, adopted child or a child for whom a parent-child relationship is established.); Gary, *supra* note 94, at 787, 820–824

lished in 2015 explored the scope of the inheritance penalties, which result from traditional state probate codes, that are imposed on children living in nontraditional families.[116] Two primary problems exist: the lack of inheritance rights by children who are not adopted by their functional parents and the disinheritance of many children who are adopted by an unmarried co-parent.[117] Children who may be affected by traditional inheritance laws include stepchildren in blended families, children adopted by a co-parent, and children being raised by grandparents, neighbors, friends, foster parents or other relatives.[118]

A variety of legal changes could be made to modernize the intestate shares of surviving spouses and children.[119] Just as marital status no longer determines parental rights under family law, the marital status of a child's parents should not determine a living child's inheritance rights.[120] Additionally, a state's probate code definitions of a parent and child should match the definitions of parent and child in the state's family code, so long as the family code favors functional parent-child

(proposing that the court should have the power to reduce intestate shares to spouses, children or parents, and enlarge the categories of potential takers by including domestic partners, persons who functioned as a parent or child, and persons who provided uncompensated care to the decedent); Lee-Ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Success*, 62 SMU L. REV. 367, 368-69 (2009). Professor Tritt argued that in determining testamentary intent, a functionally based approach should replace the approaches used in traditional succession law (a sanguinary nexus between the decedent and heir) and the 2008 amendments to the UPC (which expanded the definition of children in its model statutes beyond blood relations). *Id.* at 372, 407. Inheritance law should focus on the rights and best interests of the decedent only, not on the rights and best interests of the child, appropriate for other areas under family law, but not in determining inheritance rights. *Id.* at 372. Instead, estate law jurisprudence with its property-owner-centered view should govern, with one caveat: the traditional sanguinary nexus test defining child status should be replaced with an unadulterated functionally based approach to defining a parent-child relationship. *Id.* at 404, 429. Professor Tritt proposed a list of factors that could be used to guide the court in determining whether a parent who functioned as a parent or a child who functi oned as a child should inherit under succession law. *Id.* at 405. These factors are as follows: (i) whether the decedent held him/herself out to be a parent of the child for a substantial period of time (if the decedent died while the child was in gestation, such time could include the pregnancy of a partner or surrogate mother or the time and effort spent during which [assisted reproductive technology] is procured); (ii) whether benefits of love and affection accrued to the child; (iii) whether the parent-child relationship was publicly recognized (which could include the period while the child was in gestation); (iv) whether the decedent desired to have the rights afforded to a parent; and (v) whether the decedent performed obligations of parenthood for a substantial period of time. *Id.* (footnote omitted).

116 Wright, *supra* note 106, at 1.

117 *Id.* at 5–6.

118 *Id.* at 81.

119 *Id.* at 82.

120 *Id.*

relationships and uses the "best interests of the child" standard.[121] Where the status of a functional child is at issue and the testator has not expressed contrary instructions, some argue that the best interests of the living child should be the norm in inheritance law.[122]

This empirical study clearly shows, we believe, that intestacy laws do not adequately reflect the presumed intent of parents or other adults who leave property to their children. When 82% of decedents with stepchildren choose to leave at least some property to those children who would have no rights under intestacy, it would appear the law needs to change. But how? One easy change would be to recognize that many people who do not have children of their own, but do have stepchildren, seem to want to benefit those children to the exclusion of other relatives. It might make sense for the intestacy laws to place stepchildren, or perhaps only stepchildren who were raised in the decedent's home, before collateral relatives. In cases in which the decedent has both children of his or her own and stepchildren, the majority resulted in the children sharing, with no clear disfavoring of stepchildren over natural or adopted children. If legislators feel uncomfortable with having stepchildren take equally with children, even though that was the predominant disposition in our sample, perhaps a model in which the stepchildren take one-half shares what the biological children take might make sense.

It was also quite clear that many decedents used a will to deviate from the equal treatment for their children that is the default rule under intestacy. Many children were disinherited, or specific items of property were devised to certain children. While deviation from unequal treatment might be difficult under a default intestacy rule, it would not be difficult to provide a form will that decedents could use to identify certain items of property that should pass to different children without requiring all the formal steps and expenses of a will. Much like the separate writing provision that allows for the relatively simple disposition of tangible personal property,[123] a notarized document that distributes property unevenly within a specific class of beneficiaries, like children and stepchildren, who end up being the primary takers in the vast majority of estates, could ease the pressure among those populations for whom complex or expensive estate planning is not feasible.

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121 *Id.* at 81.

122 *Id.* at 76. This is contrary to Lee-Ford Tritt's argument that inheritance rights should focus on the rights and best interests of the decedent only, not on the rights and best interests of the child, which may be appropriate for other areas under family law, but not under the property owner centered view of estate law jurisprudence. Tritt, *supra* note 114, at 372, 429.

123 *See* UNIF. PROBATE CODE § 2-513 (UNIF. LAW COMM'N 2010).

In the case of blended families where both spouses have children from prior relationships, the intestate priorities giving most of the decedent's property to the surviving spouse could result in completely disinheriting the decedent's biological children. The marriage of Carol and Mike Brady is exemplary.[124] Carol and Mike married, each bringing three children from previous marriages to their new family. Mike's wife had died, leaving him a widower with three small sons. Assuming he inherited all of his first wife's property upon her death intestate, and Carol inherits that property upon Mike's death if he dies intestate, then upon Carol's death intestate all of the property will pass to Carol's three daughters and none to Mike's three sons. This would include property that Mike had inherited from his first wife. One possible way to reform intestacy statutes that might deprive children of property from both of their parents would be to give Mike only a life estate in his first wife's property, such that it passes from him to his sons upon Mike's death, and does not pass to Carol. All other property Mike acquires after his marriage to Carol should pass to Carol, but perhaps not property he inherited from his first wife or his parents. Similarly, upon Carol's death, property she inherited from Mike could pass to Mike's sons rather than her daughters. Such a solution, although seemingly moving away from the partnership theory of marriage, better reflects likely testamentary intent, certainly the intent of first spouses who don't want their property passing to the children of their surviving spouse's new spouse.

These are just a few ways in which inheritance law reforms may be able to better reflect the presumed intentions of the growing number of decedents with nontraditional family relationships. But much more needs to be done to discover patterns in the way these people dispose of their property and to devise solutions that better calibrate their intentions to their dispositions.

CONCLUSION

This has been a tremendously interesting project and one that we hope to continue, and one which we hope will generate interest and commentary by many scholars and lawmakers. As we continue to amass more information about how people actually do leave their estates at their death, we can try to provide more tailored tools to make it easier to effectuate their intentions and to facilitate the process of the intergenerational transmission of property. These findings are only prelimi-

124 Carol and Mike Brady are from the popular TV show, *The Brady Bunch*, airing from 1969-1974 and featuring a blended family. *The Brady Bunch*, www.cbs.com/shows/the_brady_bunch/ (last visited Sept. 11, 2017).

nary, but they reveal trends that we feel are in line with common human emotions. Most people want to benefit those they love, with whom they have formed relationships, and those who need or will appreciate the gifts. To the extent the laws of intestacy can accomplish these myriad goals, the law will better serve our growing diverse population. Moreover, most of our decedents in this study were elderly. What will the distributions look like twenty years from now, when the next generation of decedents reflects the growing disparities in wealth and family status that are growing today?

Our key findings in this study show that most decedents want to benefit their surviving spouse, regardless of whether the spouse is from a first or subsequent marriage. Most decedents also want to benefit children and step-children next. The use of trusts has grown in our society, so that nearly a quarter of all decedents poured all or most of their estates into a revocable trust. But the use of a trust clearly correlated to race and wealth. It was also significant that people in second or subsequent marriages were somewhat more likely to use a trust than those in their first marriages. This isn't surprising, and in fact reflects the common advice among estate planners, to use trusts when clients' family situations get complicated. Much more needs to be done, however, to try to uncover the extent to which wealth, domicile, and family relationships affect estate planning. For instance, a decedent in Alachua County was almost twice as likely to have a trust as one in Escambia County, despite the lower average income of Alachua County. Alachua is the home of the University of Florida and contains a more liberal and possibly more educated population. Escambia is the home of a military base and a large rural population that, despite higher income levels, seemed to have fewer indications of non-traditional family structures and estate plans. While the divorce and remarriage rate appears similar between the two counties, there were noticeable differences in testamentary dispositions. Most notable was the dramatic lack of estate planning that existed in the Black community. Further research is warranted to see how default estate planning rules may in fact be merely rules for the rich or the White, and not rules for the poor or the person of color.